

## ANNEX A

### PARTIES' RESPONSES TO QUESTIONS FROM THE FIRST MEETING

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## ANNEX A-1

### CANADA RESPONSE TO QUESTIONS FROM THE PANEL AT THE FIRST MEETING

(24 February 2003)

**Q2. Could Canada please indicate what the stumpage fee covers, i.e, what the timber harvester pays for with the stumpage fee. Is it the right to own the harvested tree? The right to cut the tree? Both? Something else? In this context, please comment on the statement at paragraph 3 of the 12 February 2003 closing statement of the United States that "[t]he mills pay to get that tangible timber – not intangible rights – and they pay only for the timber they harvest".**

#### Reply

1. A stumpage fee is not a price paid by tenure holders in return for "timber". This is because provinces transfer stumpage – the right to harvest trees on Crown land – in exchange for a number of obligations to be assumed by the tenure holder, one of which is the payment of a stumpage fee or charge after the timber is cut. The tenure holder thus "pays" for its right to harvest by accepting these obligations – the payment of the fee upon harvest as well as in-kind payments regardless of harvest.

2. From the perspective of both the provinces and the tenure holder, the distinction between the right to harvest and the end product has significant legal and economic consequences. A tenure or licence represents the right to current and future harvests. Tenure holders incur silviculture responsibilities and stumpage fees based on the amount of standing timber they harvest. A tenure or licence also carries current and future obligations such as forest management planning, fire protection, and insect and disease control. These obligations are independent of any harvest. Finally, in accepting a long-term tenure, a harvester accepts responsibility for transforming immovable or real property into movable personal property or goods, and to provide ongoing conservation and management services in respect of the real property.

3. In this way, the right to harvest standing timber granted by Canadian provincial governments is fundamentally different from a simple ownership right in harvested trees. A tenure holder incurs costs and risks that it would not incur if it simply purchased trees. Provincial governments require the discharge of several responsibilities before the right to harvest timber may be exercised. In contrast, the simple sale of short-term cutting rights on public lands in the United States concerns the harvest that is currently available. In addition, in US forests, the government undertakes many of the obligations that are borne by Canadian tenure holders.

4. Canada notes, of course, that the question of the existence of a financial contribution must be approached from the perspective of the alleged provider of the alleged good – in this case, the provincial governments. In this vein, it is instructive to note that outside the United States, most natural resources are owned by governments. When production decisions are turned over to the private sector, the question arises of the fiscal mechanisms by which governments should be compensated for the extraction or use of the resources. The practices by which governments levy charges on government-owned and privately managed natural resources vary greatly. They all involve similar issues.

5. The principal problem governments face in determining charges is the trade-off between production efficiency and ensuring a maximum return to the government. In a world of incomplete

information and imperfect markets, no fiscal mechanism guarantees both productive efficiency and maximum return.<sup>1</sup>

6. Governments use a wide variety of instruments to balance the tension between these two goals. The United States often relies on private ownership—based on prior transfer of the land itself—or on auctions for oil and gas, minerals, and standing timber on lands still in public ownership. Other governments use specialized fiscal devices, such as production-sharing arrangements, resource-rent royalties, and gross or net revenue sharing. In many instances, these charges are denominated as taxes rather than royalties or production charges. An example is the “resource-rent tax” or RRT in Australia.<sup>2</sup>

7. As the Australian RRT illustrates, these fiscal instruments generally do not and cannot collect 100 per cent of the resource rents. All of the levies governments use impose some penalty on production efficiency, and governments strive to develop fiscal mechanisms that will not stifle the incentive to produce.

**Q3. Canada argues that there is a meaningful legal distinction, under the stumpage programmes, between the right to harvest and the right to own the harvested tree. Could Canada please indicate the significance, in concrete terms in respect of this dispute, of this distinction – i.e., are there any stumpage contracts where the timber harvester does not have ownership rights to the harvested timber? If so, please provide a specific description of these situations and an indication of their magnitude in relation to total stumpage.**

#### Reply

8. In Canada most forms of tenure confer a right to harvest standing timber that is in the nature of a proprietary interest. The legal nature of this right, and the point at which the harvester owns the harvested tree varies depending on the form of tenure and the provincial jurisdiction.

#### *British Columbia*

9. Long-term tenure holders in British Columbia have the legal right to cut timber on a defined area of Crown land. The tenure holder owns the logs resulting from the harvest of standing timber. The right to harvest also includes a right of access to the land for that purpose. These two aspects constitute one integral interest in land described in the common law as a *profit à prendre*.<sup>3</sup>

#### *Alberta*

10. In Alberta the two forms of long-term tenure arrangements are the Forest Management Agreement (“FMA”) and the Timber Quota. FMAs account for more than 60 per cent of the annual allowable cut in Alberta. Timber Quotas account for close to 30 per cent of the annual allowable cut.

11. The legal nature of FMAs is set out in Section 16(2) of Alberta’s *Forests Act*:

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<sup>1</sup> In the case of volumetric stumpage charges for the exercise of timber-harvesting rights in British Columbia, this trade-off is discussed and illustrated in Nordhaus 2001a. (Exhibit CDA-13)

<sup>2</sup> The Australian RRT is levied on net cash flows for oil and gas projects that achieve a specified return. The return was originally set at 15 percentage points above the long-term bond rate. The threshold rate compounds pre-tax cash flows until a positive cumulative cash flow emerges. At that point, a tax rate of 40 per cent is levied on resource rents. The government’s share of net rents on a present value basis is therefore 40 per cent, while 60 per cent is retained by the producer.

<sup>3</sup> See footnote 12 of Canada’s First Written Submission and Exhibits CDA-9 to CDA-12.

*Except as against the Crown and subject to any agreement to the contrary, ownership of all Crown timber on land subject to a forest management agreement or forest management lease is, during the term of the agreement or lease, vested in the holder of the agreement or lease, who is entitled to reasonable compensation from any person who causes loss of or damage to any of the timber or improvements created by the holder.*<sup>4</sup> [emphasis added]

12. This provision confers a proprietary interest in the standing timber to the FMA holder. However, it does not convey complete ownership of the standing timber as the provision stipulates that the Crown retains its superior rights after the tenure is conferred. The FMA holder obtains full ownership rights in the harvested timber only after the harvest.

13. Timber Quotas give the tenure holder the right to harvest a percentage of the annual allowable cut in a particular forest area. These tenures do not convey a real property interest. Instead, the tenure holder receives a licence to cut a certain number of trees in an area if it meets certain obligations. Licences generally are issued every 3 or 4 years. Full ownership interest in the harvested timber vests in the quota holder when the timber is cut.

#### *Ontario*

14. In Ontario the province uses two major forms of licence to provide access to Crown timber: Sustainable Forest Licences and Forest Resource Licences. These licences provide a legal right to harvest standing timber, but do not confer a proprietary interest in land.<sup>5</sup> Ontario also differs from other provinces in that the ownership of harvested timber is not transferred to the harvester until all stumpage fees have been paid.<sup>6</sup>

#### *Québec*

15. In Québec the Crown timber supply is managed through a long-term form of tenure referred to as a Timber Supply and Forest Management Agreement (“TSFMA”). This form of tenure accounts for 99.4 per cent of the annual Crown softwood harvest. The provisions of the *Forest Act* govern ownership rights in the province.<sup>7</sup>

16. A TSFMA provides for the right to enter specified public lands and harvest a limited volume of timber as described in the agreement.<sup>8</sup> For each TSFMA, an annual forest management plan must be submitted to the Ministère des Ressources Naturelles for approval. After the plan is approved, the TSFMA holder receives a forest management permit that allows it to harvest specific cutting areas in accordance with the plan. The Québec *Forest Act* provides that this forest management permit confers harvesting rights that are immovable rights.<sup>9</sup> It also provides that ownership of harvested

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<sup>4</sup> *Forests Act*, R.S.A. 2000, Chapter F-22. (Exhibit CDA-115) Under section 1(l) of the *Forests Act*, the term “timber” means all trees living or dead, of any size or species and whether standing, fallen, cut or extracted.

<sup>5</sup> *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25, at s. 36. (Exhibit CDA-116) *Black’s Law Dictionary* defines a licence as follows:

A revocable permission to commit some act that would otherwise be unlawful; esp., an agreement (not amounting to a lease or profit à prendre) that it will be lawful for the licensee to enter the licensor’s land to do some act that would otherwise be illegal, such as hunting game.

See: B.A. Garner, ed., *Black’s Law Dictionary*, 7<sup>th</sup> Ed. (St Paul: West Group, 1999), at 931. (Exhibit CDA-117)

<sup>6</sup> *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25, at s. 33. (Exhibit CDA-116)

<sup>7</sup> S.Q., Ch. F-4.1. (Exhibit CDA-118)

<sup>8</sup> *Ibid.*, at s.42.

<sup>9</sup> *Ibid.*, at s. 87.

timber vests in the harvester once logs reach the processing facility, or when the harvester pays the appropriate stumpage fee.<sup>10</sup>

**Q4. Is it possible for a tenure holder to sell to another party its own contractual right to harvest, without the permission of the provincial government, and while maintaining its tenure contract in force? In other words, can someone enter into a stumpage contract and then sell off the rights to harvest under that contract?**

Reply

17. The answer to this question varies from province to province.

*British Columbia*

18. In British Columbia tenures themselves are transferable with the approval of the provincial government. In fact, tenures are frequently traded. As well, a tenure holder may arrange a contract with a third party – usually a logging contractor who is already working on behalf of the tenure holder – that allows that third party to log a part of the tenure at his/her own risk and take the resulting profit or loss. In this scenario, the tenure holder is in effect assigning his/her initial ownership rights to a third party. Government approval is not required. The tenure holder remains ultimately responsible for the forest management obligations on the tenure, including road construction and maintenance, planning and silviculture.

*Alberta*

19. In Alberta, the tenure holder may sell or subcontract the right to harvest without seeking government permission. The tenure holder remains responsible to the government for all obligations. A tenure holder may also transfer tenure. Government approval is required, but this is routinely granted.

*Ontario*

20. In Ontario harvest licences are not property rights that can be sold. Where a business holding tenure is sold or sells assets (harvesting equipment, physical buildings, goodwill, etc.) the provincial government may consent to forest resource licences being transferred to the buyers of a business, and has regularly done so.

21. Tenure holders may enter into contracts under which the other contracting party receives their right to harvest. This may be done through the use of an “overlapping agreement” that is recognized by the provincial government.

*Québec*

22. In Québec, TSFMA's are not transferable to another party. TSFMA's are agreements between the province and a specific party. If the party to a TSFMA sells the related timber processing facility, the accompanying TSFMA is revoked and reverts to the province as the owner and steward of the public forest. A new TSFMA between the province and the new owner of the timber processing facility must be approved by the province and executed. There is no guarantee that an entity purchasing a timber processing facility will acquire the tenure that was previously associated with that facility.

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<sup>10</sup> *Ibid.*, at s. 8.

23. In the recent examples of large scale timber processing facility acquisitions, applications to re-issue the same tenures to the new mill owner were presented to and approved by the Ministère des Ressources Naturelles after confirmation that the new owner had the necessary resources to ensure the continuing fulfilment of the obligations that run with the tenures and that the necessary forest plans were in place. In those cases, new TSFMAs were executed with the new timber processing facility owner. In all cases, TSFMAs are linked to the actual, residual supply needs of timber processing facilities and the parties' capacity to fully perform the duties and obligations that run with the tenures.

**Q5. Concerning newcomers seeking access to stumpage:**

- (a) **Could Canada please indicate how a newcomer seeking stumpage goes about obtaining it. Please discuss, *inter alia*, the availability of forested land that is not already subject to tenure contracts; the required capacities that the newcomer must have in order to obtain a tenure contract; how long it typically takes between an initial request from a newcomer and the execution of a stumpage contract; and any other relevant elements.**

Reply

24. "Stumpage" is the right to harvest standing timber. It is transferred to harvesters as part of tenure agreements that generally require harvesters to assume a variety of obligations including road-building, silviculture and numerous other forest management responsibilities.

25. Canada understands the Panel to be asking how newcomers enter into tenure agreements and obtain stumpage as part of those agreements. Canadians have been harvesting forests for centuries and there are claims of one kind or another, whether through private ownership or tenure arrangements, on most accessible forests. Consequently, there are inevitable and obvious limits on the creation and availability of entirely new tenures, which imply grants of access to previously unclaimed stands of trees. Some new tenures are created, but the much more common phenomenon is trade, in one form or another, in already established tenures. Such trade is very common and very widespread. What follows is a discussion based on British Columbia, Alberta, Ontario and Québec. Together these provinces account for 96 per cent of lumber exports from Canada.

*British Columbia*

26. In British Columbia there are various ways for a "newcomer" to obtain stumpage rights. First, short-term tenures are advertised publicly and are open to application by registrants in the Small Business Forest Enterprise Programme ("SBFEP"). For one type of short-term tenure, registrants must be market loggers who do not own processing facilities.<sup>11</sup> The applications are awarded solely on the basis of the highest bid pursuant to an auction process. For the second type of short-term tenure, registrants cannot hold a major long-term tenure. Applications are awarded on the basis of a number of neutral factors including price. Hundreds of these short-term tenures are awarded each year under the SBFEP programme. These SBFEP tenures collectively accounted for about 12 per cent of the Crown harvest during the period of investigation. These licences are generally of one to two years duration, are not replaceable, and have no forest management obligations. The Ministry of Forests advertises the availability of new tenures and newcomers can then apply to participate in the bids for those new tenures.<sup>12</sup>

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<sup>11</sup> See Response of the Government of British Columbia to US Department of Commerce 1 May 2001 Questionnaire (28 June 2001), Vol. 1 at BCIII-1 to III-3. (Exhibit CDA-119)

<sup>12</sup> *Ibid.*, Vol. 1 at BCIII-1; BCIV-50 to 51.

27. Second, long-term tenures may be and are purchased from existing tenure holders. Transfers of tenure in British Columbia are quite frequent.<sup>13</sup> A majority of British Columbia's major long-term replaceable tenures in fact have been transferred in market transactions since their issuance to the initial tenure holders.<sup>14</sup> This demonstrates that newcomers have access to stumpage rights in British Columbia through the acquisition of existing tenures. Numerous major US companies, for example, have obtained tenures in this manner.

28. In general, eligibility for concluding tenure agreements with the province is open to any legal or natural person satisfying easily met criteria. For example, US corporations can purchase and have purchased tenures in British Columbia and are also free to participate in the SBFEP programme. Transfers of tenure are subject to approval of the provincial government, which is generally granted.

### *Alberta*

29. There are three types of commercial tenure arrangements in Alberta used to harvest coniferous timber: the long-term Forest Management Agreement (FMA) and the Timber Quota (already discussed above), and the short-term Commercial Timber Permit (CTP).

30. A newcomer seeking access to Alberta stumpage would have several options for obtaining it. First, approximately 4 per cent of Alberta's forests are not under tenure, and a newcomer could compete for new tenures that might be offered. Second, a newcomer could buy a company holding tenure or could buy that company's tenure. While provincial permission is required for tenure transfers, it is routinely granted. It is not uncommon for companies to be bought and sold, with their tenure rights being conveyed to the purchaser. During the period of investigation, for example, seven small Timber Quotas were transferred. Third, a newcomer could compete for the short-term permits (CTPs). These permits convey rights to cut timber for 3 to 5 years. They are issued either through open auctions, sealed tender or by direct sale in certain communities to the residents there. CTPs represent about 7 per cent of Alberta's annual allowable cut.

31. The basic eligibility criterion for entering into a tenure arrangement offered in Alberta for timber harvesting rights is that the person be 18 years of age. The process thereafter depends on the tenure type. Timber Quotas generally have been sold in auctions open to all, with no processing requirements attached. Timber Quota auctions are advertised ahead of time. A bidder must make a lump sum cash bid for the tenure, as well as commit to paying regulation stumpage dues and miscellaneous fees, and promise to undertake a variety of forest management obligations. It generally has taken less than 6 months between the advertisement for the Timber Quota and issuance of the Quota.

32. FMAs are not sold at public auction, but are entered into after a competitive selection process. The selection process considers which proposal is best able to fulfill the purpose of the FMA, which includes goals such as long-term utilization of the resource, protection of the environment, and government revenues and taxes. Typically, when large timber supplies afford the opportunity, the province advertises the availability of timber development areas. The province gives interested parties a specified period to analyze the resources in the area and prepare and submit their proposals for managing and developing it. The province reviews each proposal to ensure it addresses forest management objectives established by the province.

33. Once a company has decided on its timber development proposal, the province will incorporate a commitment based on that proposal into the FMA to ensure the timber is not wasted. However, the government does not encourage any particular type of facility and there are no

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<sup>13</sup> See Response of the Government of British Columbia to US Department of Commerce 17 December 2001 Supplemental Questionnaire at Exhibit BC-S-168. (Exhibit CDA-120)

<sup>14</sup> *Ibid.*, at 3.

requirements that the FMA timber be used in the facility. In addition, subject to government approval, the company can change its development direction. The FMA process is detailed and therefore time consuming. On average, it might take 2 to 4 years from the advertisement of timber area to the completion of the FMA.

34. CTPs sold by auction or sealed tender are advertised ahead of time. These auctions/tenders generally involve per cubic metre bids, agreement to pay reforestation levies and miscellaneous charges, and limited forest management obligations. Directly-sold CTPs pay regulation stumpage fees, as opposed to bids, but otherwise are the same as their bid counterparts. CTP eligibility criteria beyond the basic age requirement noted above differ from area to area. Some sales include residency requirements, or require possession of a manufacturing facility, possession of logging equipment, or may require the bidder to have operated a CTP recently, and may exclude Timber Quota or FMA holders from bidding. In some cases, sales conditions may consider the need for support to small businesses in rural communities and therefore may ensure that only small operators bid. About half of the CTPs require the wood to be processed at a specified mill, which means that the winner would negotiate with the mill owner after winning the sale. The time between the notice of sale and the actual conferral of tenure averages is typically less than 3 months.

#### *Ontario*

35. Two general types of tenure arrangements govern timber harvests in Ontario: (1) Section 26 Sustainable Forest Licenses (“SFLs”), and (2) Section 27 Forest Resource Licenses (“FRLs”). In addition, while not constituting a form of tenure, the Crown also makes use of other forms of wood supply commitments, including Supply Agreements issued under Section 25 of the Crown Forest Sustainability Act (“CFSA”), Commitment Letters, and licences to harvest trees that are not in a Crown forest but are still reserved to the Crown.

36. Generally, to obtain any type of licence, 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. Licencees must be able to demonstrate their ability to fulfill their obligations under the licence (*i.e.*, meet environmental protection requirements, perform silviculture obligations, etc.).

37. Section 26 SFLs also require that the licence holder have the ability to meet the substantial obligations of the SFL’s terms and conditions. The Ontario SFL holder must be able to ensure the delivery of a comprehensive planning and renewal programme, as required by the SFL. This includes, for example, obligations regarding forest management planning, performing inventories, annual work schedules, compliance activities, First Nations relations and providing information.

#### *Québec*

38. Most of the accessible forest land in Québec’s public forest is covered by TSFMA. Those areas represent 87.4 per cent of forests in the public forest, leaving 12.6 per cent as public forest reserves which are not subject to harvest. This does not mean that new market entrants have been unable to enter into TSFMAs with the province.

39. If a newcomer wishes to enter into a TSFMA with the province, it must own a timber processing facility and demonstrate that it is capable of fulfilling its obligations under the TSFMA. There are no restrictions as to who may own or operate a timber processing facility.

- (b) **Could Canada please indicate how often newcomers are granted stumpage– that is, how common an occurrence is this, versus the situation of long-standing tenure relationships that are renewed upon expiry.**



## Reply

40. Assured supply through long-term tenures is an essential feature of obliging companies to build roads, plant trees, and pay for forest fire protection and protections against insects and disease. Long-term tenures do not mean, however, a closed market. Mills open and close all the time, everywhere in Canada. They are bought and sold. Changes in mill ownership, the closing of old mills and the opening of new ones, always impact tenures. Changes in technology often drive mills out of business while stimulating the construction of new mills.

41. There are abundant examples of this fluidity. On a grand scale, in the last five years, Weyerhaeuser, the largest lumber producer in North America, bought MacMillan Bloedel, what was then the largest producer in Canada. Donahue, which at the time was the largest producer in Québec, was bought by Abitibi Consolidated. Bowater, an American company, bought Alliance, one of Québec's largest producers, last year. International Paper, the leader and largest member of the US Coalition for Fair Lumber Imports, bought Weldwood in Canada. Louisiana Pacific is building a state-of-the-art mill in Ontario to access black spruce for specialized use. The notion that Canadian trees are controlled in perpetuity by an entrenched group of long-term tenure holders is a caricature of the Canadian market.

42. The situation in each of British Columbia, Alberta, Ontario and Québec is set out below.

### *British Columbia*

43. Even though there are relatively few new long-term tenures awarded in British Columbia, new tenures can be made available from time to time. New tenures are advertised publicly and applications are examined and awarded on the basis of price and other relevant factors, such as First Nations employment. There are generally no restrictions on who can apply for such long-term tenures.

44. It should also be noted that the majority of long-term tenures do not "expire" prior to renewal but rather are renewable pursuant to evergreen provisions. Those long-term tenures are renewed (replaced) on a fixed periodic basis (such as every 5 years) so long as the terms of the agreement are honoured.

### *Alberta*

45. As indicated in the response to question 5(a) above, newcomers have multiple opportunities to obtain stumpage under long-term tenure in Alberta. The province does not track the number of new companies that secure tenure, but there have been multiple instances where long-term tenures originally issued to one company have been transferred to another company. Recent examples of these transfers are West Fraser Timber's purchase of their FMA from Alberta Energy Company and Weldwood's purchase of their FMA from Sunpine Forest Products. (Weldwood was subsequently made a wholly owned subsidiary of International Paper). In the period of investigation alone, seven small Quotas were transferred.

### *Ontario*

46. The Ontario Minister of Natural Resources has the right to amend licences and reallocate forest resources to other licensees. Significant reallocations have and continue to occur.

47. During the period of investigation (POI) in this case, four Section 26 Sustainable Forest Licenses (SFLs), twenty Section 27 Forest Resource Licenses (FRLs) and one Section 25 Supply Agreement were transferred in Ontario. In addition, between 1993 and 2001, approximately 5,774,600 cubic metres of the total available harvest during the POI (about 25 million cubic metres)

was reallocated without compensation to the original tenure holders. This reallocation over time constituted about 23 per cent of the harvest available during the POI. Lastly, Ontario is committed to a significant expansion of parks and protected areas. In 1994, the Crown began removing land from existing tenures in order to create new parks and protected areas. By March 31, 2003, 1.3 million hectares will have been removed for this purpose. The total 2.7 million hectares that will be removed represents a 9 per cent reduction in total area that was under tenure. Again, compensation was not provided to the tenure holders.

*Québec*

48. Between 31 March 1996 and 31 March 2001, a total of 75 TSFMA's were revoked for the following reasons: plant closures; sale of assets; change in needs; bankruptcy; and failure to respect silviculture obligations. In the same period of time, 70 new TSFMA's were entered into by the province, and 92 TSFMA's were renewed.

	31-Mar 1996-1997	31-Mar 1997-1998	31-Mar 1998-1999	31-Mar 1999-2000	31-Mar 2000-2001	Totals
New TSFMA's	34	9	8	13	6	70
Revoked TSFMA's	18	18	11	21	9	77
Renewed TSFMA's	69	18	3	1	1	92

Source: Ministère des Ressources Naturelles, 18 February 2003

49. As these numbers show, there is significant turnover in TSFMA's. Whenever a TSFMA is revoked, it is subject to reallocation. As mentioned above in response to Question 5(a), if a newcomer wishes to enter into a TSFMA with the province, it must own a timber processing facility and demonstrate that it is capable of fulfilling its obligations under the TSFMA. There are no restrictions as to who may own or operate a timber processing facility.

**Q6. Could Canada please describe in detail what happens if a tenure holder does not meet its obligations under a tenure contract, including, specifically, road building and maintenance, forestry management obligations (silviculture, pest control, reforestation, etc.), minimum cut requirements, and timber processing requirements. In particular in respect of minimum cut requirements and timber processing requirements, can a tenure holder lose its tenure for failure to meet these requirements?**

Reply

50. The details vary from province to province.

*British Columbia*

51. One key element of the bundle of rights and obligations represented by tenure agreements are tenure holder's forest management obligations. The province has the authority to impose severe penalties, including fines, for failure to meet obligations regarding road construction and maintenance, silviculture, protection and other forest management obligations, as set out in Sections 117 and 143 of the *Forest Practices Code of British Columbia Act*. In addition, the *Forest Act* provides for suspension (Section 76) or cancellation (Section 77) of a tenure agreement for failure to comply with the requirements of the *Forest Act* or the *Forest Practices Code of British Columbia Act*. If a tenure holder fails to meet its forest management obligations, it is subject to significant penalties, including fines and possible suspension or cancellation of the underlying tenure agreement itself. Although loss of the underlying tenure has never happened, it is a potential penalty for non-compliance.

52. Similarly, tenure holders are subject to potential loss of allowable annual cut for any failure to meet minimum cut requirements, as described in Section 66 of the *Forest Act*. In addition, tenure holders are also subject to loss of allowable annual cut for failure to meet any timber-processing requirement that may be applicable to a specific tenure. Minimum cut and timber-processing requirements are not applicable to all types of tenure. Moreover, processing requirements are applicable only as set forth in individual tenure agreements and are not required in all cases even for the same tenure types.

#### *Alberta*

53. No minimum cut requirements are enforced on any of the tenures available in Alberta.

54. If a tenure holder does not meet forest management, road maintenance or other similar obligations under a tenure contract, penalties would be imposed on the errant tenure holder. Some CTPs do tie the wood cut to particular mills, but these CTPs account for a very small percentage of the province's annual allowable cut. If the violations were severe and pervasive, Alberta could withdraw the tenure from the tenure holder. Alberta has found, on occasion, tenure holders to be in default and has imposed penalties including calling on performance bonds posted by the company. In these circumstances, the province has required these tenure holders to take remedial measures, including restoring the performance bonds, in order for the tenure holder to maintain their tenure rights.

#### *Ontario*

55. There are no processing requirements associated with the tenures available in Ontario. Licence holders are, however, generally required to indicate to the province that they have a market for the timber they intend to harvest. That market may be a facility in which they have an ownership interest or one in which they have no interest.

56. Ontario does not have minimum cut requirements.

57. With respect to tenure holders that breach their obligations (road building, forest management, etc.) in Ontario, the Crown has the right to pursue enforcement actions. A wide range of penalties and remedies are available to address any breach, including the potential denial of a tenure right or refusal to extend such a right. As a factual matter, Ontario has never encountered failures to meet tenure obligations so egregious as to revoke a tenure completely.

#### *Québec*

58. In Québec, there is no minimum cut requirement. If a tenure holder does not meet the obligations imposed under its tenure contract, it may lose its tenure. Québec indicated in its questionnaire response that several tenures were revoked during the fiscal year 1999-2000 for failure to respect tenure obligations (although unstated, at issue were silviculture obligations).

**Q7. In the event that, *arguendo*, a Member were permitted under certain circumstances to use as a benchmark for the determination of benefit market conditions in a market other than that of the country of provision, what in Canada's view should have guided the USDOC's choice of such a benchmark assuming that it were permissible to disregard in-country prices?**

#### Reply

59. As the question recognizes, Canada submits that a Member may only use market conditions in the country of provision to determine the adequacy of remuneration. If it were permissible to ignore in-country prices for private stumpage, however, Canada first notes that there was evidence on the

record that could have been used by Commerce as a benchmark in this case – evidence which Commerce has consistently used as a benchmark in cases where it has determined that no in-country prices exist. As set out in response to question 10, Commerce had extensive evidence before it that demonstrated that provincial stumpage systems are operated consistently with market principles. This evidence included a demonstration that the provinces earned substantial profits from timber harvesting sales during Commerce's period of investigation.<sup>15</sup>

60. Contrary to the United States' assertions, Commerce has consistently used this type of benchmark evidence where it has determined no in-country prices exist because the government has a monopoly or a near monopoly.<sup>16</sup> Furthermore, the United States' efforts to distinguish its previous practice from the circumstances of the present case must fail. In its Closing Statement at the First Oral Hearing the United States argued that it "only" resorted to this benchmark in these other cases because there was no world market price for the good or service in question that was commercially available in the countries in question. It is abundantly clear that there is no "world market price" for standing trees in the forest nor are standing trees in a forest in the United States "commercially available" in Canada. Thus, on the basis of the United States' own argument, if it were able to disregard in-country prices in this case, it should have considered the evidence the Canadian provinces submitted that to determine, "consistent with market principles", whether remuneration was adequate.

61. This being said, if it were permissible to use as a benchmark for the determination of benefit market conditions in a country other than the country of provision, Commerce should have determined whether the out-of-country benchmarks it used were available to purchasers in the country of provision. If these out-of-country benchmarks were available to purchasers in the country of provision they would then form part of prevailing market conditions "in" the country of provision. Here they did not, since neither timber harvesting rights nor standing timber in the United States is available in Canada.

62. In addition, Commerce should have determined whether the prevailing market conditions in the country used as a benchmark (here the United States) were the same as the prevailing market conditions in the country of provision, and if not, whether it would be possible to quantify the impact of the differences on relative in-country prices. In the case of stumpage, the market conditions affecting it include all of the factors that US agencies (such as those in the states of Maine and Wisconsin<sup>17</sup>) identify as critical for intra-jurisdictional comparisons, such as timber size and quality, terrain, distance from mills, and conditions of sale. Equally important, the investigating authority would have to identify all of the factors that necessarily affect price levels in different countries including cost of capital, prevailing wage rates, inflation rates, and different monetary, tax, labour and environmental regulations and policies. These factors make prices for most goods and services, and certainly for stumpage and other property rights, different in different countries. Here, the multitude of differences that exist because of the border make valid cross-border comparisons impossible to do, as Commerce itself found in all previous lumber investigations.

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<sup>15</sup> See Canada's First Written Submission at paragraphs 106-108. As is demonstrated there Canadian provinces earned substantial profits from their stumpage programmes. For instance, during the Period of Investigation, British Columbia earned a profit of C\$541 million, representing a return of 75 per cent of expenditures. The other major producing provinces also showed substantial profits on their stumpage programmes – 35 per cent for Ontario, 67 per cent for Québec, and 25 per cent for Alberta. See also PricewaterhouseCoopers Report (Exhibit CDA-47). See also Analysis of the Profitability of Standing Timber Sales in the Public Forests for the Québec Ministère des Ressources Naturelles, attached to Letter of 7 January 2002 from Matthew J. Clark to Hon. Donald L. Evans. (Exhibit CDA-49).

<sup>16</sup> *Certain Hot-Rolled Carbon Steel Flat Products from South Africa*, 66 Fed. Reg. 50,412 (2001) (final determination) (Exhibit CDA-50); *Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 50,413 (2001) (final determination) (Exhibit CDA-51); *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, 67 Fed. Reg. 55810 (2002) (final determination) (Exhibit CDA-52).

<sup>17</sup> See Canada's First Written submission, at para. 85, footnote 59.

63. The impossibility of valid cross border price comparisons underlies the reason why the Members, including the United States, made the choice to use only the actual market within the country being investigated to find a benchmark. Remaining within the country allows the benchmark to automatically take into account the natural comparative advantages or disadvantages that a country may enjoy as well as the effects on the market of that countries' monetary, tax, labour and environmental regulations and policies. These important market influences cannot be integrated into the benchmark if the benchmark comes from another country.

**Q9. The USDOC final determination (Exhibit CDA-1), at pages 39-40, contains the following statements:**

**"...StatsCan data show that approximately 2.5 million cubic meters of softwood logs were imported into Canada during the POI, and each of the investigated Provinces imported US logs during the POI. ...**

**"This extensive record evidence that Canadian lumber producers had actual imports of US logs and purchased US stumpage during the POI would support basing our benchmark on tier one of the regulatory hierarchy [market prices from actual transactions within the country under investigation]. However, we do not have sufficiently detailed import prices on the record to use as the benchmark for all Provincial stumpage programmes. Therefore, we are using stumpage prices in the United States under tier two of the regulatory hierarchy [world market prices that would be available to purchasers in the country under investigation]."**

#### Reply

64. Canada would like to make several comments with respect to the excerpts from the Final Determination quoted in this question from the Panel.

65. First, the programmes found by Commerce to be countervailable subsidies were provincial stumpage programmes. Under these programmes, provinces transfer a right to harvest standing timber to timber harvesters. The "good" that Commerce claims was provided at a subsidized price is standing timber or the right to harvest such timber. It is not logs – whether imported or domestically produced. Commerce's benefit analysis, therefore, necessarily involved a determination of whether *stumpage* was provided by the provinces at less than adequate remuneration. There was ample evidence provided to Commerce by the provinces (as detailed in Canada's answer to question 10 below) that would have allowed Commerce to answer this question, without resort to import price data for logs.

66. Second, with the exception of imports of logs into Québec, the import of logs into Canada represent less than 1 per cent of the total annual harvest. In western Canada this is largely due to extensive log export bans that have been imposed by the United States.<sup>18</sup> With respect to log imports into Québec, the United States itself explained in its Second Written Submission to the panel in

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<sup>18</sup> As noted in Canada's First Written Submission at paragraph 75, log export restrictions are in place for the public lands in Washington, Idaho and Montana that Commerce used as a benchmark for British Columbia, the source of 58 per cent of Canadian exports subject to countervailing duties.

*United States – PD Softwood Lumber*<sup>19</sup>, that these imports, from Maine into Southern Québec relate to particular factors that are unique to this area.<sup>20</sup>

67. Third, determining “adequate remuneration” for any Canadian province based on prices of imported logs is an intractable problem. Complete data on the species and other characteristics of imports do not exist. Statistics Canada data are for a broad category of “wood in the rough” that is not limited to logs. Nor does the record contain all the necessary information concerning harvesting costs, which may be different, for example, because of differences in the terrain or in the distance to mill or market. There is therefore no valid means to estimate the harvesting and transportation costs that should be deducted for imported log prices as a measure of stumpage charges, even (incorrectly) assuming that in this case the necessary information about log imports were available by species, grade and other relevant criteria.

**Q10. The parties seem to have very different views as to what the record evidence shows in respect of the existence or not of a private market for stumpage in Canada. Could the parties clarify for the panel what they consider the pertinent record evidence was, and why they consider that it was, or was not, representative and/or usable?**

#### Reply

68. The record evidence in the underlying investigation that relates to the provincial stumpage markets may be broken down into two separate categories: (1) record evidence of prevailing market conditions in Canada including evidence of private markets for stumpage in Canada; and (2) information relating to alleged “price suppression” which Commerce claims was caused by significant involvement of the provincial governments in the Canadian market. Article 14(d) of the SCM Agreement provides that the former is central to a calculation of a benefit. The latter is not mentioned in this provision.<sup>21</sup> Canada nonetheless has provided information on both categories in order to assist the Panel in understanding this evidence.

#### *Private Markets For Stumpage in Canada*

69. The in-country benchmark evidence provided by Québec, Ontario, Alberta and British Columbia in this investigation (from which 96 per cent of exports of softwood lumber from Canada originate) was as follows:

#### *Québec*

70. Québec submitted a study prepared by independent forest consultants entitled *The Private Forest Standing Timber Market in Québec*.<sup>22</sup> The study concluded that the use of the Québec private market “as the basis for calculating public forest dues is ... appropriate and justified”,<sup>23</sup> because the private forest is an independent market with near perfect competition, that is free of distortion from government influence.<sup>24</sup>

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<sup>19</sup> United States – Preliminary Determinations With Respect to Certain Softwood Lumber From Canada, Report of the Panel, WT/DS236/R, adopted 1 November 2002 (“United States – PD Softwood Lumber”).

<sup>20</sup> *United States – PD Softwood Lumber*, US Second Written Submission, at para. 27. (Exhibit CDA-121)

<sup>21</sup> United States – PD Softwood Lumber, at para. 7.52.

<sup>22</sup> See Response of the Gouvernement du Québec to US Department of Commerce 5 July 2001 Supplemental Questionnaire (August 3, 2001), Vol. 3, Exhibit QC-S-100 (“The Private Forest Standing Timber Market In Québec” (“Del Degan I”)) (Exhibit CDA-29).

<sup>23</sup> Del Degan at 154.

<sup>24</sup> *Ibid.*, at Summary VIII and 152.

71. The study also examined the question of market size and representativeness, looking at numerous authoritative real-world examples and providing a case analysis of the US milk sector.<sup>25</sup> It concluded that it is the nature of the competition in a market that determines whether the market produces reliable prices, not the size of the market.<sup>26</sup>

72. The record evidence before Commerce also demonstrated the validity of the private prices used by Québec in setting public stumpage fees. In its own extensive verification of Québec's responses Commerce learned that Québec does not create the private timber prices used in the parity technique by administrative whim, but rather collects data on standing timber sales in the private forest in a rigorous, objective, and careful manner. The following verified facts describe the systematic way in which Québec collects the private prices:

- The Ministère des Ressources Naturelles ("MRN") begins by collecting private forest standing timber prices through outside consultants<sup>27</sup> in the form of *annual surveys* of forestry companies that purchase standing timber in the private forest.<sup>28</sup>
- The consultants conducting the surveys perform on-site interviews and verify the information provided by reviewing source documents.<sup>29</sup>
- The annual surveys of private forest transactions cover at least 75 per cent of the approximately 150 private forest operators in Québec. The MRN also conducts a *complete census* of private forest contractors every three years.<sup>30</sup>

73. Commerce was presented with three years of the annual private forest stumpage surveys and census. Commerce was also presented with copies of the original survey results reporting private forest stumpage transactions in Québec.<sup>31</sup> As stated in its Verification Report, Commerce found no discrepancies in this information.<sup>32</sup> And, as the United States conceded in its First Written Submission "Quebec ... submitted actual prices from non-government transactions." [emphasis added]<sup>33</sup>

74. The record evidence also demonstrated the existence of two distinct and separate standing timber markets in Québec. The two markets have different suppliers and different purchasers. This separation exists in large part because the vast majority of Québec sawmills are shut out of the public forest. It also exists because, by law, the public forest in Québec may only operate as a *residual supply source*.<sup>34</sup> A sawmill in Québec must therefore look to the private forest and other external

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<sup>25</sup> *Ibid.*, at 108-123 and Appendix 1.

<sup>26</sup> *Ibid.*, at 122-123 and 153.

<sup>27</sup> These outside consultants are firms that specialize in forest assessments, economic analysis, and forestry market surveys. See Response of the Gouvernement du Québec to US Department of Commerce 5 July 2001, Vol. 1 at 126. (Exhibit CDA-138)

<sup>28</sup> Response of the Gouvernement du Québec to US Department of Commerce 1 May 2001 Questionnaire (28 June 2001), Vol. 1 at 58. (Exhibit CDA-138)

<sup>29</sup> Response of the Gouvernement du Québec to US Department of Commerce 1 May 2001 Questionnaire (28 June 2001), Vol. 1 at 126-127. (Exhibit CDA-138)

<sup>30</sup> Response of the Gouvernement du Québec to US Department of Commerce 1 May 2001 Questionnaire (28 June 2001), Vol. 1 at 73. (Exhibit CDA-138)

<sup>31</sup> *Ibid.* at Exh. QC-S-66 (Exhibit CDA-32), QC Aug. 3 Supplemental Response at Exh. QC-S-90 (Exhibit CDA-33), and Memorandum from Eric Greynolds to Melissa G. Skinner, Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Verification of the Questionnaire Responses Submitted by the Government of Québec (Feb. 15, 2002) ("Québec Verification Report") at 2 and Verification Exhibit 2 (Exhibit CDA-34).

<sup>32</sup> See, e.g., Québec Verification Report at 12, 14. (Exhibit CDA-34)

<sup>33</sup> US First Written Submission, at para. 66.

<sup>34</sup> Under Section 43 of the Québec Forest Act (Exhibit CDA-118), the public forest is subordinate to the private forest and to other external sources of supply. An applicant for a public tenure in Québec must justify

sources *before* the public forest may be used. This forces demand onto the private forest. Commerce verified data objectively demonstrating that the private forest in Québec is a premium market.

75. Further evidence of the existence and validity of the Québec private forest standing timber market is the longstanding and vigorous log trade between private landowners in the Northeastern United States and dozens of mills in Québec. During the exclusion process in this investigation, Commerce reviewed in detail the log sourcing of sixteen mills commonly referred to as “Border Mills.”<sup>35</sup> Based on this examination, Commerce verified that approximately 73 per cent of the softwood logs purchased by those mills during the period of investigation came from the United States.<sup>36</sup> The reality of this trade belies United States’ “suppression theory” that the Québec government’s sale of timber distorts the prices in the Québec private forest standing timber market. This position makes no economic sense in light of the Québec Border Mills’ long and active log trade with the United States, and in particular the state of Maine.<sup>37</sup>

#### *Ontario*

76. Ontario provided evidence of the existence of a private market by submitting information regarding the overall volume of private stumpage sales.<sup>38</sup> In addition, Ontario also submitted to Commerce an expert study by Resource Information Systems Inc. (“RISI”) entitled “Ontario’s Private Timber Market” that provided a detailed overview and assessment of the significant private market timber sales in the province.<sup>39</sup> In its Final Determination, Commerce acknowledged the existence of a private market in Ontario.

77. The information submitted regarding Ontario’s private market was representative of the Ontario private market as a whole. The RISI study examined 129 specific transactions for the sale of one million cubic metres of timber. This volume amounts to more than one third of the estimated private timber market in Ontario.<sup>40</sup> This study – which contrary to US assertions, was not prepared for the purposes of litigation – provides a detailed analysis of actual private market prices in the province. The RISI Study concluded that:

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a need for public supply by proving that alternative private supplies are not available. Allocation of public forest land will only be allowed up to a level of supply not available from private sources.

<sup>35</sup> See Memorandum from The Team Office VI to The File, *Final Calculations for Companies Requesting Exclusion*, March 21, 2002. (Exhibit CDA-122)

<sup>36</sup> *Ibid.* at Appendix A page 1. This accounted for approximately 2.3 million cubic metres of softwood logs.

<sup>37</sup> Commerce correctly recognized in *Lumber III*, that the Québec Border Mills’ log trade does not make economic sense if Québec private forest prices truly are suppressed:

Finally, export restrictions, according to the Coalition’s own argument, depress domestic prices relative to the export market. The Coalition *fails to provide a credible reason why mills in Québec and Ontario, which supposedly benefit from significantly underpriced domestic logs, would bother to buy such a significant volume of expensive US logs.*<sup>37</sup> [emphasis added]

See: *Lumber III*, 57 Fed. Reg. at 22,621. Since Commerce’s *Lumber III* determination, the operation of the Québec private forest has not changed in any material manner except for accounting for a larger share of the total provincial softwood timber harvest (increasing from approximately 10 per cent to 17 per cent). (Exhibit CDA-28)

<sup>38</sup> This information was provided in Ontario’s first questionnaire response to Commerce. Response of the Government of Ontario to US Commerce Department May 1, 2001 Questionnaire (28 June 2001) at Exhibit ON-STATS-1. (Exhibit CDA-36)

<sup>39</sup> RISI is an acknowledged leading source for independent economic analysis of timber markets throughout the world. See Letter from Hogan & Hirtson L.L.P. to US Department of Commerce, dated 30 July 2001, regarding the Private Timber Market in the Province of Ontario which contains Resource Info. Sys. Inc., Ontario’s Private Market (June 2001)). (Exhibit CDA-37)

<sup>40</sup> *Ibid.*, at 1. (Exhibit CDA-37).



The results of the survey suggest that the market for private timber in Ontario appears to be both competitive and efficient. Buyers and sellers have the same information about market conditions, sellers produce homogeneous products, they are price-takers and they can enter and exit the market easily. Hence the market meets the classic definition of a competitive market. The market can also be classified as efficient given its low transaction costs and low level of government involvement.<sup>41</sup>

78. The RISI Study and the separate analysis of the softwood transactions by Charles River Associates (“CRA”) provided Commerce with private transaction pricing information on both a transaction-specific and a weighted average basis.<sup>42</sup> In addition, the CRA Study evaluated the market conditions in Ontario for private timber sales and concluded that the prices for private timber were established by the marginal supply of timber within Ontario. It also calculated the average price for private timber purchased by sawmills during Commerce’s period of investigation.

79. Commerce verified the accuracy and completeness of the submitted private transaction information. Commerce did not argue or claim that the pricing information contained in the RISI Study and used in the CRA Study was based on an unrepresentative sample of transaction prices for private stumpage in Ontario. Therefore, it was uncontested that these studies provided Commerce with private transaction information that reflected the pricing for private timber in Ontario. Finally, these studies both considered the effect of the involvement of the government of Ontario in the marketplace. In reality, Commerce’s only reason for rejecting this evidence was its allegation of “price suppression”.

#### *Alberta*

80. Alberta provided record information on the derived market value of mature standing timber. The Timber Damage Assessment (“TDA”) value is made available in an annual consultant’s report that is prepared for commercial interests. Although this TDA value has been characterized as a form of compensation it is calculated based on information derived from arm’s length log transactions, combined with a smaller number of bids from competitive government auctions for stumpage in the same period, to determine the full value of the standing timber. The majority of the timber values are calculated using arm’s length log transactions from public and private sources. The standing timber values used for TDAs are then derived by deducting the attendant logging and hauling costs.

81. The TDA valuation methodology was jointly developed by commercial interests in the oil and gas, mining and forestry sectors in Alberta in an effort to derive the proper valuation of mature standing timber that would be destroyed when energy and mining development occurs. The TDA values provide a basis for recompense to forest sector companies for this destruction. TDA stumpage values are highly reliable, as they have been calculated in the normal course of business by an independent consultant using a consistent procedure dating back to 1993.<sup>43</sup>

82. In 2000, TDA values were *derived* from data on wood volumes equivalent to 6 per cent of Alberta’s harvest,<sup>44</sup> a portion of the harvest many times larger than the portion of Minnesota’s timber

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<sup>41</sup> *Ibid.*, at 15.

<sup>42</sup> Dr. George Eads of CRA, a former Member of the US President’s Council of Economic Advisors, was the principal author of the CRA Study.

<sup>43</sup> In addition, as Commerce officials noted at verification, the consultant spot-checks the data to confirm its accuracy. Verification of the Questionnaire Responses Submitted by the Government of Alberta (15 Feb. 2002), at p. 18-19. (Exhibit CDA-130)

<sup>44</sup> Response of the Government of Alberta to the US Department of Commerce 1 May 2001 Questionnaire, Alberta Vol 1 – Narrative Response and Appendix A (28 June 2001), at AB-X-15 (Exhibit CDA-123); Response of the Government of Alberta to the US Department of Commerce Supplemental Questionnaire (3 August 2001), at AB-SUP-5 (Exhibit CDA-124); Response of the Government of Alberta to the Department of Commerce 19 November 2001 Questionnaire (17 December 2001), Exhibit 63. (Exhibit CDA-45)

harvest which Commerce relied on for Alberta's comparison. The consultant compiled this data from 20 locations from across the province.<sup>45</sup>

#### *British Columbia*

83. In addition to economic analysis that demonstrated that British Columbia's stumpage system was administered in a manner consistent with market principles,<sup>46</sup> British Columbia provided evidence concerning the limited market for private stumpage in British Columbia. In order to respond to Commerce's request for information in this regard, the British Columbia lumber industry engaged consultants to survey whether mills had purchased any standing timber from private lands on the prices paid. That consultant's report indicated that nearly all private wood fibre sales are of logs rather than standing timber, and that 99,000 cubic metres of standing timber from private lands was purchased during the year 2000, which represents 0.1 per cent of the total B.C. harvest.<sup>47</sup>

84. British Columbia also provided evidence concerning competitive auctions are held under Section 20 of the Small Business Forest Enterprise Programme ("SBFEP"). As previously described, these Section 20 auctions are awarded to the highest bidder on the basis of price and amount to 6 per cent of British Columbia's harvest.<sup>48</sup>

#### *Other Relevant Record Evidence From All Provinces*

85. These four provinces provided information demonstrating that, consistent with market principles, they earned substantial profits from their stumpage programmes. This evidence demonstrates that harvesters cannot be said to be receiving stumpage "for less than adequate remuneration". Canada's First Written Submission at paragraphs 106-108, discusses this evidence in detail.<sup>49</sup>

86. In conclusion, Commerce had ample evidence of prevailing market conditions in Canada, including detailed economic analysis. This evidence clearly was not "limited", as the United States claims.

#### *Price Suppression*

87. Commerce rejected this in-country evidence on the basis that there were "no useable market-determined prices between Canadian buyers and sellers..." Its reason for this conclusion was that "the large government presence" in the market suppressed private prices, making it "difficult to find a market price that is independent of the distortions caused by the government's actions."<sup>50</sup> None of the sources relied on by Commerce to arrive at this conclusion *demonstrated* "based on the facts and economics that the predominance of the government supply significantly distorts the market."<sup>51</sup>

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<sup>45</sup> Response of the Government of Alberta to the US Department of Commerce 19 November 2001 Questionnaire (17 December 2001), Exhibit 63, at 4. (Exhibit CDA-45)

<sup>46</sup> See Canada's First Written Submission at paragraphs 109-110.

<sup>47</sup> See Norcon Forestry Ltd. and PricewaterhouseCoopers L.L.P., "Survey of Primary Sawmills Arms'-Length Log Purchases in the Province of British Columbia," Addendum, "Arms'-Length Purchases of Softwood Standing Timber from Private Lands," (attached to letter from Steptoe & Johnson, 21 December 2001) (Exhibit CDA-60). No information on grade or species of this minimal volume of private stumpage sold is available.

<sup>48</sup> Response of the Government of British Columbia to US Department of Commerce 1 May 2001 Questionnaire (29 June 2001) Vol. 1, at IV-46-66; Vol. 3, at Exhibit BC-S-1, attachments G1 and G2. (Exhibit CDA-42)

<sup>49</sup> See also answer to Question 7.

<sup>50</sup> Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, 21 March 2001, at pp. 36-37 [ "CVD FD" ] (Exhibit CDA-1).

<sup>51</sup> *United States – PD Softwood Lumber*, US Answers to the Panel's 26 April 2002 Questions, at para. 88. (Exhibit CDA-137)

88. Commerce's finding of "distortion" and "price suppression" in the Final Determination relied heavily on the Preamble to its Regulations.<sup>52</sup> It described the Preamble as stating that "if the government provider constitutes a majority or a substantial portion of the market, then such prices in the country will no longer be considered market-based and will not be an appropriate basis of comparison for determining whether there is a benefit." [emphasis added]<sup>53</sup> Thus, Commerce treated the Preamble as if it prescribes a *per se* rule that requires the rejection of in-country prevailing market conditions in any situation where the government is the majority provider of the good. Commerce therefore assumed price suppression without any factual or economic analysis.

89. Even if Article 14(d) permitted the rejection of in-country benchmarks on the basis of price suppression, the Preamble does not contain such a *per se* rule. Nowhere does the Preamble, the regulation itself or the statute, state that if the government constitutes a majority of the market then private prices will no longer be considered an appropriate basis for comparison. The Preamble merely invites an inquiry into whether a large government presence in the market may create distortion.

90. That type of analysis was never undertaken by Commerce. The "evidence" which the United States claims supports Commerce's finding of market distortion does not withstand even limited scrutiny.

91. The "economic" evidence relied on by Commerce to conclude that private market prices were suppressed consisted of a single report prepared by Economists, Inc. ("EI") for the petitioner.<sup>54</sup>

92. Although the EI report purports to provide an economic model of some provincial stumpage markets in Canada, it is entirely theoretical. It does not examine private market prices or transactions anywhere in Canada and consequently, does not demonstrate that there is actual "price suppression" in any province. It therefore, provides no support for Commerce's conclusion that "in each of the Provinces, the stumpage market is clearly driven by the government's control of the total softwood timber harvest".

93. Further even as a theoretical analysis the report is flawed. The economic model on which the report is based is premised on the erroneous assumption that Crown timber supply in the provinces increases as price increases.

94. The report commences with the proper assumption that the supply of Crown timber cannot supply the entire provincial market.<sup>55</sup> In the ensuing analysis, however, this assumption changes. The

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<sup>52</sup> The preamble provides that,

While we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a *majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative [benchmark] in the hierarchy.* [emphasis added].

*See: Countervailing Duties – Final Rule*, 19 C.F.R. Part 351, or 63 Fed. Reg., 65,348 at 65,377. (Exhibit CDA-125)

<sup>53</sup> CVD FD, at 47. (Exhibit CDA-1) It is clear from the reports submitted to Commerce by Canada that it is the nature of the competition in a market that determines whether the market produces reliable prices, not the size of the market. Economically, the central question is not whether government presence is large, rather it is whether the "market" being analysed has the characteristics or essential indicia of a market. In this case, they do and thus they should have been considered by Commerce.

<sup>54</sup> R. Stoner and M. Mercurio, *Economic Analysis of Price Distortions in a Dominant-Firm/Fringe Market?* (4 January 2002) ("EI Report"). (Exhibit US-22)

report creates a second scenario in which “through some policy change, the ‘supply schedule’ in the administered sector is no longer unresponsive to price. Rather than a fixed administrative price  $P_A$ , the price (sic) in the administered sector responds positively to price.”<sup>56</sup> Accordingly, the conclusions of the EI report are premised on: (1) an assumed “policy change” that does not exist; and (2) an assumption that the Crown timber supply will increase if the price of timber increases. As the record evidence flatly contradicts these assumptions this economic model simply does not stand up to even minimal scrutiny.<sup>57</sup>

95. As Canada noted in its First Written Submission and First Oral Statement the remaining evidence relied on by the United States to support “the conclusion that stumpage fees on public lands are the price driver for the stumpage markets in those Provinces” consisted of little more than the following anecdotal evidence. It is far from “substantial”, as claimed by Commerce.

96. **First**, was a letter of the Québec Minister of Natural Resources to the President of the Fédération des producteurs de bois du Québec (“FPQ”), submitted to Commerce by the petitioner to argue that “private stumpage prices in Quebec are affected by the administratively-set price for public stumpage.”<sup>58</sup>

97. This letter is a Government response to the private land owners’ association’s criticisms of the cost adjustments used to make public and private timber comparable in Québec’s parity system, which itself is used for setting public land stumpage rates. The relevant portion of the letter relied upon by Commerce states:

*Toutefois, je suis conscient que la tarification des bois des forêts publiques puisse avoir une influence indirecte sur le marché privé.*

98. The verb “puisse,” as used in the letter, translated means “could” or “might”. It does not translate into “does”. Therefore, the above sentence, translated, reads:

However, I am aware that public land stumpage charges [*could* or *might*] have an indirect influence on the private market.

99. This in itself demonstrates the United States’ gross mischaracterization of the value and import of the letter. However, the context of the above passage is equally revealing: the statement is simply the reason given by the Minister as to why the Government of Québec continues to undertake meaningful dialogue with Québec private landowners. It is clearly not proof of “price suppression”.

100. The **second** piece of “evidence” the United States alleges Commerce relied on to conclude that Québec private stumpage prices were distorted was a 1995 thesis by a university student that

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<sup>55</sup> The report states that, “firms in the administered sector *cannot* fulfill all market demand at the administered price”[emphasis in original] EI Report at 7. (Exhibit US-22)

<sup>56</sup> *Ibid.*, at 8.

<sup>57</sup> In Ontario, for example, the CRA report demonstrates that private sellers sell softwood timber at prices higher than the Crown price. CRA report, at Attach 5 (Exhibit CDA-38). If the EI report’s assumption were correct, Crown supply would expand to fill demand before the market would tolerate higher prices. Moreover, Québec and Ontario both imported softwood from the United States during the period of investigation. This indicates that the supply of timber is not sufficient to meet demand for these markets.

In addition, this economic analysis is completely inapplicable to Québec where there is not a “single stumpage market” sourced from both the private and public forests. Instead, the public and the private markets in Québec constitute two entirely separate and distinct markets for timber with marked differences in purchasers. This separation is reinforced by the provisions of Québec’s *Forest Act*. See para. 74 above.

<sup>58</sup> Letter from J. Brassard, Ministre des Ressources naturelles, Gouvernement du Québec, to J.-C. Nadeau, Fédération des producteurs de bois du Québec, dated 12 July 2000. (Exhibit CDA-126). See CVD FD, at 38. (Exhibit CDA-1)

analysed forms of tenure in Québec.<sup>59</sup> Although the paper refers to sources as late as 1993 the only studies that substantively examine “price suppression” discuss the Québec stumpage regime that was replaced in 1989. Interestingly, in *Lumber III*, the Coalition (the petitioner in this case) made the same “distortion” argument regarding Québec private stumpage prices.<sup>60</sup> In commenting on the argument in that case, Commerce described the study relied on by the Coalition at that time as completely outdated and irrelevant since it examined a system that was replaced in 1989 by Québec’s current system of 28 “biophysically and geologically homogeneous tariffing zones.” It went on to say that “the evidence cited by the Coalition is either outdated and irrelevant or anecdotal...”<sup>61</sup> Thus, in *Lumber III* Commerce rejected evidence that was arguably more current, reliable and relevant than the material it is now relying on to arrive at the opposite conclusion.

101. A **third** piece of evidence relied on by Commerce are statements made by Mr. Jean-Pierre Dansereau the Executive Director of the FPQ. In its verification report Commerce suggests that the Mr. Dansereau stated that his syndicate might lobby the Government of Québec because,

[P]rivate wood lot owners have an interest in the level of stumpage fees because *if* the GOQ sets fees at an arbitrarily low level, it would depress stumpage fees and log prices ...[emphasis added]<sup>62</sup>

102. Commerce neglects to mention that this statement was made only with respect to *hardwood* lumber.<sup>63</sup> In Québec’s rebuttal brief the province attached an affidavit of Mr. Dansereau that provides critical information on this conversation, noting that:

The report fails to mention that my statements regarding the concern of private landowners as regards the level of private stumpage *is a matter of historic fact, that in recent years is relevant mainly to hardwood species, which are in oversupply in Quebec and have been for many years.*

The report also fails to mention my statements *that softwood lumber and logs in Québec are now in undersupply, and have been for many years, with the result that private prices for softwood lumber and logs have gone up and have been at a satisfactory level for many years.* [emphasis added]<sup>64</sup>

103. This affidavit confirms that this conversation only pertained to the effect that public stumpage *might* have on private hardwood timber prices. It also confirms that Commerce was informed that there was high demand for softwood in Québec during this period. This conversation cannot be relied upon to establish that “price suppression existed in this province”. In fact, it establishes the opposite.

104. **Fourth**, with respect to Ontario, Commerce relied on a report prepared by the petitioner. That report purportedly relied on a survey of “marketing boards, logging contractors and foresters” in Ontario, yet conceded that, “Most people contacted refused to provide information.”<sup>65</sup>

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<sup>59</sup> Luc Parent, “A Financial Strategy for the Development of Private Timber Lands in Quebec” (June 1995). See US Answers, at para. 40 and footnote 52. (Exhibit US-33). The study was not actually cited in the Final Determination. It was cited in the Preliminary Determination and in the United States’ First Written Submission.

<sup>60</sup> *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570, 22,597 (Dep’t Commerce 28 May 1992) (final determination). (Exhibit CDA-24).

<sup>61</sup> *Ibid.*, at 22,598.

<sup>62</sup> Québec Verification Report, at 28-29. (Exhibit CDA-34)

<sup>63</sup> In the CVD FD, Commerce only conceded that Québec, “questions the accuracy of our verification report”. See: CVD FD, at 38. (Exhibit CDA-1)

<sup>64</sup> Québec Rebuttal Brief, 1 March 2002, Exhibit 2. (Exhibit CDA-127)

<sup>65</sup> David Cox et al., Examining the Market Value of Public Softwood Timber in Canada 106-08 (27 July 2001). (Exhibit CDA-128)

105. There is no actual evidence in the record regarding the underlying survey. Further, the report contains neither a summary of survey responses nor any individual responses. In addition, no information was provided regarding how the survey was structured or its response rate, nor was a sample survey instrument attached. Accordingly it was impossible to confirm the facts allegedly supporting the report. In spite of this complete absence of facts, the strongest conclusion it could manage was that, “(s)tumpage prices in all of Ontario . . . *appear* to be *influenced* by Crown prices.”[emphasis added]<sup>66</sup>

106. **Fifth**, with respect to British Columbia, Commerce pointed to a report prepared by environmentalists in B.C., to establish “price suppression” in that province.<sup>67</sup> This report does not analyse whether domestic benchmarks in BC are suppressed. Instead, the report argues that Crown stumpage is subsidized using a cross-border comparison that is even more inaccurate than that undertaken by the Commerce in the underlying investigation. In an attempt to support its methodology the report asserts that:

[S]ince loggers bidding on Small Business sales have no choice but to dispose of their timber in an environment where timber prices are artificially low, even the bonus bids in the Small Business Programme will *tend to* underestimate timber value.[emphasis added]<sup>68</sup>

107. This assertion was supported by no evidence or analysis whatsoever. This single sentence is the only sentence in the report that speaks of “price suppression” of domestic benchmarks.

108. Commerce pointed to no other evidence regarding “price suppression” in any other province.

109. As should now be clear there was ample evidence of in-country benchmarks for Commerce to consider in this case and simply no reasonable basis for Commerce to conclude that prices in Canada were “suppressed” or “distorted” by the fact of significant provincial government ownership of forestry resources.

**Q11. With regard to its pass-through claim, could Canada clarify whether it is arguing that a pass-through analysis was required in all cases in the investigation, i.e. even in case of complete identity between the timber harvester and the sawmills (lumber producers); or does Canada consider that a pass-through analysis was required only in those cases where there allegedly existed arm's length transactions between timber harvesters and lumber producers and between lumber producers and remanufacturers?**

Reply

110. Subsidy pass-through analysis is required in every instance where the subsidy found to exist is allegedly bestowed on one person while the countervailing duty is imposed on the products of another. Where the timber harvester and the producer of subject merchandise are the same “recipient” of the alleged subsidy, no pass-through analysis would be required.

111. The United States found subsidization (albeit incorrectly) only for those producers of subject lumber who participate in the stumpage programmes directly. Though a Member may average the amount of a subsidy found to exist over all such producers, it may not average its obligation to demonstrate that a subsidy exists over instances of direct participation and potential indirect

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<sup>66</sup> *Ibid*, at 106.

<sup>67</sup> T.L. Green and L. Matthaus, *Cutting Subsidies or Subsidized Cutting?*, Report commissioned by BC Coalition for Sustainable Forestry Solutions (12 July 2001). (CDA Exhibit – 129)

<sup>68</sup> *Id.*, at 9.

participation. The relevant nexus for the imposition of countervailing duties on the merchandise of a given producer is direct participation in the alleged stumpage programme, not simply production of subject merchandise.

112. In this case, the United States admits to the existence of arm's-length transactions.<sup>69</sup> Because the United States has failed to conduct any pass-through analysis, the volume of Crown timber harvested by entities that did not produce subject lumber and the amount of subsidy derived from that volume, for example, must therefore be excluded from the numerator in the aggregate rate calculation. Likewise, no duty can lawfully be imposed on the products of lumber remanufacturers purchasing at arm's length.

**Q13. Could Canada take the Panel through its analysis of each of the provisions it alleges have been violated by the failure of the USDOC to conduct a pass-through analysis, and indicate why it considers each of these provisions has been violated?**

Reply

113. Under Article 1.1 of the SCM Agreement, a subsidy may be direct or indirect. A direct subsidy exists where the recipient of the alleged subsidy receives the financial contribution directly from the government. Where such direct relationship does not exist, then a Member must establish that the alleged recipient has received an indirect financial contribution that has conferred a benefit. A Member may not presume the existence of an indirect subsidy in such circumstances any more than it may presume the existence of a direct subsidy. Under Articles 10, 19.1, and 32.1 of the SCM Agreement and Article VI of the GATT 1994, a countervailing duty may be imposed only where an investigating authority demonstrates that the producer of subject merchandise has benefited from a "subsidy"; under Article 19.4, countervailing duties may be imposed only in respect of subsidies legally determined to have existed, and only at the amounts permitted by the SCM Agreement.<sup>70</sup> Where, therefore, a subsidy is alleged to have been bestowed on one person, and countervailing duties are imposed against the products of another, the "pass-through" of the subsidy from the one to the other must be established and may not be presumed.

114. The United States has acknowledged the existence of arm's-length transactions,<sup>71</sup> and is therefore under an obligation to demonstrate the existence of a "subsidy" in all such cases. Because the United States presumed rather than demonstrated the existence of a "subsidy" in those cases, the United States acted inconsistently with Article 1.1 of the SCM Agreement and therefore violated: (a) Article 10 by failing to impose countervailing duties in accordance with the provisions of the SCM Agreement; (b) Article 19.1 by imposing countervailing duties in the absence of a final determination of the existence and amount of a subsidy; (c) Article 19.4 by levying countervailing duties in excess of the amount of the subsidy found to exist; (d) Article 32.1 by taking action against a subsidy not in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement; and (e) Article VI:3 of the GATT 1994 by imposing duties in the absence of an indirect subsidy finding.

**Q15. In paragraph 179 of its first submission, Canada argues that Article 19.4 SCM is violated where, for example, a countervailing duty is based on a subsidy calculation in which the amount of a subsidy is higher than permitted by the methodologies set out in the SCM Agreement. Could Canada explain what it considers to be the "methodologies set out in the SCM Agreement"? Could Canada also please explain the relationship of this argument to**

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<sup>69</sup> US First Written Submission, at paras. 106, 113; US Oral Statement, at para. 30. See also *United States – PD Softwood Lumber*, at para. 7.74.

<sup>70</sup> See, e.g., *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, 9 December 2002, at paras. 139, 147, and 149.

<sup>71</sup> US First Written Submission, at paras. 106, 113; US Oral Statement, at para. 30. See also *United States – PD Softwood Lumber*, at para. 7.74.

**paragraph 121 of its oral statement: "...neither Article 19.4 nor Article VI:3 refers to a calculation methodology".**

Reply

115. Neither Article 19.4 nor Article VI:3 refers to a specific calculation methodology for determining the amount of a subsidy or subsidy per unit rate. At the same time, various provisions of the SCM Agreement, as interpreted and applied by panels and the Appellate Body, set out general guidelines to be followed in determining a correct subsidy per unit rate as required by Article 19.4.

116. Article 19.4 provides:

No 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. [footnote omitted]

117. It therefore requires that the maximum amount of a countervailing duty is limited to the per unit rate of subsidization on the allegedly subsidized and exported products. For Article 19.4 to have any meaning, the calculation of a per unit subsidy rate must be done correctly. That is, a countervailing duty may be imposed only to the extent that the rate reflects the subsidy attributable to the allegedly subsidized and exported product.

118. Article 19.4 incorporates four concepts, all of which are grounded in the provisions of the SCM Agreement: subsidy, amount of the subsidy, subsidization per unit, and countervailing duty. Because none of these concepts is defined in Article 19.4, it must be presumed that the provision incorporates by reference elements fundamental to subsidy and countervailing duty determinations found elsewhere in the SCM Agreement, and that those elements have in turn been correctly determined.

119. First, a countervailing duty imposed as against a practice that is *not* a subsidy within the meaning of Article 1 violates Article 19.4 to the extent that the countervailing duty rate exceeds the subsidy rate, which would be zero. Such a countervailing duty rate would not be imposed in accordance with the subsidy determination methodology set out in Article 1 of the SCM Agreement, and would be inconsistent with Article 19.4.

120. Second, where the amount of a subsidy has been impermissibly created or inflated by using incorrect benchmarks, by definition the subsidy per unit rate attributable to an allegedly subsidized and exported product is illegally inflated. Such a countervailing duty rate would be inconsistent with Article 19.4. One calculation methodology to determine that amount is set out in Article 14, which provides mandatory guidelines for the "calculation of the amount of a subsidy in terms of the benefit to the recipient". Article 14 sets out "methods" of determining the amount of the benefit to the recipient in paragraphs (a) to (d). Other methods have been developed and amplified in various panel, arbitration and Appellate Body reports.

121. Finally, even where a subsidy has been correctly determined to exist, and the amount has been correctly calculated, Article 19.4 imposes an obligation on a Member to calculate the rate by dividing the total subsidy (the numerator) by the total sales volume of all products to which the alleged subsidy is attributable (the denominator), to arrive at the per unit rate of subsidy on the allegedly subsidized and exported product. Or, where only a subset of those products are included in the denominator, only the portion of the subsidy attributable to that subset of products should be in the "numerator".



122. Article 19.4 is the only provision in the SCM Agreement (in conjunction with Article VI:3 of GATT 1994) that limits the level of the countervailing duty to the per unit subsidy rate. As such, Article 19.4 is the operative obligation in the context of Canada's calculation-related claims.

**Q16. Could Canada please respond to the US argument that Article 19 SCM Agreement does not establish any requirements concerning how a subsidy is to be determined, and that such obligations are found elsewhere in the Agreement, in Article 14 in particular (US first submission, para. 95), a provision not invoked by Canada. Does Canada consider that Article 14 SCM Agreement is relevant to its claims concerning the calculation of the rate of subsidization by the USDOC?**

Reply

123. Canada refers the Panel to its answer to question 15 which explains Canada's view of the relationship between Article 19.4 and other provisions of the SCM Agreement including Article 14. Article 14 goes to the measurement of the subsidy (the numerator in the subsidy rate calculation), while Article 19.4 expressly addresses the necessity of calculating a per unit subsidy rate, involving matching the numerator and denominator.

17. Assuming, *arguendo*, that the total amount of subsidy benefit has been determined in conformity with the Agreement, could both parties clarify what, in their view, was or should have been the product scope of the numerator and the denominator in the USDOC subsidization calculation?

124. Article 19.4 provides that the countervailing duty rate may not exceed the "subsidization per unit of the subsidized and exported product." A countervailing duty may be imposed, therefore, only in the amount of the alleged subsidy *attributable* to the subsidized and exported product.

125. This means that if the numerator is the total subsidies received by a producer, then the denominator must be all output products of that producer. In the facts of this case, the numerator of the subsidy per unit calculation is "all logs entering sawmills." Accordingly, the denominator should have been "all output products produced from those logs" – in other words, all products to which the subsidy may be attributed. In this case, Commerce excluded certain output products produced from those logs (certain "residual products"). By dividing the total subsidy by only a portion of the alleged subsidized products, Commerce inflated the subsidy per unit rate.

126. The following softwood products are produced from softwood log and lumber inputs in sawmill establishments:

- (1) in-scope softwood lumber;
- (2) softwood co-products resulting from the lumber production process (including chips, sawdust, etc.); and
- (3) other non-scope "residual" softwood products (including any non-scope softwood products shipped from the sawmill establishment, for example, remanufactured products that were further milled in the same sawmill establishment, pallets, fuel wood, logs and particle board or wafer board that was manufactured on-site from the chips and sawdust resulting from the lumber production process).

127. In addition, a host of products are produced by remanufacturers of lumber who use softwood lumber products (from sawmills) as their input products. These *remanufactured lumber products* all result from the original softwood logs that entered sawmills. Commerce grossly understated the value

of these remanufactured products (in contradiction to the record evidence), thereby further understating the denominator and overstating the subsidy rate.

128. Of course the more accurate way to determine the subsidy per unit rate of the subject merchandise would have been to limit the numerator of the equation to only the volume of logs used in the production of softwood lumber (*i.e.*, the alleged subsidy directly attributable to the production of subject merchandise) and then to divide that amount by the value of softwood lumber products.

**Q18. Could Canada please identify the relevant record evidence as to the products that it argues should have been included in the sales denominator of the subsidization calculation, and explain why those products should and could have been included.**

Reply

129. In Canada's original questionnaire response, Canada provided provincial and country-wide shipment data (Statistics Canada survey data) for *in-scope softwood lumber* and *softwood co-products*.<sup>72</sup> Further, in its 21 December 2002, supplemental questionnaire response, Canada provided a country-wide estimate for *residual product* shipments from sawmills.<sup>73</sup> These data were verified by the Department and the verification exhibits are attached as Exhibit CDA-\_\_\_\_.<sup>74</sup> In addition, in a submission dated 7 January 2002, Canada provided detailed estimates for shipments of *remanufactured products* as compiled by Natural Resources Canada's Pacific Forestry Centre.<sup>75</sup> These data were verified by Commerce and the verified values are attached at Exhibit CDA-\_\_\_\_.<sup>76</sup>

130. As described in response to question 17, the four groups of products above are all produced originally from softwood logs. Consequently, since the numerator in the equation included all logs entering sawmills, then the denominator necessarily needed to include the output of those logs.

**Q19. According to Canada, the USDOC used "manifestly incorrect data" (para. 132 Canada's oral statement) in its selection of a conversion factor which led to the inflation of the subsidy and amounts to a legal error. In Canada's view, was it manifestly incorrect of the USDOC not to accept the conversion factor suggested by Minnesota in its Public Stumpage Price Review and Price Index (CDA-113), when it is clearly noted in this Minnesota document that "the reader should use caution when comparing the prices shown in this report with actual prices received or expected on any specific timber sale. Individual sale prices will vary significantly from the averages shown in this report because of variability in both economic and physical conditions"? (CDA-113, p. IV.A)**

Reply

131. The text in the Minnesota Public Stumpage Price Review and Price Index ("Price Report") to which question 19 refers in no way speaks to the applicability of the conversion factor that appears on the face of the Price Report. The purpose of the disclaimer cited in question 19 is simply to caution readers that the Price Report lists *average* prices per species. These average prices, of course, will differ somewhat from actual prices paid by specific purchasers of public timber in Minnesota, which

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<sup>72</sup> Response of the Government of Canada to the US Department of Commerce 1 May 2001 Questionnaire (29 June 2001) at Exh. GOC-GEN-3. (Exhibit CDA-131)

<sup>73</sup> Response of the Government of Canada to the US Department of Commerce 26 November 2001 Questionnaire (21 Dec. 2001) at Exh. 41. (Exhibit CDA-132)

<sup>74</sup> Verification of the Government of Canada (23 January 2002) at Exhibit. 7 (all calculations) (Exhibit CDA-133); and Exhibit 13 (residual products) (Exhibit CDA-86).

<sup>75</sup> Estimated Added Value of Remanufacturer Shipments (8 January 2002). Exhibit CDA-134)

<sup>76</sup> Verification of the Survey of Secondary Manufacturing conducted at the Pacific Forestry Centre (15 February 2002), Exhibit CALC-1 (redacted public version). (Exhibit CDA-135).

are based on the specific economic conditions of each sale and the physical conditions of the particular stand. Actual transaction prices may be higher or lower than the average prices listed in the Price Report, and the Price Report cautions readers regarding this fact lest they assume that the listed price is what they will receive or pay in a sale. Therefore, it would be incorrect to infer anything about the validity of the conversion factor on the face of the Price Report from this standard disclaimer about average prices.

132. The front cover of the Minnesota Price Report also notes that all reported volumes and values (*i.e.*, sales prices) in the Price Report are predicated on the specified conversion factor. Any departure from the conversion factor underpinning the data in the Price Report renders the price data meaningless for comparison purposes – a basic fact that Commerce never addressed.

**Q20. Could each party clarify how it sees the role of the Panel in respect of the calculation-related claims, in light of the Panel's standard of review?**

133. The Panel's standard of review is set out in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. Article 11 provides in relevant part as follows:

[a] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

134. The Appellate Body in *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* summarized “a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations”:

This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.<sup>77</sup>

135. It would not be appropriate for this Panel to conduct a *de novo* review of the evidence. For instance, this Panel is not required to determine which conversion factors were appropriate (assuming that any are appropriate) to convert from thousand board feet to cubic metres. Rather, the question that the Panel may, and indeed is required to, address is whether Commerce examined all the pertinent facts, provided an adequate explanation of how the facts supported its determinations and addressed the complexities of the data. Commerce did not do so and the facts on the record firmly contradict the conclusions reached by Commerce. A review, in accordance with Article 11 of the DSU, of the conclusions of Commerce in the light of the evidence before it reveals that Commerce violated Article 19.4 in imposing countervailing duties in excess of the alleged per unit rate of subsidization.

**Q23. The US argues that nothing in Article 12 SCM imposes on the investigating authority an obligation to engage in an endless cycle of notice and comment, and that Article 12.3 rather**

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<sup>77</sup> *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body, WT/DS192/AB/R, adopted 5 November 2001, para. 74.

**reflects the time constraints imposed on completion of the investigation, requiring only that relevant information be provided, "whenever practicable". Could Canada please react to this US argument that linking Articles 12.1 and 12.3 to 12.8 would create an endless cycle of notice and comment?**

Reply

136. Nothing in Article 12 (or, indeed, in Canada's submissions) suggests that an investigating authority is required to engage in an endless cycle of notice and comment.

137. Each of Articles 12.1, 12.3 and 12.8 is aimed at information or evidence of varying degrees of importance to the investigation or final determination. And, depending on the importance of the information or evidence at issue, each provision contains internal qualifiers designed to limit its application.

138. In the facts of this case, the issue is whether the United States provided an opportunity to the Canadian interested parties to comment on *new* information and evidence. In respect of Canada's first claim, the United States failed to give interested parties *any* notice of its choice of benchmark state for Alberta and Saskatchewan prior to the Final Determination, let alone an opportunity to defend their interests. With respect to Québec, Commerce accepted and relied upon *new* evidence submitted by the petitioners without permitting *any* comments by interested parties. Canada's claims under Article 12 involve factual circumstances in which parties were denied any opportunity to comment, and not an "endless cycle of comment and rebuttal" as the United States claims. Accordingly, the hypothetical posed by the United States is not relevant to this dispute.

**Q24. What in Canada's view is the temporal relationship between the obligation of Article 12.1 and 12.3 on the one hand and Article 12.8 on the other hand. In Canada's view, do the obligations of Article 12.1 and 12.3 continue to apply even after a disclosure under Article 12.8?**

Reply

139. There is no "temporal" relationship between Articles 12.1 and 12.3, and Article 12.8. Specifically, nothing in Articles 12.1 and 12.3 or Article 12.8 suggests that compliance with Article 12.8 remedies violations of Articles 12.1 and 12.3 in the course of the investigation or that compliance with Article 12.8 obviates the need to comply with Articles 12.1 and 12.3.

140. Each of these provisions is an independent obligation. Each concerns information, evidence or facts of different degrees of importance to an ongoing investigation or to a final determination. For instance, Article 12.8 concerns disclosure of "*essential* facts under consideration which form the basis for the decision whether to apply definitive duties" while Article 12.3 concerns timely opportunities to see and prepare presentations on the basis of "*relevant*" information that is used in an investigation whenever practicable. It is possible, even after disclosure of essential facts under Article 12.8, for an investigating authority to come into possession of relevant information within the purview of Article 12.3. Article 12.8 should not be interpreted to reduce Articles 12.1 and 12.3 to inutility for any period following an Article 12.8 disclosure.

**Q25. Could both parties comment on the views of the EC concerning Article 12.8 as presented in paragraphs 23 and 24 of the EC's oral statement ?**

Reply

141. Paragraph 23 of the EC's oral statement concerns Article 12.3 of the SCM Agreement. Canada agrees with the EC that Article 12.3 imposes two distinct obligations on investigating

authorities: to provide timely opportunities both to *see* relevant information and to *prepare presentations* on the basis of that information. This accords with Canada's position as set out in paragraphs 211 and 212 of Canada's First Written Submission.

142. With respect to paragraph 24, Canada agrees that Article 12.8 does not require an investigating authority to engage in an endless cycle of notice and comment or comment and rebuttal. Canada further agrees that the disclosure of essential facts required by Article 12.8 must be done as early as is feasible so as to ensure that the parties have sufficient time to defend their interests. The EC is also correct in its analysis that the obligation to disclose essential facts under Article 12.8 is not limited or qualified by any considerations of practicability.

**Q26. Could the parties please provide an overview of the dates of the communications concerning the MFPC report, and explain the nature of such communications in each case? Could the US explain why this MFPC letter was not put on the record when it was received by the administration, and indicate where in the record these reasons are reflected? Please provide a copy of the USDOC regulations concerning submission and service of documents in countervailing duty investigations.**

#### Reply

143. An overview of the dates of communications concerning information provided by the Maine Forest Products Council ("MFPC") and the nature of that information is provided in the timeline below.

144. The MFPC comprises the largest private timber owners in the state of Maine. MFPC members submit the data that is collected by the Maine Forest Service ("MFS") and appears in the MFS Stumpage Price Report. The MFS Stumpage Price Report was the sole source of pricing information used by Commerce in its subsidy calculation when it made the cross-border comparison of Québec public timber to Maine private timber. Thus, the information the MFPC provided was the single most important information Commerce received regarding the subsidy analysis it performed for Québec. The MFPC information directly contradicted Commerce's findings in the Preliminary Determination. It stated, among other things, that:

- The MFS Stumpage Price Report "is not a pricing tool and is not used as one by private landowners in Maine."
- The product described in the MFS Stumpage Price Report "as a 'sawlog' is a log having a butt diameter (inside bark) equal to or greater than 9 inches, the accepted and standard definition of a sawlog in Maine. In fact, most of the timber we sell for sawlogs yields logs with diameters greater than 9 inches. Logs with diameters of 10, 12, and 15 inches are the most common sawlog sizes in Maine."
- Less expensive pulpwood and studwood had to be included in any Maine benchmark.
- Expensive sawlogs not used in lumber production (*i.e.*, used in furniture production and high-end millwork) identified in MFS Stumpage Price Report should be removed from any Maine benchmark.

145. The MFPC told Commerce that they had compared two very different things and thereby grossly overstated the alleged subsidy being provided by the Québec government to its lumber producers. Moreover, the MFPC noted in their letter to Commerce that Commerce had acknowledged these errors in its calculation during their meeting with the MFPC: "But we recognize, *as did the*

*Department*, that the comparison in the preliminary determination was not apples-to-apples because, in Quebec, there is no sawlog, pulpwood, or studwood distinction.”) [emphasis added].<sup>78</sup>

146. The US assertion that “a filing error” resulted in the MFPC information not being put on the record is not credible. The MFPC had met with the lead officials running the investigation on two occasions in Washington, D.C. during the investigation. The Deputy Assistant Secretary received the information sent by the MFPC. Commerce put the information on the record only when the Québec government independently became aware of its existence and made a request to that effect. Commerce then relied on new information filed by the petitioners, and denied Québec to an opportunity to comment on this new information.

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<sup>78</sup> See MFPC 20 December 2001, Letter attached to Letter from US Department of Commerce to All Interested Parties (20 February 2002) at p. 4. (Exhibit CDA-100)

### **Handling of the Information from the Maine Forest Products Council**

#### **2001**

- 14 May MFPC first meeting with Commerce officials in Washington, D.C.
- Commerce officials present at the meeting:
- Assistant Secretary of Import Administration
  - Deputy Assistant Secretary, Group II
  - Senior Director, Office IV, Import Administration
  - Director, Office VI, Import Administration
- 14 May NAFTA P.R. 88 Ex Parte Memo commemorating meeting of 5/14
- 17 August Preliminary Determination published
- 30 October MFPC second meeting with Commerce officials in Washington, D.C. Commerce is told that their cross-border comparison in the Preliminary Determination between Québec public timber and Maine private timber is seriously flawed and dramatically inflates the subsidy rate. In the letter submitted by the MFPC on December 20, 2001, it states that Commerce officials at this meeting recognized that the comparison in the Preliminary Determination was not “apples-to-apples” because, in Quebec, there is no sawlog, pulpwood, or studwood distinction.
- Commerce officials present at the meeting:
- Deputy Assistant Secretary, Group II
  - Director, Office VI, Import Administration
  - Special Assistant to the Assistant Secretary for Import Administration
- 31 October NAFTA P.R. 554 Ex Parte Memo commemorating meeting of 10/30
- 20 December Certified letter with the MFPC information addressed to Deputy Assistant Secretary, Group II received by Commerce. The information explains in detail the flaws with the agency cross-border comparison. Among other errors, the MFPC notes that the term sawlog in Maine refers to a log with a diameter of at least 9 inches and that pulpwood and studwood must be included in any Maine benchmark.

#### **2002**

- 7 January Investigation record officially closes
- 17 January Last day to comment on or rebut factual evidence submitted on or before 7 January 2001
- 21-29 January Commerce verification of Québec (during which Québec officials learn for the first time that Commerce has in its possession information from Maine private timber owners discussing the cross-border comparison in the Preliminary Determination (*i.e.*, the MFPC information))

- 8 February Québec's written request for any information that Commerce has received from Maine landowners to be put on the record
- 15 February Verification Report for Québec issued
- 20 February Memorandum from the Director, Office VI, Import Administration circulated to parties attaching MFPC information. Memorandum characterizes the MFPC information as "important to certain central issues in the proceeding" but "untimely." No explanation from Commerce on how information it sought and received prior to the close of the record could be untimely.
- 1 March Rebuttal briefs are submitted
- 4 March Coalition files new factual information in the form of two expert reports attacking the substance of the MFPC information. Quebec is prohibited from commenting on this new information.
- 21 March Final Determination due but not issued
- 25 March Final Determination actually issued to the parties
- 2 April Final Determination published

**Q27. Could Canada please react to the US argument that in Canada's theory, an income tax exemption granted solely to two industries – the auto industry and the textile industry is not specific under Article 2.1 because the two industries in the group manufacture dissimilar products? Does Canada agree with the US proposition that Canada's approach concerning specificity would mean that even a subsidy limited to a single large industry – whether steel, autos, textiles, telecommunications or the like – could not be specific because of the diversity of products of each of those producers?**

Reply

147. Canada is asked to react to the assertion of the United States that under Canada's reasoning, a subsidy granted solely to auto and textile producers, or to a "single large industry" such as steel or autos, would not be specific under Article 2.1. Canada can confirm that in principle such a subsidy could be found to be specific in either case.

148. The United States, however, makes general assertions about the import and consequences of Canada's submissions without in any way addressing the interpretation of the relevant provisions of the SCM Agreement. The provision at issue is Article 2 of the SCM Agreement and in particular, in this question, the words "industry" and "group of industries". The ordinary meaning of "industry" is "[a] particular form or branch of productive labour; a trade, a manufacture".<sup>79</sup> The ordinary meaning of "group" is "[a] number of people or things regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose, or classed together because of a degree of similarity."<sup>80</sup> As explained in Canada's First Written Submission, these terms, read in context and in light of the object and purpose of the Agreement, require product-based identification of industries.<sup>81</sup>

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<sup>79</sup> *New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993), at 1356. (Exhibit CDA-66)

<sup>80</sup> *Ibid.*, at 1151. (Exhibit CDA-136)

<sup>81</sup> Canada's First Written Submission, at paras. 159-162.



149. Applying the meaning of those terms to the hypothetical proposed by the United States, Canada does not dispute that a subsidy limited to what the United States calls “a single large industry” (such as “steel”, “autos”, “textiles”, “telecommunications”, or the like)<sup>82</sup> could be found specific, even though the producers make a diversity of products. These so-called “single large industries” may well fit the Article 2.1 definition of “certain enterprises”. That term, as defined in Article 2.1, refers to “an enterprise or industry or group of enterprises or industries”.

150. Under the facts of a particular case, it may be completely appropriate to find that producers of a wide variety of steel products (or automobile products, or textile products, etc.) are a group of “steel industries” (or “automobile industries”, “textile industries”, etc.) because of the similarity and relatedness of their output products. The fact that a government used the similarity and relatedness of the products of these “certain enterprises” to limit access to a subsidy programme would indeed be the type of government action the specificity test was designed to address.

151. Similarly, Canada does not claim that “an income tax exemption granted solely to two industries – the auto industry and the textile industry – is not specific ... because the two industries manufacture dissimilar products.”<sup>83</sup> In a case like that posited by the United States, a tax exemption granted solely to two dissimilar industries may indeed be an instance of government rendering the subsidy “specific to certain enterprises”. But such a finding would not flow from the United States’ erroneous reasoning that those unrelated industries form a single “group” consisting of “all users” of the subsidy. If the evidence in the hypothetical case supports the conclusion, it may be reasonable to find that the “certain enterprises” that use the subsidy are the industries producing “autos” and the industries producing “textiles”. Because Article 2.1(c) provides that “use of a subsidy programme by a limited number of certain enterprises” may indicate government targeting, and those two groups of industries appear to be a “limited number” of certain enterprises that the government has targeted, such a subsidy may indeed be specific to certain enterprises.

152. However, simply labelling an aggregation of producers as a “single large industry” merely because they use a particular programme, without any analysis of whether they are appropriately considered “certain enterprises”, does not satisfy the requirements of Article 2. Under the United States’ reasoning, one could easily refer to the “single large industry” of agricultural producers. But even the United States acknowledges, as a matter of law,<sup>84</sup> that the diversity of products produced by agricultural producers is sufficiently varied that agriculture is neither a “single large industry” nor even a group of industries.

153. By aggregating a potentially vast number of enterprises, industries, and groups of industries into a single “industry” through such labels as “autos”, “textiles”, or “steel”, the United States impermissibly interprets the term “industry” without context.<sup>85</sup> The drafters of the SCM Agreement did not negotiate the language of Article 2 in a vacuum. Contrary to the US contention, Canada is indeed interpreting these terms consistent with the “common practice” of referring to industries by the type of products they produce.<sup>86</sup> And in contrast to the standardless approach advocated by the United States, the record evidence on specificity submitted by Canada is based on established, objective criteria. The Standard Industrial Classification in Canada is similar to multilateral systems

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<sup>82</sup> US First Written Submission, at para. 152

<sup>83</sup> US First Written Submission, at para. 151.

<sup>84</sup> 19 C.F.R. § 351.502(d). (Exhibit CDA-74)

<sup>85</sup> The *Lumber III* Canada-United States Binational FTA Panel reviewing an almost identical *de facto* specificity finding did not accept this US approach. It found the determination in that case “circular, depending upon the identification and labelling of the group of stumpage users rather than upon a reasoned analysis of the actual businesses in which those users were engaged.” For the Panel, this approach revealed “a mechanical and arbitrary exercise which is not supportable under US law.” See FTA *Lumber III* CVD Panel (2d) at 39 (Exhibit CDA-68).

<sup>86</sup> US First Written Submission, at para. 150.

of industrial classification such as the United Nations *International Standard Industrial Classification of All Economic Activities* (ISIC),<sup>87</sup> and the *North American Industry Classification System* (NAICS).<sup>88</sup> This evidence demonstrates that immediate users of stumpage – that is, not taking into account the multiple downstream industries that purchase wood products as inputs – include thousands of enterprises in at least 23 categories of industries, and the industries are as unrelated as lumber, agricultural chemicals, paper, and furniture.

**Q28. On specificity, could Canada please indicate whether, if a subsidy is used by only three companies, out of a total of 1 million, an "industry" analysis of the three users also would be required under Article 2 for a finding of specificity to be legal? In Canada's view, is it impossible to find specificity solely on the basis of a limited number of users ?**

Reply

154. Article 2 does not require an industry analysis in all cases. The definition of “certain enterprises” encompasses enterprises as well as industries. An investigating authority may therefore determine that three companies are three “certain enterprises”, without resort to an analysis of whether those three companies belong to a common industry.<sup>89</sup> Under Article 2.1(c), “use of a subsidy programme by a limited number of certain enterprises” is a factor that may be considered as an indication that a government has rendered a subsidy specific in fact. Canada’s position is that a limited number of users may well be an indication of specificity, and in some cases, after analysis of all the relevant evidence, may even be sufficient for a specificity finding. But the mere fact that there might be a limited number of users does not, and cannot, create an irrebuttable presumption of specificity. Even in the hypothetical given, where only three companies are users, Article 2.1(c) does not support an interpretation that the subsidy programme will necessarily be found specific – for example, the fact that the subsidy is new may provide a perfectly reasonable explanation for a limited number of users, and indicate that there is no government targeting of certain enterprises.

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<sup>87</sup> United Nations, *International Standard Industrial Classification of all Economic Activities*, Statistical Papers Series M No. 4, Rev. 3 (ISIC Rev. 3.1). See the following Internet site: <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=17&Lg=1>. Under the ISIC, the mere reference to “autos”, for example, refers to many different industries. See <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=17&Lg=1&Co=3410>. The same is true for a reference to “textiles”. See <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=17&Lg=1&Co=17>.

<sup>88</sup> See in particular Statistics Canada’s explanation of the NAICS at <http://www.statcan.ca/english/Subjects/Standard/naics/1997/naics97-intro.htm>.

<sup>89</sup> Canada notes, however, that the vast number of enterprises is uncontested in this case.

## ANNEX A-2

### UNITED STATES RESPONSE TO QUESTIONS FROM THE PANEL AT THE FIRST MEETING

(24 February 2003)

**Q1. Does the US consider that the "good" provided through the stumpage programmes is the "right" to harvest timber or is it the standing timber itself. Could the US comment on the USDOC determination (p.30) that "the term 'goods' encompasses all 'property'. The term 'property' includes 'the right to possess, use and enjoy a determinate thing. In its widest sense, property includes all a person's legal rights of whatever description'. Therefore, the sale of a license or right to harvest timber also constitutes the provision of a good within the meaning of Section 771 (5) (B) (iii) of the Act."**

#### Reply

1. As the United States stated in the *Final Determination*, "we determine that the Provincial governments provide a good (timber) to lumber producers within the meaning of Section 771(5)(B)(iii) of the Act."<sup>1</sup> It is therefore the view of the United States, as discussed in our first written submission and statements at the first panel meeting, that the provinces provide standing timber and that standing timber is a "good" within the ordinary meaning of that term.

2. In response to Canada's arguments that the provinces merely provided a "right" to harvest timber, the United States also stated in the *Final Determination*:

Finally, we note that, even assuming *arguendo* that the Provinces are providing stumpage in the form of a license or right to cut timber, Section 771(5)(B)(iii) would still apply. As noted above, the term "goods" encompasses all "property". The term "property" includes "the right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel). . . [and] [a]ny external thing over which the rights of possession, use, and enjoyment are exercised. . . . In its widest sense, property includes all a person's legal rights of whatever description." Black's Law Dictionary at 1232. Therefore, the sale of a license or right to harvest timber also constitutes the provision of a good within the meaning of Section 771(5)(B)(iii) of the Act.<sup>2</sup>

As stated in the quoted passage, this was an argument in the alternative, not the interpretation relied upon as the basis for the United States' determination. Although the passage demonstrates that the ordinary meaning of the term "goods" is sufficiently broad to encompass certain rights, it is the view of the United States that it is unnecessary for the Panel to reach the issue of whether the right to harvest timber in and of itself would constitute a "good" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because standing timber is unquestionably a "good" within the meaning of that Article.

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<sup>1</sup> See *Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada*, 30 (21 March 2002) (Exhibit CDA-1) ("*Issues and Decision Memorandum*"). The referenced provision of the US Trade Act is equivalent to Article 1.1(a)(iii) of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

<sup>2</sup> *Issues and Decision Memorandum*, at 29.

3. All sales transactions, including timber sales, entail the transfer of legal rights and obligations. A contract for the sale of semiconductors necessarily confers on the buyer the right to take the semiconductors. Likewise, to sell standing timber, the seller must give the buyer the right to cut the timber. In either sales transaction, the item sold (the semiconductor or standing tree) and the right to take the item are not severable.

4. In determining whether goods are sold under tenure contracts, *what actually occurs* must be taken into account.<sup>3</sup> Under the provincial tenure systems, the tenure holder pays only for the volume of trees it harvests, and those trees are the only things the tenure holder acquires. As Canada has acknowledged, timber is a “market asset” and through tenures the provincial governments relinquish ownership of those assets to the lumber companies.<sup>4</sup> All other rights of ownership of the land and everything on it remain with the province.<sup>5</sup> These facts support the United States’ conclusion that tenures are contracts for the sale of a good – timber.

**Q2. Could Canada please indicate what the stumpage fee covers, i.e, what the timber harvester pays for with the stumpage fee. Is it the right to own the harvested tree? The right to cut the tree? Both? Something else? In this context, please comment on the statement at paragraph 3 of the 12 February 2003 closing statement of the United States that "[t]he mills pay to get that tangible timber – not intangible rights – and they pay only for the timber they harvest".**

#### Reply

5. The record evidence in the underlying investigation demonstrates that stumpage is payment for the actual timber. The tenure holder pays the stumpage fee after the timber is harvested and pays, on a volumetric basis, only for the timber it harvests.<sup>6</sup> As noted in the amicus submission by the Natural Resources Defense Council, the British Columbia (“B.C.”) Supreme Court held that “[t]he Crown exerts its financial interest in the forests of the province through stumpage appraisal, a process which places value on timber harvested. Stumpage is the price a licensee must pay to the Crown for its timber.”<sup>7</sup> This was confirmed by B.C. in its questionnaire response when it described its timber pricing system as “a means of charging specific stumpage according to the relative value of *each stand of timber being sold*.”<sup>8</sup>

6. Moreover, tenure holders do not acquire ownership of the trees unless and until they harvest the trees, and payment for the cut timber has been made to the government. For example, the Government of Quebec acknowledged that it “sells standing timber” and that “stumpage is charged on the volume harvested, i.e., . . . after trees have been felled. Stumpage charges are not based on

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<sup>3</sup> See e.g., Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 16 June 1999, para. 9.45.

<sup>4</sup> Joint Case Brief Submitted to the Commerce Department on Behalf of the Government of Canada, Government of Alberta, Government of British Columbia, Government of Manitoba, Government of Ontario, Gouvernement du Québec, Government of Saskatchewan, Government of the Northwest Territories, Government of the Yukon Territory, and British Columbia Lumber Trade Council, vol. 2, B6 (22 February 2002) (“Canada Case Brief”) (Exhibit US-3).

<sup>5</sup> Response of the Government of Ontario to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 4, Exhibit ON-GEN-18, sec. 36 (28 June 2001) (Exhibit US-56).

<sup>6</sup> *Issues and Decision Memorandum*, at 29-30 (Exhibit CDA-1).

<sup>7</sup> *British Columbia v. Canadian Forest Products* (8 February 1999), Victoria 972176, (1999) BCJ 335 (B.C.S.C.), affirmed 2000 BCCA 456 (Exhibit US-57).

<sup>8</sup> Response of the Government of British Columbia to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 1, at IV-16 (28 June 2001) (emphasis added) (Exhibit US-58).

inventories of standing timber.”<sup>9</sup> Thus, the facts demonstrate that the tenure holder is paying for the tree, not merely the right to cut the tree.

**Q3. Canada argues that there is a meaningful legal distinction, under the stumpage programmes, between the right to harvest and the right to own the harvested tree. Could Canada please indicate the significance, in concrete terms in respect of this dispute, of this distinction – i.e., are there any stumpage contracts where the timber harvester does not have ownership rights to the harvested timber? If so, please provide a specific description of these situations and an indication of their magnitude in relation to total stumpage.**

Reply

7. The United States wishes to clarify that when the Panel refers to “stumpage contracts where the timber harvester does not have ownership rights to the harvested timber”, we interpret that as *not* including those situations in which the party to the stumpage contract (the tenure holder) pays a subcontractor to harvest the timber on its behalf. In those situations, the subcontractor (harvesting company) is not a party to the stumpage contract and does not have ownership rights in the timber. The subcontractor is simply providing a service to the tenure holder.

8. As is typical in a contract for the sale of goods, the record evidence demonstrates that the actual tenure holder or licensee obtains ownership rights to the timber it harvests, provided it pays the stumpage fee. For example, section 8 of the Quebec Forest Act provides that “[f]ull ownership of the timber authorized for harvesting under a forest management permit remains in the domain of the State until the timber is felled and delivered to the destination indicated in the permit [i.e., the sawmill owning the tenure], unless the prescribed dues are paid in full.”<sup>10</sup> Likewise, section 33(1) of the Ontario Crown Forest Sustainability Act provides that “[p]roperty in forest resources that may be harvested under a forest resource license remains in the Crown until all Crown charges have been paid in respect of the resources.”<sup>11</sup> Section 28(4) of the Alberta Forests Act also provides that “[t]he holder of a timber license or permit becomes the owner of timber authorized to be cut pursuant to the license or permit when the timber is actually cut by him or on his behalf”.<sup>12</sup> The United States also understands that, under B.C. law, ownership of the objects covered by a profit à prendre (B.C.’s description of its tenure licenses) is acquired when the objects are “captured”.<sup>13</sup>

9. There is no record evidence of stumpage contracts under which the contracting party (tenure holder or licensee) does not have ownership rights to the harvested timber.

**Q4. Is it possible for a tenure holder to sell to another party its own contractual right to harvest, without the permission of the provincial government, and while maintaining its tenure contract in force? In other words, can someone enter into a stumpage contract and then sell off the rights to harvest under that contract?**

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<sup>9</sup> Response of the Government of Quebec to the Department of Commerce’s 21 November 2001 Questionnaire, at 5 (17 December 2001) (Exhibit US-59).

<sup>10</sup> Response of the Government of Quebec to the Department’s 1 May 2001 Questionnaire, vol. 3, Exhibit QC-S-16 (28 June 2001) (Exhibit US-24).

<sup>11</sup> Response of the Government of Ontario to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 4, Exhibit ON-GEN-18, sec. 31(1) (28 June 2001) (Exhibit US-60).

<sup>12</sup> Response of the Government of Alberta to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 2, Exhibit AB-S-9 (28 June 2001) (Exhibit US-61).

<sup>13</sup> Jessica Clogg and Andrew Gage, A Legal Opinion Regarding the Report, “An Economic Analysis of Whether Long-Term Tenure Systems in British Columbian Provincial Forests Provide Countervailable Subsidies to Softwood Lumber Imported into the United States” by William D. Nordhaus, 3 (7 August 2001), appended to Letter from Natural Resources Defense Council to Donald Evans (August 13, 2001) (Exhibit US-62).

10. The record evidence demonstrates that all of the Canadian provinces place legal restrictions on the transfer of tenure harvesting rights.

British Columbia: Section 54 of the B.C. Forest Act provides that the written consent of the Minister of Forests is required for “the disposition of a [tenure] agreement or an interest in an agreement.” Section 55 of the Act provides that failure to obtain consent may result in the cancellation of the timber license.<sup>14</sup>

Quebec: Section 39 of the Quebec Forest Act provides that “[a]greements are not transferable” and section 84(2) provides that the Minister of Natural Resources “shall terminate the [TSFMA] agreement without prior notice . . . where the agreement holder has made an assignment of his property.” In fact, TSFMAs are not transferable even among sawmills owned by the same company.<sup>15</sup>

Ontario: Section 35 of the Ontario Crown Forest Sustainability Act provides that “[a] transfer, assignment, charge, or other disposition of a forest resource license,” including any interest therein, is void without the written consent of the Minister of Natural Resources.<sup>16</sup>

Alberta: Section 28(2)-(3) of the Alberta Forests Act provides that “[n]o person shall assign” a tenure license without the prior written consent of the Minister for Sustainable Resource Development and that any assignment, to be valid, must be “an unconditional assignment of the entire interest of the assignor” in the tenure license.<sup>17</sup>

Saskatchewan: Section 31 of the Saskatchewan Forest Resources Management Act provides that “[n]o licence is to be assigned, transferred, charged or otherwise disposed of without the minister’s written consent provided in accordance with the regulations”.<sup>18</sup>

Manitoba: Section 12 of the Manitoba Forest Act provides that “[e]xcept as otherwise authorized or approved by the minister, and subject to such terms and conditions as he may consider fit to impose, a right to cut timber under this Act is not assignable or transferable.”<sup>19</sup>

**Q8. Concerning the subsidy calculation, the US argues that the USDOC used US price data as the "starting point" for an assessment of the fair market value of Canadian timber, and then made adjustments to the US price data for obligations such as road building and silviculture (as "conditions of sale" in Canada) to arrive at an assessment of fair market value of timber in Canada (US first submission, para. 79-82). The implication of this argument seems to be that the USDOC did not simply make an unadjusted "cross-border" comparison, but rather, that it adjusted the US prices to arrive at some sort of a proxy price, based on the US price, to use as the "market value" benchmark in Canada. However, Attachment 1 to the US First Written Submission seems to show that in fact the unadjusted US price was used as the benchmark for "market value" in Canada. While Attachment 1 makes clear that, on the "government price"**

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<sup>14</sup> Response of the Government of British Columbia to the Department of Commerce’s 1 May 2001 Questionnaire, at vol. 7, Exhibit BC-S-36 (28 June 2001) (“B.C. 28 June Response”) (Exhibit US-63).

<sup>15</sup> Response of the Government of Quebec to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 1, at 49 (28 June 2001) (Exhibit US-64).

<sup>16</sup> Response of the Government of Ontario to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 4, Exhibit ON-GEN-18, sec. 35 (28 June 2001) (Exhibit US-65).

<sup>17</sup> Response of the Government of Alberta to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 2, Exhibit AB-S-9 (28 June 2001) (Exhibit US-61).

<sup>18</sup> Response of the Government of Saskatchewan to the Department of Commerce’s 1 May 2001 Questionnaire, Exhibit SK-S-13 (28 June 2001) (Exhibit US-66).

<sup>19</sup> Response of the Government of Manitoba to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 1, MB-S-13 (28 June 2001) (Exhibit US-67).

side of the equation, the stumpage fees were increased to account for the in-kind costs borne by Canadian harvesters under stumpage contracts, it seems to the Panel that such costs would have had to be included on that side of the equation, no matter what market benchmark was used (whether from inside Canada, from another market, etc.), simply to arrive at the total cost to the stumpage holder of the trees that it harvests on Crown land. As such, therefore, these adjustments seem to have nothing to do with adjusting the benchmark to which that government price is compared to determine the amount of subsidy benefit. Could the United States please comment.

#### Reply

11. Article 14(d) requires the investigating authority to determine the adequacy of remuneration “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).” Thus, in establishing a market benchmark price, the investigating authority must make adjustments to account for differences in prevailing market conditions to ensure a proper comparison between the government price and the market benchmark price. The United States made such adjustments in this case.

12. To minimize the need for adjustments, the United States sought data for comparable timber. Nevertheless, some adjustments were necessary. Species mix is an important market condition because the industry in a given area will seek to maximize the revenue based on the relative mix of very valuable species, such as douglas fir, and less valuable species, such as spruce. To take account of differences in species, the United States averaged the price data by species to match the species in the relevant province. Where the species mix was different between the benchmark state and province, the United States “re-mixed” the US species prices to reflect the relative species mix in the province, thus adjusting for the differing market conditions. The United States also made adjustments for other differences in market conditions, such as road building and silviculture requirements. As the Panel notes in its question, in the benchmark calculation, the United States made these adjustments to the Canadian stumpage price. The relevant issue is the difference between the benchmark price and the government price; therefore, it is mathematically irrelevant whether adjustments were made by adding adjustments to the government price, or subtracting them from the benchmark price.

13. While it is true that some adjustments may be necessary regardless of what market benchmark price is used, the adjustments made in this case would not necessarily be made if the market benchmark was different. The adjustments are dictated by what, if any, differences exist in the market conditions. For example, if the market conditions (species mix, road building and silviculture obligations, etc.) in the benchmark market were identical to those in the province, no adjustments to either price would be required. Similarly, if another benchmark market had been selected with other differences in market conditions from the selected benchmark market, the adjustments would differ as well.

**Q9. The USDOC final determination (Exhibit CDA-1), at pages 39-40, contains the following statements:**

**"StatsCan data show that approximately 2.5 million cubic meters of softwood logs were imported into Canada during the POI, and each of the investigated Provinces imported US logs during the POI.**

**"This extensive record evidence that Canadian lumber producers had actual imports of US logs and purchased US stumpage during the POI would support basing our benchmark on tier one of the regulatory hierarchy [market prices from actual transactions within the country under investigation]. However, we**

**do not have sufficiently detailed import prices on the record to use as the benchmark for all Provincial stumpage programmes. Therefore, we are using stumpage prices in the United States under tier two of the regulatory hierarchy [world market prices that would be available to purchasers in the country under investigation]."**

**Could the US please indicate in detail the reasons why the record did not contain "sufficiently detailed" import price data to use as the benchmark? What did the USDOC do to obtain such data? Did it request such detailed data from Canada? Please indicate where in the record the relevant information on this point can be found (i.e., both any requests for, or other efforts to obtain, such information, as well as the data of record on import prices, and any memoranda or other documents discussing the problems with those data). If neither party has yet provided this part of the record to the Panel, could the US please submit it.**

Reply

14. The provincial governments provide timber on the stump (i.e., standing trees). The market benchmark price must, therefore, also be a stumpage price. In theory, one could derive a stumpage price from log import prices, but it would be far more complex and, in all likelihood, less accurate, than using an actual stumpage price because of the need for complex adjustments. The United States did request data on average import prices for US logs. The United States did not, however, request the data necessary to derive stumpage prices from the US log import prices because it was able to obtain data for the US timber on the stump. Using the prices for US timber on the stump eliminated the need for the complex adjustments that would have been necessary if US log import prices were used. The United States did, however, rely on the evidence of log imports, as well as evidence of Canadian purchases of US stumpage, to establish that the US timber is commercially available to Canadian lumber producers.

**Q10. The parties seem to have very different views as to what the record evidence shows in respect of the existence or not of a private market for stumpage in Canada. Could the parties clarify for the panel what they consider the pertinent record evidence was, and why they consider that it was, or was not, representative and/or usable?**

Reply

15. *Manitoba and Saskatchewan*: Manitoba and Saskatchewan did not provide any private stumpage price data.<sup>20</sup>

16. *Alberta*: According to Alberta's questionnaire response, only one per cent of the harvest in Alberta comes from private land.<sup>21</sup> Alberta did not provide any data on private stumpage prices. The "Timber Damage Assessments" ("TDAs") provided by Alberta do not represent private market prices for stumpage. In describing this data, Alberta stated:

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<sup>20</sup> See Response of the Government of Manitoba to the Department of Commerce's 1 May 2001 Questionnaire, vol. 1, MB-55-MB-56 (28 June 2001) (Exhibit US-20); see also Response of the Government of Saskatchewan to the Department of Commerce's 1 May 2001 Questionnaire, SK-81-SK-82 (28 June 2001) (Exhibit US-21).

<sup>21</sup> Response of the Government of Alberta to the Department of Commerce's 19 November 2001 Questionnaire, vol. 1, Amended Table 1, Exhibit AB-S-1 (17 December 2001) (Exhibit US-68). That revised document demonstrates that Alberta had a private sawlog harvest of 1 per cent during the POI (138,154 private volume divided by 12,349,143 total volume equals 1.1 per cent).



beginning in 1993, Alberta has had a consultant collect information on an annual basis on the value of arms *length log purchases in the province*. *This information, which does not differentiate between private and crown wood, has been used by the province to develop a means for mediating disputes between timber operators and other industrial operators concerning the value of standing timber adversely affected by industrial operations.*<sup>22</sup>

Moreover, in its rebuttal brief submitted to the Commerce Department in the underlying investigation, Alberta stated that the TDAs are “simply a set of voluntary guidelines outlining value calculations that can be used by private parties with rights on provincial land who are involved in negotiating appropriate compensation for damages one party has committed related to those activities.”<sup>23</sup>

17. *British Columbia*: B.C. provided government auction data from (1) the small and very restricted Small Business Forest Enterprise Programme (“SBFEP”), and (2) a study prepared for purposes of the investigation which contained a very small number of selected prices (the “Norcon Study”). As previously noted, the SBFEP sales are government sales of Crown timber, not private sales. Moreover, the United States rejected SPFEP auctions prices because most potential bidders are excluded from participating in the auctions. The prices are therefore not representative of market prices.

18. On 26 July 2001, the United States issued a supplemental questionnaire requesting, in part, that B.C. “provide the volume and value by grade and species of softwood stumpage (standing timber) from private lands . . .”<sup>24</sup> The British Columbia Lumber Trade Council (“BCLTC”) subsequently submitted the Norcon Study. The Norcon Study identified 99,779 cubic meters of private timber, which is 0.17 per cent of the 58,559,158 cubic meters of Crown timber harvested during the period of investigation, or 0.15 per cent of the 65,405,994 cubic meters of the province’s total sawlog harvest for the period of investigation. In addition to the fact that the data represent a minuscule portion of the B.C. harvest, Norcon noted that “the data on purchases of private standing timber are not broken down by grade and species because such detail was not available”.<sup>25</sup> Moreover, Norcon noted that “[n]one of these purchases to the best of Norcon’s knowledge was made pursuant to a bid or tender process”.<sup>26</sup> No additional information was provided. There was, therefore, more than sufficient reason for the United States’ conclusion that the Norcon study did not provide a sufficient basis for establishing market benchmark prices.<sup>27</sup>

19. *Ontario*: On 30 July 2001, Ontario submitted a study conducted by Resource Information Systems, Inc. (“RISI”).<sup>28</sup> The RISI survey, which was conducted for purposes of the investigation, collected data for both hardwood and softwood timber for all types of destination mills. Recognizing the limitations in this data, on 18 December 2001, Ontario submitted a study by Charles River

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<sup>22</sup> Response of the Government of Alberta to the Department of Commerce’s 1 May 2001 Questionnaire, vol. 1, page AB I-8 (Exhibit US-69) (emphasis added).

<sup>23</sup> Rebuttal Brief of the Government of Alberta, vol. 2, at 65, fn. 94 (1 March 2002) (Exhibit US-55).

<sup>24</sup> Letter from Steptoe & Johnson LLP to Donald Evans (December 21, 2001) with attached *Survey of Primary Sawmills’ Arm’s Length Log Purchases in the Province of British Columbia* (prepared by PricewaterhouseCoopers LLP and Norcon Forestry Ltd.) (“Norcon Study”) at 7-8 (Exhibit US-70). The chart contained on page 7, which identifies the region, the volume and value, is the sum total of the private price information provided.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *Id.*

<sup>27</sup> *Issues and Decision Memorandum*, at 76-77 (Exhibit CDA-1).

<sup>28</sup> Response of the Government of Ontario to US Department of Commerce 25 July 2002 First Supplemental Questionnaire (3 Aug. 2001), at ON-SUP-2 - ON-SUPP-8 (Exhibit CDA-39).

Associates (“CRA”),<sup>29</sup> which analyzed the RISI survey data relating solely to softwood timber going to sawmills. The only data on private softwood timber that CRA was able to extract from the RISI study related to 111,000 cubic meters of timber and this data was not species specific.

20. In addition, as noted in the *Final Determination*, the United States learned at verification that:

large parcels of private land in the northern parts of Ontario, where the bulk of softwood timber is harvested, are owned by mills themselves or large integrated concerns that also hold SFLs and FRLs. Further, we learned that many of these private parcels have been managed for years by these concerns.<sup>30</sup>

21. *Quebec*: As noted in our first written submission<sup>31</sup>, Quebec provided actual prices from non-government transactions. Substantial record evidence, however, demonstrated that the private stumpage prices in the provinces, including Quebec, do not represent “market” prices, i.e., prices undistorted by the government’s financial contribution.

**Q11. With regard to its pass-through claim, could Canada clarify whether it is arguing that a pass-through analysis was required in all cases in the investigation, i.e. even in case of complete identity between the timber harvester and the sawmills (lumber producers); or does Canada consider that a pass-through analysis was required only in those cases where there allegedly existed arm's length transactions between timber harvesters and lumber producers and between lumber producers and remanufacturers?**

Reply

22. When a lumber producer harvests timber from its own provincial tenure and pays less than adequate remuneration to the province, there can be no question that the benefit flows directly to that lumber producer. As discussed further in response to Question 12, consistent with the SCM Agreement, that benefit may be allocated over the producer’s total sales, and any portion of those sales that are exports to the United States may be subject to countervailing duties.

**Q12. On remanufactured products, assuming subsidies were provided to lumber producers through stumpage programmes, and those lumber producers sold lumber at arms length to remanufacturers, whose products were the exported products, how and why in the US view would this situation NOT affect the subsidy amount (numerator) of the subsidization calculation? Please provide a concrete numerical example to illustrate your reasoning.**

Reply

23. To answer the Panel’s question the United States will use a hypothetical case involving one sawmill and one remanufacturer that purchases lumber from the sawmill at arm’s length and then exports the remanufactured lumber to the United States. We will demonstrate how the subsidy calculation is performed on an aggregate basis, and then compare that calculation to the calculation that would be performed if the two companies were individually investigated.

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<sup>29</sup> Charles River Associates, *An Economic Analysis of the Appropriateness of Relying on Ontario’s Private Timber Sales*, Exhibit ON-SUP2-12, Questionnaire Response of the Province of Ontario to the Department’s Second Supplemental Questionnaire (18 December 2001) (Exhibit CDA-38).

<sup>30</sup> *Issues and Decision Memorandum*, at 98 (Exhibit CDA-1) (citations omitted).

<sup>31</sup> See First Written Submission of the United States, para. 66 (22 January 2003) (“US First Written Submission”).

24. *Aggregate Investigation:* Based on data submitted by the government, the investigation establishes that the government has provided one million cubic meters of Crown timber to sawmills for \$1/cubic meter less than the market price. The total subsidy benefit is, therefore, \$1 million, but data on specific recipients of the benefit is unknown because company-specific investigations were not conducted.

Benefit: \$1 million

Sawmill	™Lumber sales of \$1 million	™Remanufacturer
?		?
Lumber exports \$9 million (Total sales \$10 million)		Lumber exports \$2 million (Total sales \$2 million)

Countervailing Duty Calculation: \$1 million (total benefit) divided by \$12 million (total sales of products) equals an 8.33 per cent rate, which is applied to \$11 million in exports of subject merchandise.

25. *Company-Specific Investigation:* The company-specific investigation establishes that one million cubic meters was harvested from a tenure held by the sawmill. Some sawmills are integrated, producing both milled and remanufactured lumber, and some remanufacturers have tenure. However, for purposes of this hypothetical, the remanufacturer is independent and does not hold tenure, and a company-specific analysis demonstrates that the sales of lumber from the sawmill to the remanufacturer did not result in any benefit accruing to the remanufacturer.

Sawmill	? Lumber sales of \$1 million	? Remanufacturer
Benefit: \$1 million		
?		?
Lumber exports \$9 million (Total sales \$10 million)		Lumber exports \$2 million

Sawmill Countervailing Duty Calculation: \$1 million divided by \$10 million equals 10 per cent applied to \$9 million in exports.

Remanufacturer Countervailing Duty Calculation: \$0 divided by \$2 million equals 0 per cent applied to \$2 million in exports.

26. In both hypothetical cases, the duties do not exceed the subsidy benefit found to exist. The illustrations demonstrate that, although the company-specific subsidy rates differ from the aggregate subsidy rate, the total amount of the subsidy benefit remains unchanged because the basis for the subsidy, i.e., the volume of timber entering the sawmill, is unchanged. In the company-specific analysis, only the *company-specific* benefits (numerators) change, not the aggregate amount of the subsidy, because the allocation of the benefit is based on company-specific information. As the United States explained in its first written submission and oral statement,<sup>32</sup> however, the SCM Agreement does not require a company-specific analysis in an investigation.

27. The United States also notes that, in the hypothetical investigation of specific companies, as in the aggregate investigation, exporters of the subject merchandise that were not individually investigated could be subject to duties, consistent with Article 19 of the SCM Agreement, even

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<sup>32</sup> See, US First Written Submission, at paras. 108-114; Oral Statement of the United States at the First Meeting of the Panel, para. 32 (11 February 2003) (“US First Opening Statement”).

though those exporters may not have received any benefit. As the United States explained in its first written submission and oral statement,<sup>33</sup> subjecting uninvestigated companies to countervailing duties does not constitute an impermissible presumption that those companies received a subsidy benefit. Members routinely apply countervailing duties to exports from companies that were not individually investigated, as envisioned in Article 19.3, even though the producers may not have received any subsidy benefit or may have a subsidy rate significantly lower than the rate applied. Thus, if allocating some portion of the subsidy to remanufacturers that were not individually investigated and subjecting their exports to duties is inconsistent with the SCM Agreement, then Members are routinely violating the Agreement when they apply any subsidy rate to an exporter that was not individually investigated.

**Q13. Could Canada take the Panel through its analysis of each of the provisions it alleges have been violated by the failure of the USDOC to conduct a pass-through analysis, and indicate why it considers each of these provisions has been violated?**

Reply

28. In paragraph 129 of its first written submission, Canada claimed that the United States violated Articles 10, 19.1, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the *General Agreement on Tariffs and Trade* (“GATT 1994”).

29. Article 19.1 of the SCM Agreement requires a final determination of the amount of the subsidy and a final determination of injury as pre-conditions to the imposition of a countervailing duty. Article 19.1 does not, however, establish any requirements concerning how a subsidy or injury is to be determined.

30. Article 19.4 of the SCM Agreement establishes an upper limit on the amount of the countervailing duty that may be levied, i.e., the amount of the subsidy found to exist. In other words, Article 19.4 expressly addresses the *levying* of duties *after* a subsidy has been “found to exist.”<sup>34</sup> The sole calculation requirement in Article 19.4 is a requirement to calculate the subsidy on a per-unit basis; Article 19.4 does not establish any other requirements concerning how the subsidy is to be calculated.<sup>35</sup> Similarly, Article VI:3 of GATT 1994 establishes that the amount of the subsidy found is the upper limit on the amount of the countervailing duty that may be levied<sup>36</sup>, but does not address how the subsidy is to be calculated.

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<sup>33</sup> See US First Written Submission, at para. 109; US First Opening Statement, at para. 33.

<sup>34</sup> Article 20.3 of the SCM Agreement provides that, “[i]f the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed . . . .” The possibility that the duty actually levied may be lower than the definitive duty “found to exist” in the investigation unavoidably includes the possibility that the duty actually levied may be zero because, on examination in a review, the particular producer in question may be found not to have received a subsidy. Therefore, the SCM Agreement does not require that each exporter be found to have received a subsidy in order to be subject to countervailing duties.

<sup>35</sup> As the Panel recognized in Question 15, Canada, in fact, has conceded that its claim under Article 19.4 is dependent upon the existence of an inconsistency with some other provision of the SCM Agreement that imposes obligations with respect to the subsidy calculation. See Canada First Written Submission, at para. 179.

<sup>36</sup> Thus, for example, if a Member determines a subsidy of \$12 per unit has been granted, the Member may not impose a countervailing duty of \$20 per unit.

31. Although Canada also references Articles 10 and 32.1 of the SCM Agreement, because those claims are dependent on the other provisions cited by Canada, they must likewise fail.<sup>37</sup>

**Q14. The US refers to recent amendments to an EC regulation to argue that other Members such as the EC also consider that in certain circumstances it is warranted to consider world market prices rather than in-country prices. Could the US please react to the EC's clarification in its third party submission that these amendments are not relevant for the resolution of this dispute since these amendments relate to a situation where there are no market conditions? Could the US please also react to the clarifications made in the EC's oral statement that its amended regulation applies only when there are no market conditions in the country of provision and that it "agrees with Canada and the panel in United States - Lumber (Provisional) that the US determination of benefit violated Article 14 (d) of the SCM Agreement" (EC oral statement para. 8). In the light of these clarifications by the EC, does it remain the US view the EC's regulation and practice support its position in this case?**

#### Reply

32. In its third party written submission, the European Communities ("EC") states that "the problem with the 'cross-border' methodology attacked by Canada is not that it eventually allows consideration of world market prices, but under which conditions recourse may be had to alternative benchmarks".<sup>38</sup> The EC's regulation states that, "when appropriate", an alternative to prices in the country of provision may be used to measure the adequacy of remuneration. The preamble to the EC's regulation states that it is appropriate to consider world market prices where market benchmark prices in the country of provision "do not exist or are unreliable".<sup>39</sup> In its written submission and oral statement, the EC does not address the issue of unreliable prices. The EC does, however, argue that Article 14(d) permits consideration of world market prices where no "market" conditions exist, and it defines "market" conditions as "prices determined by independent operators following the principle of supply and demand."<sup>40</sup> The EC's interpretation of Article 14(d) of the SCM Agreement therefore supports the United States' position that where, as in the present case, there are no "market" prices in the country of provision, Article 14(d) permits the use of alternative benchmarks.

33. The EC concedes that "as a third party [it] is obviously not in a position to comment on the availability of *independent market-driven prices for non-governmental stumpage* (be it from private Canadian land or imported)".<sup>41</sup> The EC, however, does precisely that when it supports its argument with erroneous factual assertions such as "the USDOC rejected the use of *actual market prices*,"<sup>42</sup> and that the reason for such rejection was "the *mere assertion* that such prices are driven by the stumpage prices on Crown land."<sup>43</sup>

34. As discussed in our first written submission and oral statement<sup>44</sup>, and in our responses to other questions from the Panel contained herein, the facts on the record of the investigation demonstrate that there were no "independent market-driven prices for non-governmental stumpage" available in

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<sup>37</sup> See e.g., Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.133 (where consequential claims were rejected because the main claims were not successful).

<sup>38</sup> Third Party Submission by the European Communities, para. 31 ("EC Third Party Submission") (emphasis in original).

<sup>39</sup> See Notification of Laws and Regulations Under Article 32.6 of the Agreement, European Communities, G/SCM/N/1/EEC/2/Suppl.3 (18 November 2002) (Exhibit US-15).

<sup>40</sup> *Id.* at para. 27.

<sup>41</sup> *Id.* at para. 32 (emphasis added).

<sup>42</sup> *Id.* at para. 20 (emphasis added).

<sup>43</sup> *Id.* at para. 32 (emphasis added).

<sup>44</sup> See US First Written Submission, at paras. 64-76; US First Opening Statement, at paras. 23-26.

Canada. Most of the provinces failed to provide any price data on private stumpage sales or provided inadequate data. Moreover, the evidence established that the limited price data that was provided did not represent independent market-driven prices.

35. The EC characterizes the United States' reliance on evidence that prices for timber on private lands are driven by the administered stumpage prices for Crown timber as a "flawed hypothetical undistorted market" methodology.<sup>45</sup> On this point the United States strongly disagrees with the EC. We first note the inconsistency of this statement by the EC with its apparent recognition that the proper benchmark is "independent market-driven prices". Moreover, as discussed in our first written submission and oral statement<sup>46</sup>, the United States has never advocated a "hypothetical undistorted" market standard. Nevertheless, to determine whether a benefit exists, the point of comparison must be prices that are determined by market forces, not the government's financial contribution. The United States fails to see how a price artificially suppressed by the government's financial contribution can be considered an "independent market-driven price". To argue that the United States is required to use such prices turns the SCM Agreement on its head, making government-driven rather than market-driven prices the standard by which the benefit is measured.

**Q17. Assuming, arguendo, that the total amount of subsidy benefit has been determined in conformity with the Agreement, could both parties clarify what, in their view, was or should have been the product scope of the numerator and the denominator in the USDOC subsidization calculation?**

Reply

36. Tenure holders pay for the volume of trees they harvest. The subsidy benefit is the extent to which they pay less than adequate remuneration for the trees they harvest. Thus, the proper basis for calculating the total benefit is to multiply the total volume of harvested Crown timber entering the sawmills<sup>47</sup> by the difference between the market benchmark stumpage price and the government stumpage price. For example, if the sawmill paid \$2/cubic meter for 500,000 cubic meters of harvested timber, and the market benchmark is \$4/cubic meter, the total benefit to the sawmill is \$1 million ( $\$4 - \$2 = \$2 \times 500,000$ ).

37. The denominator of the subsidy calculation should be the sales value of all products resulting from the processing of the timber.<sup>48</sup> This includes milled and remanufactured softwood lumber products and by-products that result from the processing of the timber.

38. At the first substantive meeting of the Panel, Canada asserted that certain other products, such as posts and ties, should also have been included in the denominator. The United States would have included such products in the denominator had Canada provided data from which the value of these sales could have been derived. Canada, however, failed to do so. Rather, Canada argued that a category of products labelled "residual products" should have been included in the denominator. The StatsCan information provided by Canada consisted of a single number representing the total

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<sup>45</sup> See EC Third Party Submission, at para. 32.

<sup>46</sup> See US First Written Submission, at para. 72; US First Opening Statement, at para. 14.

<sup>47</sup> Crown timber harvested by remanufacturers from their own tenures should also be included in the numerator. However, as the United States explained in its first written submission and at the first panel meeting, the United States did not have this data, which would have increased the total benefit calculation. US First Written Submission, at para. 104, fn. 134.

<sup>48</sup> The lumber production process includes remanufactured softwood lumber. Remanufacturers perform minor operations, such as cutting to odd lengths or finger jointing. By contrast, products such as particle board involve substantial additional manufacturing processes. For example, particle board requires not only the pressing of pieces of wood, but also a chemical treatment to act as an adhesive. Products resulting from such additional manufacturing processes do not belong in the denominator.

shipments that fell within the residual products category and a list of products contained in the residual products category.<sup>49</sup> The list included products, such as particle board and spruce logs, that did not result from the processing of timber.<sup>50</sup> Canada did not, however, provide any information concerning the break out of the residual products category.<sup>51</sup> The United States therefore could not determine which specific products from the list provided made up what percentage of the total number provided for in the residual products category. Accordingly, because Canada did not provide enough information concerning the make-up of the residual products category, the United States could not include that category in the denominator.<sup>52</sup>

**Q19. According to Canada, the USDOC used "manifestly incorrect data" (para. 132 Canada's oral statement) in its selection of a conversion factor which led to the inflation of the subsidy and amounts to a legal error. In Canada's view, was it manifestly incorrect of the USDOC not to accept the conversion factor suggested by Minnesota in its Public Stumpage Price Review and Price Index (CDA-113), when it is clearly noted in this Minnesota document that "the reader should use caution when comparing the prices shown in this report with actual prices received or expected on any specific timber sale. Individual sale prices will vary significantly from the averages shown in this report because of variability in both economic and physical conditions" (CDA-113, p. IV.A)**

#### Reply

39. While Canada asserted in paragraph 132 of its oral statement that the United States used "manifestly incorrect data" in its selection of conversion factors, Canada failed to point to any record evidence demonstrating that the conversion factors used by the United States were inaccurate. Rather, in response to the Panel's enquiry, Canada merely referred to alternative sources of conversion factors: (1) the Minnesota 2000 Corrected Public Stumpage Price Review ("Minnesota Stumpage Price Review")<sup>53</sup>, and (2) an Analysis of Comparative Factors Between the Public Forests of Quebec and the Private Forests of Maine.<sup>54</sup>

40. Moreover, while Canada alleges that the United States ignored the conversion factor used in the Minnesota Stumpage Price Review, its argument is based on a misreading of this document. Canada contends that the Minnesota Stumpage Price Review applied a conversion factor of 6.25. However, the first page of the document indicates that the 6.25 conversion factor only applied to the data contained in Table 2, which contained calculated volume and average prices received for pulp and bolts. The United States used the data from Table 1 to calculate certain benchmark prices because that table contained data on sawtimber. Unlike the pulp and bolts data in Table 2, the sawtimber data in Table 1 did not include any conversion factor.

**Q20. Could each party clarify how it sees the role of the Panel in respect of the calculation-related claims, in light of the Panel's standard of review?**

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<sup>49</sup> See Memorandum from Eric Greynolds to Melissa Skinner, Countervailing Duty Investigation of Softwood Lumber Products from Canada: Verification of the Questionnaire Responses Submitted by the Government of Quebec (15 February 2002) at 8, 10, Exhibit 13 (Exhibit US-71).

<sup>50</sup> *Id.* at Exhibit 13 (Exhibit US-71).

<sup>51</sup> See *Issues and Decision Memorandum*, at 22 (Exhibit CDA-1).

<sup>52</sup> *Id.* at 22-23 (Exhibit CDA-1).

<sup>53</sup> *Minnesota 2000 Corrected Public Stumpage Price Review and Price Index*, State of Minnesota, Department of Natural Resources, Division of Forestry (Exhibit CDA-113).

<sup>54</sup> Del Degan, Masse et Associates Inc., *Quebec/Maine Analysis of Comparative Factors Between the Public Forests of Quebec and the Private Forests of Maine* (December 2001), at 8-10 (Exhibit CDA-114).

Reply

The Panel's standard of review is set forth in Article 11 of the DSU:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

42. In making an objective assessment of the matter before it, this Panel is to address only those provisions of the covered agreements cited by Canada in its request for the formation of a panel.<sup>55</sup> Canada has claimed that Articles 10, 19.1, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994 essentially imposes on Members obligations with respect to the calculation of the subsidy rate. In light of the Panel's standard of review, therefore, the role of the Panel is *inter alia* to determine the "applicability" of these cited provisions in assessing the calculation methodologies used by the United States.

43. As the United States noted in its closing statement, however, Canada has failed to cite to any language in Articles 10, 19.1, 19.4 or 32.1 of the Subsidies Agreement, or Article VI:3 of the GATT 1994 establishing any obligations applicable to Canada's calculation-related claims.<sup>56</sup>

44. As such, because none of these provisions cited by Canada contains any obligations concerning the methodology of calculating the *ad valorem* subsidy rate, the Panel should find that Canada has failed to make a *prima facie* case that the United States has acted inconsistently with the SCM Agreement or GATT 1994, and that there is no inconsistency between the *ad valorem* subsidy calculation and the United States' obligations under the SCM Agreement.

**Q21. Could the US explain how it considers the USDOC complied with its obligations under Article 12.8 of the SCM Agreement with regard to the change in the US benchmark state from Montana to Minnesota? What, in the US view, is the difference between the obligations/requirements of Articles 12.1 and 12.3 on the one hand and Article 12.8 on the other?**

Reply

45. Article 12.1 of the SCM Agreement provides:

Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

The nature of the obligation contained in Article 12.1 is further elaborated upon in Articles 12.1.1, 12.1.2, and 12.1.3 which discuss questionnaires, availability of non-confidential submissions, and provision of the application for an investigation. Canada does not dispute that it was notified of the

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<sup>55</sup> See Article 7.2, WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"); Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS/22/AB/R, adopted 20 March 1997, p. 22; Panel Report, *Egypt – Definitive Anti-Dumping Measures on Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, para. 7.141.

<sup>56</sup> Closing Statement of the United States at the First Meeting of the Panel, paras. 7-8.



information the Commerce Department required and that it had ample opportunity to present information to the Department.

46. Article 12.3 of the SCM Agreement provides:

The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4 and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

The Commerce Department's regulations provide that all information submitted by interested parties must be served on all other interested parties. All non-proprietary information is also placed on the public record.<sup>57</sup> While confidential business information is protected from disclosure, any party submitting business confidential information must also supply a public summary of the submission consistent with Article 12.4.1 of the SCM Agreement. In addition, information obtained by Commerce Department officials on their own was placed in the public record and made available to all interested parties during regular business hours. Parties regularly made use of their ability to prepare presentations based on information made available to them and the record of the investigation contained more than 1500 documents.

47. Article 12.8 of the SCM Agreement states:

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

The reference to facts "under consideration" cannot be equated with the facts "finally determined" to be the proper basis for the determination. Such an interpretation would render the obligations in Article 22.5 of the SCM Agreement redundant.

48. In other words, Canada's suggestion, in paragraph 143 of its first oral statement, that the United States was obligated to inform Alberta and Saskatchewan of its final choice of benchmark prior to making its final determination, cannot be reconciled with Article 22.5 of the SCM Agreement. Article 22.5 provides that the final determination in an investigation must provide "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". If Members are to be prohibited from selecting among different facts on the record when making their final determinations unless their reliance on such facts has been previously announced, there would be no point in providing for such detailed notices of final determinations. All of the "essential facts" actually relied upon would have been identified to the parties prior to the final determination, according to Canada's interpretation, thus obviating the need for the obligations in Article 22.5 of the SCM Agreement.

49. The "essential facts *under consideration*" include competing sources of information that may serve as the basis of the final determination, and not necessarily a single set of facts upon which the final determination will rely. Indeed, the interests of the parties may differ, resulting in the parties viewing different facts as essential to the investigating authority's determination. In order to defend their interests, therefore, interested parties need to have access to the competing sources of information under consideration, not just what one party may believe is essential.

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<sup>57</sup> See 19 C.F.R. § 351.303(f)(1) (Exhibit US-45).

50. Moreover, it is the view of the United States that when the investigating authority provides a detailed preliminary determination, access to the administrative record, detailed verification reports identifying the items examined during verification and any discrepancies found, exchange of case briefs and rebuttal briefs in which parties identify both legal and factual issues and advocate approaches to those issues, these processes reasonably inform the parties of all essential facts under consideration, consistent with Article 12.8 of the SCM Agreement.<sup>658</sup>

**Q22. Is it the US view that the rate of subsidization found to exist varies depending on which US state is chosen as a basis for the comparison? If yes, would this not imply that the actual state used as the basis for the comparison is essential to the determination of the rate of subsidization? Is it the US view that the interested parties were informed of the choice of Minnesota as the benchmark state before the final determination was issued?**

Reply

51. With respect to the first part of the Panel's question, it is axiomatic that the amount of benefit found may vary with the selection of the benchmark price against which the government price will be measured. To that end, when multiple possible benchmarks are available, the United States does not dispute that selection of the benchmark is highly significant to the subsidy calculation. As discussed in response to question 21, however, this does not mean that the United States was obligated to announce its final choice of benchmark prior to issuing its final determination.

52. In this case, the United States announced in the *Preliminary Determination* its preliminary decision to use northern US border states as the basis for calculating the benchmarks for each province.<sup>659</sup> The United States also announced which criteria it considered in selecting the benchmark sources, including species-mix, climate, and topography. Moreover, the record contained information from a limited number of potential benchmarks for all Canadian provinces being examined: Washington, Idaho, Montana, North Dakota, Minnesota, Michigan, New York, Vermont, New Hampshire, Maine, and Alaska. Therefore, based on the evidence contained in the record, and on the criteria announced in the *Preliminary Determination*, all parties were informed that a limited pool of potential benchmark sources was under consideration as the basis for the benefit calculations.

53. Minnesota is a US northern border state, and the record contained all of the information necessary to use Minnesota as the basis for a benchmark prior to the parties' submission of briefs.<sup>660</sup> Canada, Alberta, and Saskatchewan all were active parties to the investigation and received copies of all information concerning Minnesota. These facts, combined with the recognition that the United States had indicated that it was considering a limited pool of potential market benchmarks which included Minnesota, leave no doubt that the United States complied with Article 12.8 by giving

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<sup>58 4</sup> See Panel Report, *Argentina – Anti-Dumping Measures on Imports of Certain Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, para. 6.125 (clarifying the obligation under Article 6.9 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, the analogous provision to Article 12.8 of the SCM Agreement).

<sup>59 5</sup> 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, 43197 (17 August 2001) (Exhibit CDA-20) (“*Preliminary Determination*”).

<sup>60 6</sup> See Memorandum from the Team to File, *Calculations for the Preliminary Affirmative Countervailing Duty Determinations: Stumpage Programmes in the Investigation of Certain Softwood Lumber Products from Canada* (9 August 2001) (“*Preliminary Determination Calculations Memorandum*”) (Exhibit US-50).

Canada notice that the use of Minnesota stumpage prices was among the “essential facts under consideration.”<sup>61</sup>

**Q25. Could both parties comment on the views of the EC concerning Article 12.8 as presented in paragraphs 23 and 24 of the EC's oral statement ?**

Reply

54. The United States does not agree that the use of the plural, “presentations”, necessarily means that the interested parties must have the opportunity to make a formal counter-rebuttal. Rather, the EC has taken the word “presentations” out of its context in Article 12.3 of the SCM Agreement. In its entirety, Article 12.3 states:

The authorities shall whenever practicable provide timely opportunities for *all interested Members and interested parties* to see all information that is relevant to the presentation of *their cases*, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare *presentations* on the basis of this information.<sup>62</sup>

In its context, Article 12.3 refers to multiple parties presenting “their cases”. The use of the plural, “presentations,” parallels the plural terms “interested Members and interested parties,” and “their cases” and merely refers to the fact that each party participating in the investigation has the ability to make its own presentation. The language does not require Members to provide opportunities for each party to make more than one presentation, as the EC argues.

55. Moreover, with respect to paragraph 24 of the EC oral statement, as the United States noted in response to Question 21, it makes the administrative record accessible to all interested parties throughout the investigation. Indeed, the US regulations require that all submissions to the record are provided by the submitting party to all other interested parties at the time of submission, subject to protections for proprietary information.

**Q26. Could the parties please provide an overview of the dates of the communications concerning the MFPC report, and explain the nature of such communications in each case ? Could the US explain why this MFPC letter was not put on the record when it was received by the administration, and indicate where in the record these reasons are reflected? Please provide a copy of the USDOC regulations concerning submission and service of documents in countervailing duty investigations.**

Reply

56. Canada argues that it was denied the opportunity to rebut information contained in two reports submitted by the petitioners on 4 March 2002 in response to the Maine Forest Products Council (“MFPC”) letter. The 4 March 2002 letter<sup>63</sup> contained commentary on the MFPC letter, and

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<sup>61</sup> <sup>7</sup> During the first substantive Panel meeting, Canada asserted that nothing would stop the United States from changing the starting point of the benchmark calculations from Montana or Minnesota to the United Kingdom or Russia. In contrast to the necessary Minnesota data, the Commerce Department’s record did not contain any information concerning the United Kingdom or Russia. Thus, it is clear that the United Kingdom and Russia were not under consideration as potential bases for the benchmark calculations. Canada’s example is therefore inapposite.

<sup>62</sup> <sup>8</sup> Emphasis added.

<sup>63</sup> <sup>9</sup> Letter from John J. Ragosta to Secretary of Commerce (March 4, 2002) (Exhibit CDA-112) (“4 March 2002 letter”).

tables containing information that Quebec itself submitted on 4 January 2002. Specifically, a report authored by the James W. Sewall Company (“Sewall Report”) attached to the 4 March 2002 letter contains tables with information derived from the Maine Forest Service 2000 Stumpage Price Report and 2000 Wood Processor Report.<sup>764</sup> Quebec submitted those reports as an attachment to its 4 January 2002 submission.<sup>765</sup> Therefore, much of what Canada complains about is commentary on factual information Quebec had placed on the record.<sup>766</sup>

57. The chronology of events concerning the March 4, 2002 letter is provided below.

58. On 30 October 2001, Deputy Assistant Secretary Bernard Carreau (“DAS Carreau”) and other Commerce Department officials met with representatives of the MFPC. During this meeting, the MFPC gave the officials a survey of US private landowners and Quebec border mill owners. On 31 October 2002, the Commerce Department placed a memorandum in the administrative record stating that this meeting took place, which contained a copy of the survey that the MFPC had presented to the Commerce Department.<sup>767</sup>

59. During this meeting, the MFPC asserted that the Commerce Department should not have used only sawlogs when it calculated the weighted-average stumpage price for Maine. According to the MFPC, DAS Carreau “invited” the MFPC to provide the Commerce Department with more information concerning standing timber prices in Maine.<sup>768</sup>

60. On 20 December 2001, the MFPC sent a letter addressed to DAS Carreau<sup>769</sup>, in which the MFPC stated that studwood was used in the production of lumber in Maine. This letter included tables based on information from a survey conducted by the Maine Forestry Service containing prices for studwood in Maine.<sup>770</sup> The MFPC did not submit this letter in accordance with the Commerce Department’s regulations.

61. Section 351.303(b) of the regulations<sup>771</sup> require the submission of all documents to “the Secretary of Commerce, Attention: Import Administration, Central Records Unit.” Properly addressed submissions are processed through the Administrative Protective Order Office (“APO

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<sup>64 0</sup> See James W. Sewall Company, Review of Letter from Jonathan Ford to Department of Commerce, attached to 4 March 2002 letter (Exhibit CDA-112).

<sup>65 1</sup> See Letter from Arent Fox to Secretary of Commerce (4 January 2002), Attachment 1 – Quebec/Maine Analysis of Comparative Factors Between the Public Forests of Quebec and the Private Forests of Main (“Quebec/Maine Analysis”), Appendix 7 to the Quebec/Maine Analysis – Maine Forest Service, 2000 Stumpage Reports, and Appendix 8 to the Quebec/Maine Analysis – Maine Forest Service, 2000 Wood Processor Report (Exhibit US-73).

<sup>66 2</sup> Exhibit 1 to the Sewall Report does contain species-specific studwood stumpage prices that was not placed on the record previously. James W. Sewall Company, Review of Letter from Jonathan Ford to Department of Commerce, attached to March 4, 2002 letter (Exhibit CDA-112). Quebec had placed on the record aggregate studwood stumpage prices by counties in Maine through Appendix 7 of its 4 January 2002 submission. See Quebec/Maine Analysis (Exhibit US-73).

<sup>67 3</sup> Memorandum from Melissa G. Skinner, Re: *Ex Parte* Meeting with the Maine Forest Products Council Concerning the Countervailing Duty Investigation on Softwood Lumber from Canada (31 October 2001) (Exhibit US-72).

<sup>68 4</sup> Letter from MFPC to Bernard Carreau (20 December 2001) (Exhibit CDA-100). Often in such informal *ex parte* meetings, parties may attempt to present to Commerce Department officials oral information concerning the case. When that occurs, Commerce Department officials routinely request that the party formally file any relevant information in written form.

<sup>69 5</sup> Pursuant to Commerce Department regulations, parties filing documents with the Commerce Department must address those documents to the Secretary of Commerce. See 19 C.F.R. § 351.303(b) (Exhibit US-45).

<sup>70 6</sup> Letter from MFPC to Bernard Carreau (20 December 2001) (Exhibit CDA-100).

<sup>71 7</sup> The United States provided a copy of these regulations to the Panel as Exhibit US-45.

office”). The APO office controls access to business proprietary information, ensures that all documents have a certificate of service, and distributes the documents to appropriate Commerce Department officials. Commerce Department officials, such as DAS Carreau, normally receive submissions through this process.

62. Section 351.303(f)(1)(i) of the Commerce Department’s regulations also requires that “a person filing a document with the Department simultaneously must serve a copy of the document on all other persons on the service list by personal service or first class mail.” Section 351.303(f)(2) requires that all documents be accompanied by a certificate attesting to such service.<sup>772</sup>

63. Because the Commerce Department relies on these regulations to ensure that information is placed on the record and provided to interested parties, it was not immediately apparent that the MFPC letter had not been formally placed on the record. On 8 February 2002, Quebec filed a letter with the Commerce Department informing it that the MFPC letter had not been placed on the record.<sup>773</sup> The Commerce Department then took immediate steps to rectify this situation.

64. On 20 February 2002, the Commerce Department provided a copy of the MFPC letter to all interested parties, and requested comments, including information intended to rebut, clarify or correct information. Interested parties had the option of commenting on the MFPC letter in their rebuttal briefs, which were due to the Commerce Department on March 1, 2002. The Commerce Department indicated that it would accept rebuttal comments and information on the MFPC letter up to 4 March 2002.

65. On 1 March 2002, Quebec submitted its rebuttal brief, which commented on the information contained in the MFPC letter.<sup>874</sup> On March 4, 2002, the petitioners submitted comments on the MFPC letter, and rebuttal information, including the Sewall Report.<sup>875</sup>

66. This chronology establishes that all parties had an opportunity to comment on, clarify or rebut the information in the MFPC letter. The fact that the parties were not afforded an opportunity for sur-rebuttal is not consistent with the SCM Agreement.

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<sup>72 8</sup> Commerce Department regulations also require that each document submitted must include on the first page in the upper right hand corner: (1) the case number; (2) whether the document concerns an investigation or some other administrative proceeding; (3) the office within the Commerce Department conducting that proceeding; and (4) whether the document contains business proprietary information. 19 C.F.R. § 351.303(d)(2) (Exhibit US-45). This information had to be hand-written on the document by a Commerce Department official when it was formally placed on the record.

<sup>73 9</sup> Letter from Arent Fox to US Department of Commerce Regarding Request that Department Place Information Received from Maine Landowners on the Record (Feb. 8, 2002) (Exhibit CDA-101).

<sup>74 0</sup> Rebuttal Brief of the Gouvernement du Quebec (Exhibit US-51). This was not Quebec’s only opportunity to discuss the issue of whether to include studwood in the stumpage prices from Maine. Rather, on 4 January 2002, Quebec submitted a report authored by Del Degen, Masse Associates Inc., dated December 2001, which argued that the studwood, pulpwood and sawlogs in Maine must be considered. *See* Quebec/Maine Analysis (Exhibit US-73).

<sup>75 1</sup> *See* James W. Sewall Company, Review of Letter from Jonathan Ford to Department of Commerce, attached to 4 March 2002 letter (Exhibit CDA-112).