

**UNITED STATES – PRELIMINARY DETERMINATIONS  
WITH RESPECT TO CERTAIN SOFTWOOD LUMBER  
FROM CANADA**

*Report of the Panel*

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TABLE OF CONTENTS

	<u>Page</u>
<b>I. INTRODUCTION.....</b>	<b>1</b>
A. COMPLAINT OF CANADA.....	1
B. ESTABLISHMENT AND COMPOSITION OF THE PANEL.....	1
C. PANEL PROCEEDINGS.....	2
<b>II. FACTUAL ASPECTS.....</b>	<b>2</b>
<b>III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....</b>	<b>3</b>
A. CANADA.....	3
B. UNITED STATES.....	3
<b>IV. ARGUMENTS OF THE PARTIES.....</b>	<b>3</b>
A. FIRST WRITTEN SUBMISSION OF CANADA.....	3
<b>1. The Preliminary Countervailing Duty Determination.....</b>	<b>4</b>
<b>2. The Preliminary Critical Circumstances Determination.....</b>	<b>10</b>
<b>3. US Law is Inconsistent with US Obligations on Expedited and Administrative Reviews.....</b>	<b>12</b>
B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES.....	14
<b>1. Introduction.....</b>	<b>14</b>
<b>2. Statement of Facts.....</b>	<b>15</b>
<b>3. Standard of Review.....</b>	<b>15</b>
<b>4. Argument.....</b>	<b>15</b>
(a) Canada Bears the Burden of Proving Its Claim.....	15
(b) The Preliminary Countervailing Determination Is Consistent With the SCM Agreement.....	15
(i) <i>Provincial Stumpage Programmes Constitute a “Financial Contribution”</i> .....	15
(ii) <i>Provincial Stumpage Programmes Provide a “Benefit”</i> .....	17
(iii) <i>The Calculation Did Not Overstate the Subsidy Found to Exist</i> .....	18
(iv) <i>Canada’s “Pass-through” Argument Is Inapposite</i> .....	19
(c) The Preliminary Critical Circumstances Finding Is Consistent with the SCM Agreement.....	20
(i) <i>Judicial Economy</i> .....	20
(ii) <i>Authority to Impose Provisional Measures Retroactively</i> .....	20
(iii) <i>Basis for Critical Circumstances Findings</i> .....	21
(d) Expedited and Administrative Reviews.....	21
(i) <i>Section 777A(e)(2)(A) and (B) of the Tariff Act of 1930</i> .....	21
(ii) <i>Expedited Reviews</i> .....	21

(iii)	<i>Administrative Reviews</i> .....	22
C.	FIRST ORAL STATEMENT OF CANADA .....	22
<b>1.</b>	<b>The Preliminary Countervailing Duty Determination .....</b>	<b>23</b>
(a)	Stumpage is not a “financial contribution” .....	23
(b)	The USDOC’s use of “cross-border” benchmarks to find and measure “benefit” violates the SCM Agreement.....	24
(c)	The USDOC impermissibly presumed a pass-through of an alleged benefit .....	25
(d)	The USDOC impermissibly inflated the subsidy rate by calculating a “weighted- average country-wide rate” based upon only a portion of Canadian production and exports .....	25
(e)	The USDOC impermissibly applied provisional measures in excess of the subsidy preliminarily found to exist .....	25
<b>2.</b>	<b>The Preliminary Critical Circumstances Determination .....</b>	<b>26</b>
<b>3.</b>	<b>US Law is Inconsistent with US Obligations on Expedited and Administrative Reviews .....</b>	<b>27</b>
D.	FIRST ORAL STATEMENT OF THE UNITED STATES.....	28
<b>1.</b>	<b>Preliminary Subsidy Determination .....</b>	<b>28</b>
(a)	Financial Contribution .....	28
(b)	Benefit .....	29
(c)	Cross-Border Benchmark .....	29
(d)	Benefit Calculation - Indirect Subsidies (Pass-Through) .....	30
(e)	Benefit Calculation - Denominator .....	30
<b>2.</b>	<b>Critical Circumstances .....</b>	<b>30</b>
<b>3.</b>	<b>Reviews .....</b>	<b>31</b>
E.	SECOND WRITTEN SUBMISSION OF CANADA.....	31
<b>1.</b>	<b>Introduction .....</b>	<b>31</b>
<b>2.</b>	<b>The Preliminary Countervailing Duty Determination .....</b>	<b>31</b>
(a)	“Financial Contribution” .....	31
(b)	“Benefit” .....	33
(c)	Pass-Through.....	38
(d)	First Mill.....	40
<b>3.</b>	<b>The Preliminary Critical Circumstances Determination .....</b>	<b>40</b>
<b>4.</b>	<b>US Law On Expedited Reviews And Administrative Reviews .....</b>	<b>41</b>
F.	SECOND WRITTEN SUBMISSION OF THE UNITED STATES .....	42
<b>1.</b>	<b>Introduction .....</b>	<b>42</b>
<b>2.</b>	<b>Argument .....</b>	<b>43</b>

(a)	The USDOC’s Preliminary Determination that the Canadian Provincial Governments Provide a Good to Lumber Producers Is Consistent with Article 1.1(a)(1)(iii) of the SCM Agreement .....	43
(b)	The USDOC Properly Measured the Benefit from Provincial Stumpage Systems Under Article 14(d) of the SCM Agreement.....	44
(i)	<i>The Use of Commercially Available World Market Prices Is, in Appropriate Circumstances, Consistent with Article 14(d) of the SCM Agreement.....</i>	44
(ii)	<i>There Is No Evidence of a Market Benchmark in Canada .....</i>	45
(iii)	<i>US Stumpage Prices Are Commercially Available to Canadian Lumber Producers.....</i>	46
(c)	The USDOC Properly Calculated the Total Amount of the Subsidy to Producers of the Subject Merchandise.....	47
(d)	The Preliminary Critical Circumstances Finding Is Consistent with the SCM Agreement .....	49
(e)	US Laws Governing Reviews Are Consistent with the SCM Agreement .....	49
<b>3.</b>	<b>Conclusion.....</b>	<b>49</b>
G.	SECOND ORAL STATEMENT OF CANADA .....	49
<b>1.</b>	<b>Introduction .....</b>	<b>49</b>
<b>2.</b>	<b>Subsidy .....</b>	<b>50</b>
(a)	Financial Contribution .....	50
(b)	Benefit .....	51
(c)	Pass-through.....	53
(d)	First mill .....	53
<b>3.</b>	<b>Critical circumstances .....</b>	<b>54</b>
<b>4.</b>	<b>Expedited review and Administrative review .....</b>	<b>54</b>
H.	SECOND ORAL STATEMENT OF THE UNITED STATES .....	55
<b>1.</b>	<b>Financial Contribution .....</b>	<b>55</b>
<b>2.</b>	<b>Benefit.....</b>	<b>55</b>
<b>3.</b>	<b>Critical Circumstances .....</b>	<b>56</b>
<b>4.</b>	<b>Expedited Reviews .....</b>	<b>57</b>
<b>5.</b>	<b>Factual Support for the Preliminary Determination.....</b>	<b>57</b>
(a)	Processing Requirements - Independent Loggers .....	58
(b)	Private Prices.....	58
<b>6.</b>	<b>Standard of Review .....</b>	<b>58</b>
V.	ARGUMENTS OF THE THIRD PARTIES .....	59
A.	THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES .....	59
<b>1.</b>	<b>Scope of the term “good” under Article 1.1(a)(1)(iii) of the SCM Agreement .....</b>	<b>59</b>
<b>2.</b>	<b>Determination of a “benefit” under Article 1.1(b), 14(d) of the SCM Agreement .....</b>	<b>60</b>
<b>3.</b>	<b>The determination of a “pass-through” Benefit.....</b>	<b>61</b>

<b>4.</b>	<b>No application of Article 20.6 of the SCM Agreement to provisional countervailing duties.....</b>	<b>62</b>
<b>5.</b>	<b>Requested recommendation.....</b>	<b>62</b>
B.	THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES .....	62
<b>1.</b>	<b>Introduction .....</b>	<b>62</b>
<b>2.</b>	<b>A "pass-through" benefit determination .....</b>	<b>63</b>
(a)	Article 1.1(a)(1)(iv) of the SCM Agreement not the relevant benchmark for a "pass through" benefit determination.....	63
(b)	Determination of a "benefit" according to Article 1.1(b) of the SCM Agreement.....	63
<b>3.</b>	<b>The scope of Article 19.3 of the SCM Agreement for an "expedited review" .....</b>	<b>64</b>
<b>4.</b>	<b>Conclusion.....</b>	<b>65</b>
C.	THIRD PARTY ORAL STATEMENT OF INDIA .....	65
D.	THIRD PARTY WRITTEN SUBMISSION OF JAPAN.....	66
<b>1.</b>	<b>Introduction .....</b>	<b>66</b>
<b>2.</b>	<b>Arguments.....</b>	<b>67</b>
(a)	Indirect Subsidies .....	67
(b)	Existence of a financial contribution by a government .....	67
(c)	Benefits conferred.....	67
<b>VI.</b>	<b>INTERIM REVIEW .....</b>	<b>68</b>
<b>VII.</b>	<b>FINDINGS .....</b>	<b>69</b>
A.	CLAIMS RELATING TO THE PRELIMINARY COUNTERVAILING DUTY DETERMINATION .....	70
<b>1.</b>	<b>Introduction .....</b>	<b>70</b>
<b>2.</b>	<b>Claim 1: inconsistent finding of the existence of a financial contribution. ....</b>	<b>71</b>
(a)	Arguments of the parties.....	71
(i)	<i>Canada</i> .....	71
(ii)	<i>United States</i> .....	72
(b)	Analysis.....	73
(c)	Conclusion.....	79
<b>3.</b>	<b>Claim 2: inconsistent determination of benefit .....</b>	<b>79</b>
(a)	arguments of the parties.....	79
(i)	<i>Canada</i> .....	79
(ii)	<i>United States</i> .....	80
(b)	Analysis.....	81
(c)	Conclusion.....	88
<b>4.</b>	<b>Claim 3: failure to examine and determine the existence of benefit to the producers of the subject product .....</b>	<b>88</b>

(a)	Arguments of the parties.....	88
(i)	<i>Canada</i> .....	88
(ii)	<i>United States</i> .....	90
(b)	Analysis.....	91
(c)	Conclusion.....	94
<b>5.</b>	<b>Claim 4: impermissible application of a provisional duty in excess of the subsidy rate .....</b>	<b>95</b>
(a)	Arguments of the parties.....	95
(i)	<i>Canada</i> .....	95
(ii)	<i>United States</i> .....	96
(b)	Analysis.....	96
<b>6.</b>	<b>Conclusion on Canada's claims relating to the Preliminary Countervailing Duty Determination.....</b>	<b>96</b>
<b>B.</b>	<b>CLAIMS RELATING TO THE PRELIMINARY CRITICAL CIRCUMSTANCES DETERMINATION AND THE RETROACTIVE APPLICATION OF PROVISIONAL COUNTERVAILING MEASURES .....</b>	<b>97</b>
<b>1.</b>	<b>Claim 1: retroactive application of provisional measures is inconsistent with Article 20.6 SCM Agreement and violates Article 17.3 and 17.4 SCM Agreement. ....</b>	<b>97</b>
(a)	Arguments of the parties.....	97
(i)	<i>Canada</i> .....	97
(ii)	<i>United States</i> .....	98
(b)	Analysis.....	99
(i)	<i>Does Article 20.6 SCM Agreement allow for the retroactive application of provisional measures? .....</i>	<i>99</i>
(ii)	<i>Does the retroactive application of provisional measures also violate the disciplines of Article 17 SCM Agreement.....</i>	<i>101</i>
(c)	Conclusion.....	102
<b>2.</b>	<b>Claim 2: USDOC failed to establish critical circumstances under Article 20.6 SCM Agreement.....</b>	<b>102</b>
(a)	Arguments of the parties.....	102
(i)	<i>Canada</i> .....	102
(ii)	<i>United States</i> .....	104
(b)	Analysis.....	104
<b>3.</b>	<b>Conclusion on Canada's claim concerning the USDOC Preliminary Critical Circumstances Determination .....</b>	<b>104</b>
<b>C.</b>	<b>CLAIM OF INCONSISTENT CVD LAW CONCERNING EXPEDITED AND ADMINISTRATIVE REVIEWS.....</b>	<b>105</b>
(a)	Arguments of the parties.....	105
(i)	<i>Canada</i> .....	105

(ii)	<i>United States</i> .....	106
(b)	Analysis .....	106
(i)	<i>Mandatory versus discretionary legislation</i> .....	107
(ii)	<i>The US Statute and the Statement of Administrative Action</i> .....	108
(iii)	<i>USDOC Regulations</i> .....	109
(c)	Conclusion.....	115
<b>VIII.</b>	<b>CONCLUSIONS AND RECOMMENDATIONS</b> .....	<b>115</b>

**LIST OF ANNEXES**

<b>Contents</b>		<b>Page</b>
Annex A-1	Responses of Canada to questions posed in the context of the first substantive meeting of the Panel	A-2
Annex A-2	Responses of the United States to questions posed in the context of the first substantive meeting of the Panel	A-13
Annex B-1	Responses of Canada to questions posed in the context of the second substantive meeting of the Panel	B-2
Annex B-2	Responses of the United States to questions posed in the context of the second substantive meeting of the Panel	B-11



## I. INTRODUCTION

### A. COMPLAINT OF CANADA

1.1 On 21 August 2001, Canada requested consultations with the United States pursuant to Article 4 of the Dispute Settlement Understanding ("the DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 30 of the Agreement on Subsidies and Countervailing Measures ("the SCM Agreement" or "the Agreement"), with regard to the preliminary countervailing duty determination and the preliminary critical circumstances determination made by the US Department of Commerce ("USDOC") on 9 August 2001, with respect to certain softwood lumber from Canada, and with regard to US measures on company-specific expedited reviews and administrative reviews.<sup>1</sup>

1.2 On 17 September 2001, Canada and the United States held the requested consultations, but failed to reach a mutually satisfactory resolution of the matter.

1.3 On 25 October 2001, Canada requested the establishment of a panel to examine the matter.<sup>2</sup>

### B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting of 5 December 2001, the Dispute Settlement Body ("the DSB") established a Panel in accordance with Article 6 of the DSU and pursuant to the request made by Canada in document WT/DS236/2.

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference therefore are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS236/2 the matter referred to the DSB by Canada in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 22 January 2002, Canada requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

"If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

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<sup>1</sup> WT/DS/236/1.

<sup>2</sup> WT/DS/236/2.

1.7 On 1 February 2002, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Dariusz Rosati

Members: Mr. Robert Arnott  
Mr. Gonzalo Biggs

The European Communities, India and Japan reserved their third party rights.

C. PANEL PROCEEDINGS

1.8 The Panel met with the parties on 24-25 April 2002 and 4 June 2002. The Panel met with third parties on 24 April 2002.

1.9 On 26 July 2002, the Panel provided its interim report to the parties.

**II. FACTUAL ASPECTS**

2.1 This dispute concerns the preliminary countervailing duty determination and the preliminary critical circumstances determination made by the USDOC on 9 August 2001 in respect of certain softwood lumber imports from Canada, classified under headings 4407.1000, 4409.1010, 4409.1020, and 4409.1090.<sup>3</sup> This dispute also concerns US law on expedited and administrative reviews in the context of countervailing measures.

2.2 On 2 April 2001 an application for countervailing duties was filed with the USDOC by the Coalition for Fair Lumber Imports Executive Committee; the United Brotherhood of Carpenters and Joiners; and the Paper, Allied-Industrial, Chemical and Energy Workers International Union. On 20 April 2001, the application was amended to include as applicants Moose River Lumber Co., Inc.; Shearer Lumber Products; Shuqualak Lumber Co.; and Tolleson Lumber Co., Inc. On 30 April 2001, the USDOC published a notice of initiation of a countervailing duty investigation in the US Federal Register.

2.3 In May 2001, the US International Trade Commission ("ITC") published its preliminary affirmative determination that there was a reasonable indication that the US industry was threatened with material injury by reason of imports from Canada of softwood lumber, which were alleged to be subsidized by the Government of Canada.

2.4 On 27 July 2001, the USDOC amended the initiation of the investigation, to exempt from investigation imports of certain softwood lumber produced in the Maritime Provinces from timber harvested in the Maritime Provinces.<sup>4</sup>

2.5 On 17 August 2001, the USDOC published in the Federal Register a notice of preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, and alignment of final countervailing duty determination with final antidumping duty determination. Provisional measures (withholding of appraisement and posting of cash deposit or bond) were imposed on the basis of a preliminary subsidy rate of 19.31 per cent, applicable to all producers/exporters, and applied to all entries of the subject merchandise from Canada entered, or

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<sup>3</sup> The countervailing duty investigation concerned in this dispute is sometimes referred to as the "Lumber IV" investigation.

<sup>4</sup> US Department of Commerce, *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*, Exhibit CDA-1, p. 43,188.

withdrawn from warehouse, for consumption on or after 90 days prior to the date of publication of the notice.

### **III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

#### **A. CANADA**

3.1 Canada requests the Panel to:

- ? find that the Preliminary Countervailing Duty Determination of the United States in the softwood lumber case violates Articles 10, 14, 17.1, 17.2, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994;
- ? find that the Preliminary Critical Circumstances Determination of the United States in the softwood lumber case violates Article 17.1(b), 17.3, 17.4, 17.5, 19.4 and 20.6 of the SCM Agreement and Article VI:3 of GATT 1994;
- ? find that US countervailing duty law regarding expedited and administrative reviews and the application of that law in the *Lumber IV* investigation violate Articles 10, 19.3, 19.4, 21.2 and 32.1 of the SCM Agreement and that as a result, the United States has failed to ensure that its laws, regulations and administrative procedures are in conformity with its WTO obligations as required by Article XVI:4 of the WTO Agreement and Article 32.5 of the SCM Agreement; and
- ? recommend that the United States bring its measures into conformity with the SCM Agreement and the WTO Agreement, including by lifting the suspension of liquidation for the period of 19 May through 16 August 2001, and making company-specific expedited and administrative reviews available to exporters and producers subject to any countervailing duty order that may be issued as a result of the *Lumber IV* investigation.

#### **B. UNITED STATES**

3.2 The United States requests that the Panel reject Canada's claims in their entirety.

### **IV. ARGUMENTS OF THE PARTIES**

4.1 The arguments of the parties are set forth in their written and oral submissions to the Panel, and in their answers to questions. The parties' arguments as presented in their submissions are summarized in this section. Summaries of the parties' written answers to questions are set forth in the Annexes to this report (*see* list of annexes at page ).

#### **A. FIRST WRITTEN SUBMISSION OF CANADA**

4.2 The following are Canada's arguments in its first written submission.

4.3 At issue in this dispute are the preliminary countervailing duty determination (the "preliminary determination") and the preliminary critical circumstances determination made by the USDOC on 9 August 2001, with respect to certain softwood lumber from Canada, which violate US obligations under the SCM Agreement and GATT 1994. Also at issue is the denial of company-specific expedited reviews and administrative reviews under US countervailing duty law, which violates US obligations under the SCM Agreement and the WTO Agreement.

## 1. The Preliminary Countervailing Duty Determination

4.4 In the preliminary countervailing duty determination, the USDOC concluded that “provincial stumpage programmes” in Quebec, British Columbia, Ontario, Alberta, Manitoba and Saskatchewan are countervailable subsidies. It determined (a) that stumpage is the “provision of a good or service”, (b) based on a “cross-border” analysis of “benefit”, that the stumpage programmes were subsidies to softwood lumber producers, and (c) that the alleged subsidies were specific. It assumed that the benefit was passed through to certain producers. Of the 19.31 per cent country-wide subsidy rate calculated by the USDOC, a full 19.21 per cent is attributed to these “stumpage programmes”.

4.5 The USDOC’s findings and determinations and the provisional measures imposed as a result are inconsistent with US obligations under the SCM Agreement and GATT 1994. Specifically: (a) the Canadian practices in question are not “subsidies” as defined in Article 1 of the SCM Agreement, (b) the USDOC impermissibly inflated the alleged subsidy rate by calculating a country-wide rate based on only a portion of Canadian production and exports of softwood lumber; and (c) the USDOC impermissibly inflated the provisional measures imposed by applying them on an entered value after having calculated the subsidy rate using a first mill value. Although Canada is not making submissions regarding the USDOC’s preliminary finding of specificity, Canada does not accept that finding as correct<sup>5</sup>.

4.6 The Canadian practices are not “subsidies” because: (a) “stumpage” is not a “financial contribution” within the meaning of Article 1.1(a) of the SCM Agreement; (b) the USDOC’s determination and measurement of a “benefit” is based on a “cross-border” methodology that is not permitted by the SCM Agreement; and (c) the USDOC’s determination assumes holders of harvesting rights pass through an alleged benefit to softwood lumber producers, without any basis for the assumption.

4.7 “Stumpage” is not a “financial contribution”. Most forest land in Canada is publicly owned “Crown” land. As stewards of this land, Federal and provincial governments manage forestry resources not for the benefit of specific users, but for the country as a whole, and with a view to conservation and preservation of Canada’s natural heritage for future generations. Forest resource management is, therefore, concerned with a range of economic and public interests and activities associated with forest lands. These include timber, trapping, fishing, recreation, water quantity and quality, wildlife habitat, wilderness and aesthetics and erosion control. The management of forestry resources related to timber harvesting is characterized by a system of interlocking rights and obligations between provincial and federal governments, and timber harvesters. This system of resource management is based most frequently on tenure and licensing agreements.

4.8 Tenure and licensing agreements vary from province to province, but they are all similar in that they are a complex bundle of rights and obligations, containing at a minimum: (a) the right to harvest standing timber on Crown land or “stumpage”; (b) service and maintenance obligations on the part of the concern, such as road-building and maintenance, and protection against fire; (c) implementation of forestry management and conservation measures, including silviculture and reforestation; and (d) payment of a volumetric “stumpage charge”, levied upon the exercise of the harvesting right.

4.9 “Stumpage”, as a right to exploit an *in situ* natural resource, takes two forms in Canada: a servitude referred to as a *profit à prendre* and a licence to harvest standing timber. Both rights are in respect of specified provincial Crown lands. A *profit à prendre* is a form of property right that

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<sup>5</sup> In response to a question from the Panel, Canada stated that it was not pursuing a claim pertaining to specificity in this dispute. (Canada’s Answers to Questions from the Panel after the Second Meeting with the Panel, answer to question 36 from the Panel following the second meeting, Annex B-1.)

conveys a non-possessory interest in the land to the recipient. Similarly, a licence is a revocable right to do something on, or to the detriment of, the land of another that would otherwise not be permitted – in this case, the right to harvest standing timber. Other related forms of rights include: mineral servitudes, mineral entry, timber easements, licensing quotas to harvest fish, and rights of access to exploit inland water currents for use in irrigation or electrical power generation.

4.10 By the terms of Articles 10 and 32.1 of the SCM Agreement, to be countervailable a practice must satisfy the definition of “subsidy” in Article 1.1. Where an investigating authority determines the existence of a subsidy in respect of a measure that does not fit within the terms of Article 1, that determination is not in accordance with the terms of the SCM Agreement and is, accordingly, in violation of Articles 10 and 32.1 of the Agreement. Article 17.1(b) specifically provides that provisional measures may be imposed only if “a preliminary affirmative determination has been made that a *subsidy* exists”. (emphasis added).

4.11 Article 1 of the SCM Agreement sets out an *exclusive* definition for what constitutes a subsidy for the purposes of the SCM Agreement. The Appellate Body recognized in *Brazil – Export Financing Programme for Aircraft* that a subsidy as defined by Article 1 has two discrete elements: (i) a financial contribution that (ii) confers a benefit. The panel in *Export Restraints* noted that the definition of “subsidy” in Article 1 reflects the Members’ agreement not only as to the types of government action subject to the SCM Agreement, but also that not all government actions that may affect the market come within the ambit of the SCM Agreement.

4.12 Under Article 1.1(a)(1)(iii) of the SCM Agreement, a financial contribution exists where a government provides *goods*. The ordinary meaning of “goods” is “tangible or movable personal property other than money; [especially] articles of trade or items of merchandise <goods or services>”. Nothing in the context of the SCM Agreement in any way detracts from or expands this ordinary meaning. A good is a good, a product, something on the cross-border trade of which tariffs may be imposed.

4.13 This is confirmed by the negotiating history related to the measurement of a benefit. On 4 September 1990, the Chairman of the Negotiating Group on Subsidies and Countervailing Measures circulated seven “informal discussion papers” in preparation for issuing a revised version of the Chairman’s text. Discussion Paper No. 6 dealt with the measurement of the amount of a subsidy and offered draft language for the current Article 14. Draft Article 14.4(a), as set out in Discussion Paper No. 6, reflects an understanding at the time of the negotiations on the SCM Agreement of the fundamental difference between tangible commercial inputs and intangible real property rights. This draft provided in relevant part that “the amount of subsidy arising from government provision of goods, services, or *extraction/harvesting rights* ...” (emphasis added). The terms “or extraction/harvesting rights” are nowhere found either in the final text of Article 1.1(a)(1)(iii) or in the final text of Article 14(d) of the SCM Agreement. This confirms that rights, such as *profits à prendre*, are not included within the scope of the Agreement.

4.14 The USDOC simply asserted that stumpage is a financial contribution in the form of a provision of goods or services. It did not declare itself as to whether, in its view, stumpage is the provision of “goods” or “services”. The petitioner in *Lumber IV*, however, has argued that stumpage is the provision of goods (“wood fiber”) in the form of timber or logs. Canada therefore understands the USDOC to have determined that stumpage is “the provision of goods”.

4.15 The USDOC also made no attempt to examine the evidence on the record and did not analyse how property rights, such as *profits à prendre* and timber harvesting licenses, are a “financial contribution” under Article 1.1. Properly understood, *profit à prendre* and the license to harvest standing timber is not the provision of “goods” within the meaning of Article 1. These rights are not in themselves goods or services. As a simple factual matter, “stumpage” – the right to harvest

standing timber – is not a log. “Stumpage” is instead the right to exploit an *in situ* natural resource, akin to the right to extract oil and minerals from public lands, quotas to harvest fish from a country’s territorial waters, or the right of access to exploit inland water and water currents for use in irrigation or electrical power generation. To determine otherwise is to expand the scope of “provides goods” and, therefore, the SCM Agreement beyond all recognition.

4.16 Timber harvesters have the right to harvest timber from Crown lands by virtue of their tenures or licenses; they do not pay stumpage charges as remuneration to acquire this right. Rather, a “stumpage charge” is a levy on the exercise of an existing right to harvest timber. It is properly viewed as a form of revenue collection by the government and is the economic equivalent of a tax.

4.17 The USDOC erred in determining that “stumpage” is a “financial contribution”. On a plain reading of Article 1.1(a)(1)(iii), the term “provides goods” cannot be interpreted to include the granting of rights such as “stumpage”. Since stumpage is not a “financial contribution” and, therefore, not a subsidy as defined in Article 1.1, the determination by the USDOC that it is a subsidy and the imposition of provisional countervailing measures as a result, violates Articles 10, 17.1(b), 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994.

4.18 The USDOC’s use of “cross-border” benchmarks to find and measure “benefit” violates the SCM Agreement. Nothing in the SCM Agreement permits the USDOC to do so; indeed, the text, context, and Appellate Body interpretations of Articles 1 and 14 indicate that such an analysis violates the SCM Agreement.

4.19 The USDOC purported to establish that Canadian stumpage practices conferred a benefit by comparing: stumpage charges levied by Canadian provinces with stumpage prices on selected state lands in the *United States*, on the basis that such prices are “commercially available world market prices...” to softwood lumber producers in Canada. The USDOC found US stumpage prices to be higher than the charges levied by Canadian provinces. The USDOC then multiplied this difference by what it considered the portion of the provinces’ harvest consumed in sawmills to arrive at the calculated amount of the “stumpage subsidy”. The “stumpage subsidy” was wholly derived from the comparisons of stumpage charges in Canada and cross-border prices for stumpage in the United States.

4.20 Article 1.1 of the SCM Agreement provides that a subsidy exists where there is a financial contribution by a government and “a benefit is thereby conferred”. In *Canada – Aircraft*, the Appellate Body stated that “the word ‘benefit’, as used in Article 1.1(b), implies some kind of comparison... [since] there can be no “benefit” to the recipient unless the “financial contribution” makes the recipient “better off” than it would otherwise have been, absent that contribution.” In the case of a government provision of goods, the question is therefore whether the purchaser of a good from the government is “better off” than other purchasers who buy the same good from other sellers in the country subject to the investigation.

4.21 This is confirmed by Article 14(d), which sets out guidelines to calculate the amount of a subsidy based on a “benefit to the recipient” test in cases of an alleged government provision of goods. It provides in particular that, “[t]he adequacy of remuneration shall be determined *in relation to prevailing market conditions* for the good or service in question *in the country of provision or purchase*” (emphasis added). The words of Article 14(d) are unambiguous. “In the country of provision or purchase” means “in the country of provision or purchase.” It does not mean adequacy can be determined as against prevailing market conditions in *some other country* or *internationally*. Nothing in the context, object and purpose or the negotiating history of Article 14 permits reading “in” as anything other than “in”; “in the country” does not admit of “cross-border” analysis. A cross-border analysis using transactions in another country to determine the existence of and measure a

“benefit” is thus inconsistent with Article 1 and Article 14 as interpreted by the Appellate Body, and viewed in context and in the light of the object and purpose of the SCM Agreement.

4.22 The USDOC’s cross-border analysis is illogical even in the context of its own previous determinations. In each of the prior lumber cases – *Lumber I*, *Lumber II* and *Lumber III* – the USDOC rejected the use of cross-border comparisons for a number of reasons, including the USDOC’s view that they are “arbitrary and capricious”.

4.23 By using a benchmark in the United States, outside the country of the alleged provision of goods, the United States breached its obligations under Article 14 of the SCM Agreement. The USDOC’s finding of a subsidy based on criteria not permitted by the SCM Agreement is also inconsistent with US obligations under Articles 10, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994. Furthermore, the United States violated Article 17.1 of the SCM Agreement by imposing provisional measures with respect to a practice that is not a subsidy.

4.24 The USDOC also impermissibly assumed a pass-through of an alleged benefit. In the preliminary determination, the USDOC found that the alleged “financial contribution” to timber harvesters conferred a benefit on softwood lumber producers. This presumption that the alleged benefit to timber harvesters passes through to lumber producers, without a determination that this did, in fact, occur, is inconsistent with the SCM Agreement.

4.25 In Canada, standing timber is harvested and processed into logs. Logs are then usually processed in sawmills and pulp mills to produce a wide variety of products including softwood lumber. Lumber may be sold as an end product or sold to remanufacturing industries that make a vast array of products. Both softwood lumber and remanufactured products, but not logs, are subject to the US investigation. A significant portion of harvesting is done by entities operating at arm’s-length from lumber producers; in these instances, logs are sold to lumber producers and other industries in arm’s-length transactions.

4.26 A countervailing duty may be imposed only where all the elements of a subsidy have been established. A subsidy is exhaustively defined in Article 1 of the SCM Agreement. A direct subsidy exists where a financial contribution confers a benefit to the recipient of that contribution. The criteria for an *indirect* subsidy are found in Article 1.1(a)(1)(iv) of that Agreement. In the context of Article 1.1(a)(1)(iii), *i.e.* where the alleged financial contribution is the government provision of goods, an indirect subsidy may be found *only* where a private entity is entrusted or directed by government to provide these goods in a manner that confers a benefit. Thus, where the recipient of a subsidy (whose products are not subject to the investigation) enters into transactions with other entities, an investigating authority may not assume that the subsidy has been passed on, or if so, that the recipient was entrusted or directed by government to pass it on. Rather, the authority must establish the existence of a subsidy in respect of the entity being investigated. This is especially the case where the transaction is at arm’s-length.

4.27 The findings of the Appellate Body in *British Steel* are particularly relevant in this instance. There, the Appellate Body agreed with the Panel that “in order to determine whether any subsidy was bestowed on the production [of the subject merchandise], it is necessary to determine whether there was any “benefit” to [the recipient].” This included examining, on administrative review, the continued existence of any “benefit” already found to have been conferred by “financial contributions” pre-dating the privatization of the original recipient of those contributions. Moreover, this had to be done from the perspective of the producers of the imports subject to the review, not the producer that had been privatized prior to the review (*i.e.* whose imports were not subject to the review). Finally, in that case, the Appellate Body confirmed that where fair market value is paid on privatization, no previously conferred benefit could be passed through to the acquiring entity.

4.28 The Appellate Body's analysis in *British Steel* is even more apt in respect of *original* determinations where an investigating authority has the duty to establish *each element* of a subsidy. In such cases, the authority may find an "indirect" subsidy only where an indirect financial contribution has been found in the sense of Article 1.1(a)(1)(iv). The reason is simple. Where transactions take place in the market and at arm's-length, and where there has been no "direction" or "entrustment", the original recipient of a subsidy must be presumed to have retained the benefit. Conversely, to assume pass-through in such arm's-length transactions without establishing "direction" or "entrustment" in the sense of Article 1.1(a)(1)(iv) would nullify the clear meaning of that Article.

4.29 Since the USDOC did not do any indirect subsidy or pass-through analysis, its finding of "benefit" is, on its face, incorrect and illegal. In the current investigation there are no allegations of direct stumpage subsidies to the subject merchandise, softwood lumber. Softwood lumber is *processed* from logs, and logs from standing timber; neither logs nor timber are within the scope of the investigation. Logs result from the harvesting of timber – the subject matter of stumpage, which is the allegedly subsidized economic activity. The alleged subsidies therefore are on log production.

4.30 Lumber producers may not legally be *deemed* to be subsidized simply because of a finding of subsidization to upstream producers. Rather, to find that the downstream industries are subsidized, the USDOC must first establish an indirect financial contribution, and then demonstrate a benefit conferred *upon the recipient* by that contribution. The USDOC did not establish, as is required by the SCM Agreement, that any "financial contribution" by the government to timber harvesters had been "entrusted" or "directed" to be passed through to lumber producers or remanufacturers. It did not find that the alleged benefit of the financial contribution in question was also passed through to and conferred upon lumber producers or remanufacturers (the producers of the subject merchandise within the scope of the investigation). The USDOC did not provide any analysis of either requirement of Article 1 in respect of the merchandise on which it imposed a countervailing duty. *A fortiori*, remanufacturers who buy lumber from lumber producers may not legally be presumed to have benefited from an alleged stumpage subsidy two transactions away.

4.31 The USDOC has failed to establish the elements of a subsidy in respect of the subject merchandise by failing to demonstrate a pass-through of financial contribution and benefit. In imposing provisional measures on practices not properly found to be a subsidy, the United States has violated Articles 10, 17.1(b), 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994.

4.32 The USDOC also impermissibly inflated the subsidy rate by calculating a "weighted-average country-wide rate" based upon only a portion of Canadian production and exports. Having determined that various federal and provincial programmes were subsidies, the USDOC calculated the subsidy rate by 1) for each provincial stumpage programme, dividing the total calculated stumpage benefit by the total value of the province's production of softwood lumber and co-products by sawmills; and 2) for other provincial and federal programmes found to be countervailable, dividing the total calculated benefit by the value of sales (or exports, for an alleged export subsidy) of softwood lumber and co-products by sawmills for the relevant jurisdiction. In each case, the alleged benefit was the numerator, and the shipment value was the denominator of the calculation. The USDOC then weight-averaged the resulting provincial rates by the provinces' relative shares of exports to the United States to arrive at a "country-wide" rate. In these calculations, the USDOC impermissibly excluded Maritime shipments from the total Canadian shipments used as the denominator for calculating certain federal programme rates and excluded Maritime exports in weight averaging provincial rates to construct a country-wide rate.

4.33 Articles 17.2 and 19 (through Article 17.5) of the SCM Agreement, and Article VI:3 of GATT 1994 require the USDOC to estimate "the amount of the subsidy found to exist" so as to ensure it is representative of the actual subsidization. Accordingly, a "country-wide" countervailing duty rate must approximate the average rate of subsidization of the subject merchandise. This means

that shipments of subject merchandise by any company in the country under investigation (including those companies that have been excluded from the investigation or countervailing duty order) must be included in calculating a country-wide rate. Exclusion of the Maritime Provinces' shipments and exports from the calculation results in imposition of provisional measures "in excess of the amount of the subsidy found to exist."

4.34 The impropriety of the USDOC's country-wide subsidy rate calculation becomes all the more evident when it is considered that the USDOC relied on import statistics that included imports from the Maritimes to find evidence of causation of material injury or threat of material injury sufficient to initiate the investigation. The USDOC cannot now credibly exclude these Maritime shipments from the subsidy calculation. Likewise, the International Trade Commission based its preliminary determination of threat of material injury on its analysis of total imports of softwood lumber from Canada, including the Maritime Provinces. Article 17.1(b) of the SCM Agreement requires that provisional measures may be applied only if "a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports." Here, the ITC made no finding of injury based solely on the subnational group of imports on which the USDOC calculated provisional duties.

4.35 Since the preliminary determination inflates the weighted average country-wide subsidy rate in violation of Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994, the United States is also in violation of Articles 10 and 32.1 of the SCM Agreement.

4.36 The USDOC also impermissibly applied provisional measures in excess of the subsidy preliminarily found to exist. In its preliminary determination, the USDOC found a net subsidy rate of 19.31 per cent *ad valorem* and stated that it was directing the US Customs Service ("Customs") to suspend liquidation of entries of subject merchandise and to require a cash deposit or bond *in the amount of the subsidy found*. It did not in fact do so, however. Instead, the USDOC calculated the subsidy rate on a *first mill* basis, but applied it on an *entered value* basis, with the effect of significantly increasing the provisional measures applied to a considerable portion of Canadian exports of softwood lumber to the United States.

4.37 In all of the USDOC subsidy calculations, described above, the denominator of the calculation was the value of *sawmill* shipments or exports, *i.e.*, the "first mill" value. Sawmills ("first mills") produce lumber from logs. They ship lumber to end users, and also sell some quantity of lumber to downstream value-added remanufacturers ("final mills") that use lumber inputs, produce further processed lumber products (of which some are within the scope of the investigation).

4.38 A USDOC decision memorandum subsequently claimed that "[t]he record for the Preliminary Determination supports the collection of CVD deposits on an entered value basis" and the USDOC instructions to Customs referenced in the preliminary determination instructed Customs to require countervailing duty cash deposits or the posting of a bond without specifying that such provisional measures applied to the first mill value, thus ensuring application on an entered value basis. Thus, for example, where a 19 per cent duty calculated on first mill value is applied to the entered value (and, for illustration, assuming an import with first mill value of \$100 and final mill or entered value of \$125), the importer of the value-added product faces an actual duty not of 19 per cent but of 23.75 per cent of the first mill value.

4.39 Articles 17.2 and 19.4 (through 17.5) of the SCM Agreement and Article VI:3 of GATT 1994 establish the fundamental obligation that a duty may not exceed the subsidy found to exist. In applying the preliminary determination on an entered value basis, the United States significantly increased the provisional measures in violation of Articles 17.2 and 19.4 of the SCM Agreement and Article VI:3 of GATT 1994.

## 2. The Preliminary Critical Circumstances Determination

4.40 Commerce also made a preliminary critical circumstances determination as a result, the United States retroactively applied the provisional measures to entries occurring within 90 days prior to the date of publication of the preliminary determinations, *i.e.* entries from May 19 through 16 August 2001. The retroactive application of provisional measures is inconsistent with US obligations under the SCM Agreement. Even if such action were permitted under the Agreement, Commerce's preliminary critical circumstances determination is itself inconsistent with US obligations under the SCM Agreement and GATT 1994.

4.41 Under Article 20.6, "critical circumstances" exist only where four conditions are satisfied: (1) there is injury to the domestic industry that is difficult to repair; (2) such injury is caused by massive imports in a relatively short period; (3) such imports are of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of the SCM Agreement; and (4) retroactive assessment of definitive countervailing duties on those imports is necessary to preclude the recurrence of such injury.

4.42 Even where these elements are present, Article 20.6 states that the type of duties that may be assessed are "definitive", not "provisional". The term "definitive" is defined as "having the function or character of finality" or "decisive", "conclusive" and "finally settled." Accordingly, the ordinary meaning of the provision prohibits any retroactive application of countervailing measures under the Article until after a final determination is made. This understanding of the meaning of the word "definitive" in Article 20.6 of the SCM Agreement is reinforced by the consistent distinction in the Agreement, for example in Articles 20.1 and 20.3, and 22.4 and 22.5, between "provisional measures" on the one hand and "countervailing duties" or "definitive duties" on the other hand. Despite the clear application of Article 20.6 to definitive countervailing duties and not provisional measures, Commerce acted otherwise.

4.43 In its preliminary critical circumstances determination and related analysis, Commerce preliminarily determined that there had been "massive imports" of a product benefiting from a prohibited export subsidy. For Commerce, this was a sufficient basis to apply countervailing measures retroactively. Commerce recognized that the ITC had not considered (even preliminarily) the injury factors required to be considered under Article 20.6 of the SCM Agreement, and that "[f]or purposes of a final determination whether retroactive relief is warranted, other factors are considered by the ITC in its final determination". Nonetheless, Commerce applied its preliminary critical circumstances determination on a provisional basis. Since Article 20.6 permits the retroactive application of only definitive countervailing duties, and not provisional measures, for the reasons set out above, the United States has violated this provision.

4.44 Moreover, since the investigation was initiated on 23 April 2001, Article 17.3 requires that provisional measures in this case not be applied sooner than 22 June 2001. However, the United States applied provisional measures as of 19 May 2001. Article 17.3 thus not only confirms that Article 20.6 does not permit the retroactive application of provisional measures, but to the extent the United States has applied such measures sooner than 22 June 2001, it has also violated Article 17.3 outright.

4.45 Similar inconsistencies result under Article 17.4. This provision states that "[t]he application of provisional measures shall be limited to as short a period as possible, not exceeding four months." Pursuant to the preliminary determination, the United States has applied provisional duties to imports of softwood lumber from Canada for a period of four months, beginning on the date of publication of the determination on 17 August 2001 and ending 14 December 2001. However, in also retroactively applying provisional measures for the period from 19 May 2001 to 17 August 2001, the United States has applied provisional measures for a total of nearly 7 months. Here again, not only does

Article 17.4 confirm that Article 20.6 does not permit the retroactive application of provisional measures, but to the extent the United States has applied such measures from 19 May 2001 through 14 December 2001, the United States has also violated Article 17.4 on its face.

4.46 Even if provisional measures could be applied retroactively under Article 20.6, Commerce did not establish that “critical circumstances” exist in its preliminary critical circumstances determination. **First**, the IQ SMB Guarantee programme upon which the determination is based is not a prohibited export subsidy and even if it were, the amount of subsidy found for the programme was *de minimis* and thus did not provide the basis for a determination under Article 20.6. Assuming, *arguendo*, that the IQ SMB Guarantee loan guarantees programme conferred a “benefit”, the programme itself is not contingent on exports from Canada. Record information demonstrated that the programme is contingent on developing markets outside *Quebec*, not outside *Canada*. Accordingly, for the purposes of Commerce’s investigation, the IQ SMB Guarantee programme is not “contingent on export performance” under Article 3.1(a) and the determination that the “massive imports” in question have benefited from “subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of [the SCM] Agreement” is flawed.

4.47 Furthermore, a critical circumstances determination cannot be based on a prohibited subsidy of a negligible amount. Commerce found that the benefit from this programme was less than 0.005 per cent, *i.e.* a rate that is *de minimis*. A *de minimis* rate is insufficient to provide a basis for applying any countervailing measure (provisional or final). By its own terms, Article 11.9 of the SCM Agreement applies to any part of a countervailing duty investigation. Therefore, a determination under Article 20.6 is governed by the *de minimis* threshold under Article 11.9, since action under the former is based solely on a subsidy that is “paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement” and not *all* alleged subsidy programmes under investigation. Since Commerce’s preliminary critical circumstances determination is based solely on the SMB Guarantee programme, which was not an export subsidy and was found to be *de minimis*, the United States has taken action under Article 20.6 in the absence of “critical circumstances”, *i.e.* in violation of that provision.

4.48 **Second**, even if the SMB Guarantee programme had correctly been found to be a prohibited export subsidy, the rate applicable to the retroactive measures should have been the rate attributed to this programme – less than 0.005 per cent – and not the rate attributable to all other alleged subsidies taken together – 19.3 per cent. The text of Article 20.6 does not refer to “massive imports” of a product benefiting from “any or all of the subsidies under investigation”. The provision specifically refers to “subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement”. The text of Article 20.6 of the SCM Agreement and the logic behind it allow the retroactive application of only the rate that is commensurate with the benefit bestowed by the alleged prohibited subsidy. Furthermore, any countervailing measures applied under Article 20.6 must conform to the basic requirement under Articles 17.5 and 19.4 of the SCM Agreement and Article VI:3 of GATT 1994 that they may not exceed the amount of the subsidy found to exist, *i.e.* such measures can be in an amount no greater than that needed to offset the benefit conferred by the alleged prohibited subsidies found to exist. To do so at a higher rate would countervail in an amount in excess of that required to “preclude the recurrence of [the] injury” caused by such subsidies in “critical circumstances”, the object and purpose of Article 20.6. In the instant case, the applicable rate was less than 0.005 per cent as opposed to 19.31 per cent.

4.49 In applying provisional measures retroactively in the amount of 19.31 per cent, the United States has violated Article 20.6 of the SCM Agreement, as well as Articles 17.5 and 19.4 of the SCM Agreement and Article VI:3 of GATT 1994.

4.50 **Third**, no countervailing measure, whether provisional or final, can be applied retroactively under Article 20.6 without the requisite injury findings and no such findings were made by US

authorities. There is no dispute that the USDOC's determination contains no finding on the two injury elements set out in Article 20.6 of the Agreement. First, neither the USDOC nor the ITC had found "injury which is difficult to repair" and neither the USDOC nor the ITC had determined that retroactive application of definitive countervailing duties was necessary "in order to preclude the recurrence of such injury". There can be no dispute on this point because the USDOC itself expressly stated that these determinations would be made by the ITC when the ITC made its final determination. Accordingly, in applying such countervailing measures retroactively under Article 20.6 without first making the requisite injury findings, the United States violated outright Article 20.6 of the Agreement.

4.51 **Fourth**, the USDOC's finding of "massive imports" (1) incorrectly attributed to all imports from Canada the alleged benefit conferred by the IQ SMB Guarantee programme, which applies only to shipments from Quebec and (2) attributed to an alleged export subsidy an increase in imports resulting from the impending and then actual expiration of the *Canada-United States Softwood Lumber Agreement* (SLA).

4.52 The USDOC determined that imports of softwood lumber from Canada had increased by 23.34 per cent in the three months following the filing of the petition compared to the previous three months and on this basis that the requirement of "massive imports" over a "relatively short period" of time had been satisfied. The SLA expired two days before the petition was filed, *i.e.* at the end of the first quarter of 2001. Its impending expiration sharply reduced exports in the first quarter of 2001 and its actual expiry led to an increase in the second quarter. These dramatic and well-documented trade trends were nonetheless attributed by the USDOC to the existence of a *de minimis* alleged export subsidy.

4.53 Even assuming that the SMB Guarantee programme were a prohibited export subsidy, it is patently impossible to attribute the "massive imports" finding in this case, an increase of 23.34 per cent, to a programme that did not benefit any exports during the period of investigation – and in any event could have benefited only a small fraction of exports and only in an amount of less than 0.005 per cent. Since the United States has applied provisional measures retroactively in the absence of a valid finding of "massive imports", it has violated Article 20.6.

4.54 **Fifth**, the USDOC's finding of "massive imports" improperly excludes imports from the Canadian Maritime Provinces. If it is permissible, as the USDOC did, to include shipments that have not benefited from the prohibited subsidy, then it should include all such shipments and not simply the portions of those shipments that suit its needs. In this respect, the USDOC's "massive imports" finding is defective also because it was "net of the Maritime Provinces", *i.e.* the USDOC excluded from any of its calculations imports from the Canadian Maritime provinces. Under various methods of calculating "massive imports", inclusion of exports from the entirety of Canada, including the exports from the Maritime Provinces, would have resulted in a negative "massive imports" finding under the SCM Agreement. There is no basis in Article 20.6 of the SCM Agreement for making a "massive imports" finding on the basis of only a segment of total imports.

### **3. US Law is Inconsistent with US Obligations on Expedited and Administrative Reviews**

4.55 Article 19.3 of the SCM Agreement expressly requires Members to grant an expedited review to those exporters that were not individually investigated who have requested such a review, in order to establish an individual countervailing duty rate for that exporter. Article 21.2 requires the same for any interested party in cases of administrative review. The Agreement thus ensures that exporters and producers not individually investigated will nevertheless be able to obtain an individual countervailing duty rate if they so request. It also ensures that each exporter and producer is not subject to a duty rate higher than that called for in its individual circumstances. The United States has failed to implement these obligations in US law.

4.56 Section 777A(e)(1) of the *Tariff Act of 1930* establishes the general rule that the USDOC will determine an individual subsidy rate for each known exporter or producer of the subject merchandise. Where the application of the general rule is not practicable because of the large number of exporters or producers involved in the investigation, exception to this rule can be made under section 777A(e)(2)(A) and (B) of the *Tariff Act of 1930* (“the Act”), as interpreted by the SAA. Under subparagraph (A), the USDOC can limit its examination to a statistically valid sample of exporters or producers or limit its examination to those exporters and producers accounting for the largest volume of exports of the subject merchandise that the USDOC determines can reasonably be examined. Under subparagraph (B), the USDOC can determine a single country-wide rate to be applied to all exporters and producers.

4.57 The regulations implementing US obligations under the SCM Agreement regarding individual expedited and administrative reviews limit the availability of such reviews to instances where the USDOC has undertaken its investigation according to subsection (A) of section 777A(e)(2). The regulations limit the availability of expedited reviews and company-specific administrative reviews in cases where the USDOC elects to conduct its investigation on an aggregate “country-wide” basis. In such cases, the USDOC *must* deny individual exporters the benefit of company-specific expedited reviews and administrative reviews.

4.58 In the case of individual expedited reviews, section 351.214(k)(l) provides for a request for individual expedited review only if “the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act” (i.e. by sample or by taking account of those exporters and producers accounting for the largest volume of exports). Significantly, this is the case as soon as the initial decision is made as to *how* the investigation is to be conducted. In the case of administrative reviews, subparagraphs (1), (2) and (3) of section 351.213(b) each expressly bar the request by an foreign government, exporter, or importer of record for an individual administrative review where the “investigation or prior administrative review was conducted on an aggregate basis”. Moreover, the only requests the USDOC will consider for an individual administrative review in cases where administrative reviews are conducted on a country-wide basis are those for individual assessment and cash deposit rates of zero under subparagraph (1) of section 351.213(k) and then, “only to the extent practicable.” Section 351.213(k)(2) provides, however, that if, in the review, the USDOC calculated a country-wide rate, “that rate will supersede, for cash deposit purposes, all rates previously determined in the countervailing duty proceeding in question.”

4.59 This result is inconsistent with the obligations of the United States under the SCM Agreement. Article 19.3 provides that exporters not “actually investigated” are entitled upon request *in all cases* to an expedited review “in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter”. Article 21.2 entitles exporters and producers to a company-specific administrative review upon request *in all cases*. This ensures that exporters and producers not given an individual rate during the countervailing duty investigation will be given one in an administrative review. This also means that exporters and producers already given an individual rate during the investigation, may be given an individual rate again in an administrative review. Nothing in the context or object and purpose of these provisions or indeed the SCM Agreement in any way modifies the nature of these obligations. Accordingly, section 351.214(k)(l) of the regulations violates Article 19.3 of the Agreement and section 351.213(b) violates Article 21.2.

4.60 Section 351.213(b) on administrative reviews also violates US obligations regarding expedited reviews under Article 19.3. Under the US retrospective duty system, final liability for countervailing duties is not determined until the administrative review. Section 351.213(b) specifically denies exporters and producers an administrative review if the investigation was conducted on an aggregate basis. This means that an exporter or producer would still be denied the

opportunity to obtain a final individual countervailing duty rate contrary to Article 19.3, even if it were given the right to an expedited review to establish an individual cash deposit rate.

4.61 Finally, since section 351.213(k)(2) mandates that the single country-wide countervailing duty rate calculated by the USDOC in an administrative review must supersede all individual rates previously determined, this provision violates both Article 19.3 and Article 21.2. First, mandating that a single country-wide rate supersedes all individual rates effectively undoes the benefit of any expedited review that an exporter or producer may have been granted by the USDOC pursuant to an investigation conducted under section 777A(e)(2)(A). Second, it prevents exporters and producers from obtaining an individual rate in an administrative review if that review is conducted on an aggregate basis.

4.62 The USDOC decided to conduct the *Lumber IV* investigation on a country-wide basis. Three consequences flow from this decision. First, by operation of the regulations, exporters and producers involved in the investigation are denied expedited reviews and company-specific administrative reviews, in violation of Articles 19.3 and 21.2 of the SCM Agreement. Second, in this case, the USDOC will, as a result, impose a countervailing duty in excess of the amount of the subsidy found. This is because a country-wide rate necessarily imposes a duty on some exporters and producers in excess of what would be their individual duty rate. The United States therefore also violates Article 19.4. Third, as a consequence, the United States also violates Articles 10 and 32.1 of the SCM Agreement.

4.63 The US failure to provide for expedited reviews and company-specific administrative reviews in all cases means that the United States has failed to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the SCM Agreement. Thus the United States should also be found in violation of its obligations under Articles XVI:4 of the WTO Agreement and Article 32.5 of the SCM Agreement.

B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

4.64 The following are the arguments of the United States in its first written submission.

**1. Introduction**

4.65 “No Member should cause, through the use of any subsidy . . . , adverse effects to the interests of other Members, i.e. . . . injury to the domestic industry of another Member . . . .”<sup>6</sup> That obligation is the core of the dispute now before the Panel. When one Member causes injury to the domestic industry of another Member through the use of *any* subsidy, the injured Member has the right to take countervailing measures.

4.66 The United States has acted entirely within its rights under the SCM Agreement in this case by taking provisional countervailing measures to offset the injurious subsidies that Canada provides to its lumber mills. Canada’s claims to the contrary are without merit. Canada is asking this Panel to ignore the text of the SCM Agreement and create exceptions to the subsidy disciplines for Canada’s decades-old system of subsidies to its lumber industry. In addition, Canada’s claims of WTO-inconsistent US laws are, in reality, an effort to resolve a future dispute that may never occur. Therefore, consistent with the SCM Agreement and the DSU, the United States asks the Panel to reject Canada’s claims.

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<sup>6</sup> Article 5 of the SCM Agreement.

## 2. Statement of Facts

4.67 On 17 August 2001, the USDOC published its preliminary determination, which contained a preliminary affirmative countervailing duty determination and a preliminary affirmative finding of critical circumstances. In the preliminary determination, the USDOC preliminarily found that provincial stumpage programmes in Canada provided a countervailable subsidy to Canadian lumber producers. In addition, the USDOC found reasonable cause to believe or suspect that critical circumstances existed based on evidence that lumber producers received prohibited export subsidies and that there were massive imports of the subject merchandise over a relatively short period of time.

4.68 Accordingly, the USDOC imposed provisional measures (i.e., suspension of liquidation and posting of security in the form of cash deposits or bonds), effective on the date of publication of the preliminary determination, i.e., 17 August 2001. In light of the affirmative finding of critical circumstances, the USDOC ordered provisional measures applied to entries of the subject merchandise made during the period 90 days prior to the date of the publication of the preliminary determination.

## 3. Standard of Review

4.69 Article 11 of the DSU requires a panel to make an objective assessment of the matter before it and determine whether the identified measure is consistent with the provisions of the SCM Agreement upon which the claim is based. Panels cannot add to or diminish the rights and obligations provided in the SCM Agreement.

4.70 A panel does not conduct a *de novo* review of the evidence nor substitute its judgment for that of the competent authority. Moreover, the sufficiency of the evidence in this case should be judged in relation to the particular measure that Canada has challenged. It is important to bear in mind the preliminary nature of the determination at issue. The consistency of a preliminary determination with the obligations imposed on Members should be based on the record evidence before the authority at the time the determination was made.

## 4. Argument

### (a) Canada Bears the Burden of Proving Its Claim

4.71 Canada, as the complainant, bears the burden of coming forward with evidence and argument that establish a *prima facie* case of a violation. If the balance of evidence is inconclusive with respect to a particular claim, Canada must be held to have failed to establish that claim.

### (b) The Preliminary Countervailing Determination Is Consistent With the SCM Agreement

#### (i) *Provincial Stumpage Programmes Constitute a "Financial Contribution"*

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

4.73 In the preliminary determination, the USDOC concluded that these Canadian provincial “stumpage programmes” constitute a financial contribution because they provide a good to lumber producers within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. That good is timber.

4.74 Article 31 of the *Vienna Convention on the Law of Treaties*, which reflects customary rules of interpretation of public international law, states that a treaty shall be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 1.1 of the SCM Agreement defines a subsidy as a “financial contribution” by a government that confers a benefit. Article 1.1(a)(1)(iii) states that a financial contribution shall be deemed to exist where, *inter alia*, the government “provides goods or services other than general infrastructure.” The SCM Agreement does not specifically define the meaning of “provides” or “goods.” The Panel should look to the ordinary meaning of these terms.

4.75 The New Shorter Oxford English Dictionary defines “provides” as meaning, among other things, to “supply or furnish for use.” Black’s Law Dictionary defines “goods” as specifically including “growing crops, and other identified things to be severed from real property.” Provincial stumpage programmes therefore constitute a “financial contribution” because they “supply or furnish” an “identified thing to be severed from real property,” i.e., timber.

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

4.77 Canada argues that provincial governments are not providing timber to lumber producers, but rather are merely granting the right to harvest the timber. There is, however, no meaningful distinction between providing the right to harvest timber and providing the timber itself. The provincial stumpage systems are designed for one purpose: to provide timber to Canadian mills that make lumber or wood pulp. Participation in these programmes is restricted to Canadian sawmills or pulpmills, or companies that have contracts with Canadian mills to process the harvested timber. Furthermore, each of the provincial stumpage programmes charges the tenure holder on a “volumetric” basis. Tenure holders do not pay stumpage fees for timber that they do not harvest. In light of these facts, it is obvious that the provincial governments are providing timber through these stumpage systems.

4.78 Moreover, the New Shorter Oxford English Dictionary defines “provides” as meaning to “make available” in addition to “supply or furnish for use.” Thus, even if provincial tenures are viewed as simply providing the right to take timber off the land rather than providing the timber itself, such a provision would still constitute the “provision of a good” within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because the government is making the timber available. Therefore, the USDOC’s preliminary determination that provincial stumpage programmes constitute the provision of a good is entirely consistent with the text of Article 1.1(a)(1)(iii) of the SCM Agreement.

4.79 The USDOC’s Preliminary Determination is also consistent with the context, object and purpose of Article 1.1(a)(1)(iii). The object and purpose of the SCM is to impose multilateral disciplines on subsidies because of the “the trade-distorting potential” of government largesse. It is evident from Article 1.1 that the Members recognized that governments have a variety of mechanisms at their disposal to confer an advantage on specific domestic enterprises or industries and that they

intended to bring those mechanisms within the disciplines of the Agreement. Article 1.1(a)(1)(iii) should be interpreted in that context.

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

(ii) *Provincial Stumpage Programmes Provide a "Benefit"*

4.81 The *Canada Aircraft* panel stated that authorities must "determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution."<sup>7</sup> In this case, the USDOC used market stumpage prices from comparable regions of the United States, adjusted as appropriate, as the benchmark price to determine whether the stumpage programmes administered by the Canadian provincial governments provided timber to lumber producers on a more favorable basis than the marketplace would provide. The USDOC declined to use non-government prices between buyers and sellers within each province as the benchmark prices because provincial government sales constitute the overwhelming majority of timber sales in each of the provinces. As a result of the provincial governments' dominance of the timber market, the USDOC could not conclude that non-government prices within the provinces were unaffected by the very distortion a market benchmark price is intended to measure, i.e., that they reflected the market "but for" the government financial contribution.

4.82 The USDOC's decision to use a US benchmark is consistent with Article 14 of the SCM, which sets forth guidelines for measuring the amount of the benefit to the recipient of a government's financial contribution. Article 14(d) states that "the provision of goods . . . by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration . . . . The adequacy of remuneration shall be determined *in relation to prevailing market conditions* for the good or service in question in the country of provision . . . (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)."<sup>8</sup>

4.83 The dictionary definition of "in relation to" is "with reference to." Thus, under Article 14(d), the prevailing conditions in the country of provision are a reference point, not necessarily an end point, for the market benchmark. The proper benchmark measures the market but for the financial contribution. Thus, the issue is finding a market benchmark with reference to what the "in country" market would be but for the subsidy. It would therefore be improper to look outside a country simply to determine what the market value of a good is elsewhere in the world. It is, however, entirely proper to do so if one can use such prices, properly adjusted, to determine the market value of the good in the country under investigation.

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

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<sup>7</sup> *Canada Aircraft - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as affirmed by the Appellate Body, adopted 20 August 1999, para. 9.112.

<sup>8</sup> Emphasis added.

4.85 The “in relation to” language in Article 14(d) demonstrates the Members’ intent to provide more flexibility in the selection of market benchmarks for determining the adequacy of remuneration for the provision of goods and services. This flexibility is evident elsewhere in the Agreement. The “market,” as generally referred to in the Agreement, is not restricted to the exporting country, but rather encompasses the entire market available to the subsidized producer or exporter. For example, Article 14(b) refers to comparable commercial loans available to the firm “on the market.” In *Canada Dairy*, the Appellate Body recognized this flexibility, confirming that “[w]orld market prices do . . . provide one possible measure of value of milk to producers” in Canada.<sup>9</sup>

4.86 Limiting the benchmark to the exporting country’s market would also seriously undermine the object and purpose of the SCM Agreement generally, and Articles 1.1(b) and 14(d) specifically. If the government were the sole provider of a good in the exporting country, for example, there would be no non-government benchmark prices in the exporting country to use as a point of reference and it therefore would be impossible to determine that the government had provided a benefit – even if it provided the good for a fraction of its value.

4.87 The trade-distorting potential of the government’s provision of a good can be identified only by reference to an independent market price, i.e., a price that is unaffected by the very trade distortion the test is designed to identify. If the comparison price were entirely, or almost entirely, dependent upon the government price, as in the case where the government sales overwhelmingly dominate the market, the analysis would become circular because the benchmark price would reflect the very market distortion that the comparison is designed to detect. Using prices largely dictated by the government to measure the adequacy of government prices would therefore defeat the purpose of Article 14.

4.88 Whether a particular market benchmark price for the adequacy of remuneration is consistent with Article 14(d) must depend upon the facts of the particular case. Canada has failed to make a *prima facie* case that the USDOC’s use of stumpage prices for comparable US forests, adjusted to take into account differences in the conditions of sale (i.e., in relation to prevailing market conditions) in the Canadian timber market, is *per se* inconsistent with Article 14(d) where the government sales dominate the Canadian market. To the contrary, the USDOC properly determined that US stumpage prices, as adjusted, represent prices under prevailing market conditions in Canada. The adjusted US prices represent an appropriate measure of what Canadian prices would be but for the subsidy.

(iii) *The Calculation Did Not Overstate the Subsidy Found to Exist*

#### Exclusion of Maritime Lumber

4.89 The investigation in this case initially covered softwood lumber products from all Canadian provinces. After receiving comments from Canada, however, the USDOC subsequently excluded from the investigation imports of softwood lumber products produced in the Canadian Provinces of New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland (the “Maritime Provinces”) from timber harvested in the Maritime Provinces (“Maritime Lumber”).

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

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<sup>9</sup> *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/RW, Report of the Appellate Body, adopted on 3 December 2001, para. 84.

would require the USDOC to allocate some portion of the aggregate subsidy found for subject merchandise to non-subject merchandise. The result of such a calculation would be a rate that would require the United States to impose duties in an amount *less* than the subsidy found to exist with respect to the subject merchandise. Articles VI:3 and 19.4 do not require such a result.

Total Value of All Sales that Canada Provided

4.91 The Panel should review the WTO consistency of the USDOC's preliminary determination based on the record before the Department at the time the determination was made. The record at the time of the preliminary determination establishes that the USDOC used in the denominator of its subsidy calculations the amount that Canada reported in its questionnaire response as the total value of softwood lumber sales, including all sales of first-mill lumber products and remanufactured products.

4.92 *After* the publication of the preliminary determination, Canada asserted, *for the first time*, that the total amount reported in its questionnaire response as the total value of softwood lumber sales did not, as indicated in its questionnaire response, include the value of remanufactured lumber shipments. Whatever the merits of this late claim by Canada that the data it submitted did not include sales of "remanufactured" products, that question is not before this Panel. Factual determinations should be reviewed "as perceived by the [administering authority] at the time it made its determination based upon the record before it . . . ." <sup>10</sup>

(iv) *Canada's "Pass-through" Argument Is Inapposite*

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

4.94 Furthermore, nothing in the SCM Agreement precludes a Member from issuing a preliminary determination and imposing provisional measures based on data establishing the total amount of the subsidy that the government provides to the subject merchandise. Although company-specific subsidy calculations may be preferred, they are not required. Canada does not contest this point.

4.95 The SCM Agreement simply requires that the countervailing duty rate applied not exceed the subsidy found to exist. As explained above, the USDOC in this case properly determined that Canadian federal and provincial governments provided subsidies to producers and exporters of softwood lumber, and properly calculated a country-wide subsidy rate based on the total amount of the subsidy preliminarily found to exist for the subject merchandise.

4.96 The Panel should reject Canada's argument that the USDOC should have conducted a "pass-through" analysis. While such an analysis might be relevant for purposes of determining the level of subsidy received by a specific producer or exporter, no producer or exporter-specific subsidy rates are calculated in an aggregate investigation. The USDOC did not collect company-specific information, and Canada neither objected to the aggregate approach taken in this case nor recommended a company-specific approach. Nor did Canada supply any company-specific data to support its claim of the necessity of a "pass-through" analysis.

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<sup>10</sup> *United States - Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, Report of the Panel, adopted 2 February 2001, para. 6.29.

(c) The Preliminary Critical Circumstances Finding Is Consistent with the SCM Agreement

(i) *Judicial Economy*

4.97 As an initial matter, the United States notes that the USDOC issued a final negative critical circumstances finding in this case. The USDOC's preliminary critical circumstances finding is no longer of any practical consequence; retroactive provisional measures have been terminated and no retroactive assessment will be imposed. The Panel therefore should not address Canada's critical circumstances claim because it is not "necessary to resolve the particular matter."<sup>11</sup> In this case, the normal course of the investigative process has resolved Canada's critical circumstances claim and has provided Canada with the relief it seeks.

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

(ii) *Authority to Impose Provisional Measures Retroactively*

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

4.100 Article 20.6 of the SCM Agreement provides that a Member may assess final, definitive duties retroactively for a period "not more than 90 days prior to the date of application of provisional measures," if critical circumstances are present. Article 20.6 is intended specifically to provide retroactive relief in a "critical" situation. At the time of the preliminary determination, there may be a reasonable basis to believe or suspect that such a situation exists. However, retroactive assessment of definitive duties cannot be ordered until a final determination has been made many months later, following a full investigation. Absent suspension of liquidation, entries made 90 days prior to the preliminary determination might be liquidated during the intervening period. If the entries are liquidated, the possibility of retroactive relief, even though fully warranted, no longer exists.

4.101 Articles 17 and 20 of the SCM Agreement do not intend such an outcome. Article 17 of the SCM Agreement provides for the imposition of provisional measures to preserve a Member's right to relief once there is sufficient evidence to determine preliminarily that such relief is warranted. Retroactive provisional measures are essential to enable a Member to avail itself of the special remedy provided under Article 20.6. Therefore, Article 20.1 should be interpreted as providing for retroactive provisional measures where there is preliminary evidence of critical circumstances. A contrary interpretation would render Article 20.6 a nullity.

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<sup>11</sup> *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, page 18; *E.C. - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26,48/AB/R, Report of the Appellate Body, adopted 13 February 1998, para. 250.

(iii) *Basis for Critical Circumstances Findings*

4.102 In order to find critical circumstances pursuant to Article 20.6 of the SCM Agreement, the authority must determine that there have been “massive imports” within a relatively short period, and that the imported product benefitted from “subsidies paid or bestowed inconsistently” with the SCM Agreement. The USDOC’s preliminary finding of critical circumstances satisfied each of these requirements. An objective review of the facts in this case demonstrates that the USDOC had a reasonable factual basis to preliminarily determine that a Canadian province provided an export subsidy, which is prohibited under Article 3.1 of the SCM Agreement, and that imports of softwood lumber from Canada had increased more than 23 per cent over the base period. Moreover, the ITC preliminarily found that imports of softwood lumber from Canada were injuring the US industry before the USDOC made its preliminary critical circumstances determination. This preliminary injury determination, together with the evidence concerning prohibited subsidies and massive imports described above, constituted sufficient evidence to take the limited step of imposing provisional measures retroactively, pending the outcome of the full investigation.

(d) *Expedited and Administrative Reviews*

4.103 Under established WTO jurisprudence, a Member’s law violates that Member’s WTO obligations only if the law *mandates* action that is inconsistent with those obligations. If the law provides discretion to authorities to act in a WTO-consistent manner, the law, as such, does not violate a Member’s WTO obligations.

4.104 None of the US laws that Canada challenges mandates that the United States take action inconsistent with its obligations under the SCM Agreement. US law gives the USDOC broad discretion to conduct reviews. Until the USDOC exercises that discretion in a particular case, any exploration of the issues raised by Canada would be hypothetical. That is particularly true in this case because aggregate cases are extremely rare.

(i) *Section 777A(e)(2)(A) and (B) of the Tariff Act of 1930*

4.105 Section 777A of the Tariff Act of 1930, as amended (the “Act”) implemented several changes to US law to meet obligations under the SCM Agreement by eliminating the presumption in favor of country-wide rates and establishing a general rule in favor of company-specific rates. Section 777A(e)(2) contains two exceptions to the general rule to address cases, such as the lumber case, where there is such a large number of exporters and producers that it is not practicable to investigate each company individually.

4.106 Canada has not cited a single provision in the SCM Agreement that prohibits the investigative procedures set out in Section 777A(e)(2), and nothing in Section 777A(e)(2) limits the USDOC’s broad authority to conduct reviews. Canada has therefore failed to establish a *prima facie* case of a violation because it has utterly failed to establish that Section 777A(e)(2) is inconsistent with any provision of the SCM Agreement.

(ii) *Expedited Reviews*

4.107 The USDOC’s regulations governing expedited reviews do not cover aggregate cases. As noted above, aggregate cases are rare and, because they have only been used in cases involving industries with an extremely large number of producers and exporters, they present unique issues with respect to expedited reviews. Because these cases are so rare, the USDOC has not yet addressed these issues, by regulation or in practice.

4.108 Section 751 of the Act gives the USDOC broad authority to conduct reviews. The fact that the USDOC has not elected to promulgate specific regulations for handling what could potentially be an extremely large number of expedited reviews in an aggregate case does not in any way diminish the Department's statutory authority to conduct such reviews. Statutory authority is sufficient; regulations are not essential. Therefore, the fact that 19 C.F.R. § 351.214(k)(1) does not cover expedited reviews in aggregate cases does not in any way prohibit such reviews. The Panel therefore should reject Canada's claim that 19 C.F.R. § 351.214(k)(1) mandates that the United States violate its obligation to provide expedited reviews.

(iii) *Administrative Reviews*

4.109 Section 751 of the Act also provides broad authority for the USDOC to conduct administrative reviews. Again, Canada erroneously concludes that the USDOC's regulations limit that authority and require the Department to deny administrative reviews in aggregate cases.

C. FIRST ORAL STATEMENT OF CANADA

4.110 In its first oral statement, Canada made the following arguments.

4.111 The complaint of Canada before this Panel involves three distinct sets of claims:

- ? first, the preliminary countervailing duty determination made by the US USDOC is inconsistent with US obligations;
- ? second, there is no basis in the SCM Agreement for retroactive application of provisional measures under a preliminary critical circumstances determination, and
- ? third, the denial of expedited reviews and company-specific administrative reviews where the USDOC conducts a country-wide investigation violates US obligations.

4.112 These actions stem primarily from two US interpretations of the SCM Agreement that Canada believes are fundamentally wrong, and that have immense implications for Members' rights to manage their natural resources. The first is an unwarranted reading by the USDOC of the agreed definition of "financial contribution". The second is the US determination that Canadian provincial stumpage programmes confer a "benefit".

4.113 The repeated US assertion that the appropriate comparison for determining "benefit" is between provincial and selected US jurisdictions demonstrates that the US measures are a demand that Canadian forest management practices mimic their own. The United States assumes that any public ownership of forestry resources is subsidised and argues that only by auction is there any assurance that this will not occur. The WTO Agreement does not direct Members to abandon public ownership of their natural resources.

4.114 The repeated references to the alleged "market distorting" effects of "stumpage" also indicate that the United States is arguing that any government action that might have the potential to distort trade is a subsidy under the SCM Agreement. This interpretation, however, was expressly rejected by the panel in *Export Restraints*.

4.115 The panel in *Export Restraints* also found that the definition of "subsidy" in Article 1.1 reflects the Members' agreement not only as to the types of government action subject to the SCM Agreement, but also that not all government action that may affect the market comes within its ambit.

## 1. The Preliminary Countervailing Duty Determination

### (a) Stumpage is not a “financial contribution”

4.116 As noted in the first written submission “stumpage” is a right to harvest standing timber. Provinces grant these rights through tenures or through licences. Tenures and licences both carry with them a broad range of forest management responsibilities and significant in-kind costs.

4.117 Timber harvesters have the right to harvest timber from Crown lands by virtue of their tenures or licences; they do not pay stumpage charges as remuneration to acquire this right. Rather, a “stumpage charge” is a levy on the exercise of an existing right to harvest timber. Stumpage charges are properly viewed as a form of revenue collection that is the economic equivalent of a tax.

4.118 Tenures and licences both confer real property rights – the right to exploit a natural resource on public land. They are comparable in this respect to the licensing of quotas to harvest fish or the leasing of the right to extract oil or minerals from public lands. The United States nevertheless treats these rights to harvest standing timber as a financial contribution in the form of a “provision of goods”. In so doing, the United States makes two fundamental errors.

4.119 First, the ordinary meaning of the term “goods” refers to “articles of trade or items of merchandise <goods or services>” or “saleable commodities.” The United States misinterprets the term “goods” by confusing it with the term “property”. The United States found that property in its widest sense, includes all a person’s legal rights of whatever description. The issue, however, is not what property means – and certainly not what the term property might be construed to include in its widest meaning – but rather what “goods” means in the context of the SCM Agreement. The right to exploit an *in situ* natural resource – the right to harvest standing timber – is not a saleable commodity. It is not an article of trade or an item of merchandise and therefore it does not come within the meaning of “goods”. The right to harvest standing timber is not “wood fibre” or logs, any more than a lease to develop petroleum resources is gas at the pump or the right to catch fish is tuna in a can.

4.120 Indeed, this meaning of the term “goods” as articles of trade or saleable commodities is the only meaning that could have been intended by the negotiators of the WTO Agreements. As evidenced by the “General interpretative note to Annex 1A” to the WTO Agreement “goods” subject to GATT 1994 are those things in respect of which a tariff binding may be negotiated: in other words, tradable things. It follows that things that are inherently incapable of being traded across borders are not “goods”. Accordingly, standing timber cannot be considered “goods” as it cannot be traded across borders.

4.121 The second US error relates to the determination that a “financial contribution” occurs when a tenure holder exercises its right to harvest timber. This is confirmed by the USDOC’s finding in the preliminary determination that benefits conferred by the provinces’ administered stumpage programmes had been expensed in the year of receipt or when the timber was harvested. The USDOC has thus found that the “goods” were provided during the period of investigation when timber was harvested. The United States erred in its finding that a “financial contribution” under Article 1.1(a) occurred through the action of the alleged recipient, rather than in the action of a government as required.

4.122 In addition, the claim by the United States that Canada has requested the panel to read a “safe harbour” into subparagraph (iii) misses the entire point to having an agreed definition of “subsidy” to define the scope of Members’ obligations under the SCM Agreement. The claim of the United States has no support in either the text of Article 1.1 or the negotiating history of Article 14. This confirms that real property rights were not intended to be included within the scope of the Agreement.

- (b) The USDOC's use of "cross-border" benchmarks to find and measure "benefit" violates the SCM Agreement

4.123 There are three fundamental problems with the USDOC's use of cross-border price comparisons to determine whether a benefit has been conferred, and to calculate the alleged subsidy.

4.124 First, Article 14(d) of the SCM Agreement requires that the adequacy of remuneration be determined in relation to prevailing market conditions for the good or service in question in the country of provision. This direction is unambiguous and nothing in the context, object and purpose or the negotiating history of Article 14 permits reading "in the country" in any other manner. In addition, the ordinary meaning, in context, of "prevail" is "exist". The reference to "prevailing market conditions" is, therefore, to conditions that actually exist in the country of provision and not to conditions that would exist only under hypothetical circumstances.

4.125 The United States offers a number of interpretations of the term "in relation to" that would effectively read out the phrase "in the country", and would turn the mandatory "shall" into the discretionary "may". The United States also attempts to justify using prices in the United States as a benchmark by suggesting that US stumpage is available "in" Canada. It is clear that US stumpage is not available in Canada, because producers can harvest this timber only in the United States

4.126 Second, Article 14(d) was drafted in this manner because cross-border comparisons make no economic sense. The mere fact that the domestic price in one country is lower than the price in another does not mean that the first country is providing a subsidy, because a wide range of complex political and economic factors may account for differences in prices between countries. These border-related differences make valid international comparisons substantially more difficult than comparisons within a province or a country. As well, the USDOC itself has repeatedly recognised the vast differences in natural and timber conditions that exist. These differences are so great that the USDOC rejected this methodology in all three of the previous *Lumber* cases, finding in one instance that such an analysis would be "arbitrary and capricious". These determinations were factual and all of the factors that led the USDOC to reject the use of cross-border comparisons in the past still exist today.

4.127 Third, the USDOC's reliance on cross-border benchmarks was based on unsubstantiated assertions that no in-country benchmarks were available. The USDOC asserted this without bothering to demonstrate that no valid benchmark existed "in" Canada. It simply presumed that provincial stumpage charges are distorted because most standing timber is harvested on provincial lands.

4.128 In fact, the USDOC had compelling evidence before it related to private sales of timber harvesting rights, competitive tenures in certain provinces, and other evidence that provinces operate their stumpage systems on market terms. Instead of addressing this evidence, the USDOC simply asserted that stumpage fees on private lands are largely derivative of the public land prices. In the USDOC's opinion this meant that stumpage fees on private lands were distorted by that very fact. Moreover, the USDOC's purported rationale for moving to cross-border benchmarks, i.e., that there is distortion if the government does not auction timber harvesting rights, does not reflect its obligations under Article 14(d) – to determine if remuneration is "adequate".

4.129 If cross-border comparisons were permitted, then the only way Canada would ever know whether it was conferring a "benefit" would be to examine prices and market conditions in other countries. This interpretation is unreasonable and unduly onerous. It would also be impossible for Canada to be certain that the benchmark examined would be acceptable to the investigating authority. The SCM Agreement contemplates no such thing.

(c) The USDOC impermissibly presumed a pass-through of an alleged benefit

4.130 Under Article 1.1(a)(1)(iv), the USDOC must establish that any “financial contribution” by the government to timber harvesters had been “entrusted” or “directed” to be passed through to lumber producers. It also must establish that the alleged benefit of the alleged financial contribution was passed through to and conferred upon lumber producers and remanufacturers. It is not sufficient for the United States to simply assert, as it did here, that the subsidies at issue in this case are direct subsidies.

4.131 In this case, there is no allegation of direct subsidisation in respect of the subject merchandise, which is softwood lumber. Softwood lumber is produced from logs, and logs are made from standing timber; neither logs nor standing timber are within the scope of the investigation. In fact, a significant amount of harvesting is done by independent entities operating at arm’s-length from lumber producers.

4.132 The United States argues that it does not matter if some producers do not receive direct benefits because it is conducting a country-wide investigation. It is Canada’s position that lumber producers legally may not be deemed to be subsidised simply because of a finding of subsidisation to producers of the input product.

(d) The USDOC impermissibly inflated the subsidy rate by calculating a “weighted-average country-wide rate” based upon only a portion of Canadian production and exports<sup>12</sup>

4.133 This issue concerns two problems with the USDOC’s determination of the rate of subsidisation. The first is the effect of the exclusion of goods from Maritime Provinces in the preliminary determination on the calculation of a “country-wide” subsidy rate.

4.134 A “country-wide” rate is precisely that: the average rate of subsidisation of the exported product. It is the total amount of a subsidy in a country divided by all shipments or exports to the investigating Member. When the USDOC disregarded unsubsidised Maritime shipments in calculating the country-wide duty rate, it calculated a country-wide duty exceeding the average country-wide level of subsidisation. The SCM Agreement requires that a countervailing duty rate not exceed the amount of the subsidy.

4.135 The United States attempts to excuse its calculation by claiming, first, that its Maritime exclusion was a product exclusion for certain lumber produced in the Maritimes. In fact, the lumber is indistinguishable from other lumber and the exclusion was of the “Maritime provinces”. More specifically, the exclusion is a partial exclusion of Maritime companies for lumber they produce from Maritime timber. This exclusion does not alter the proper method for calculating a country-wide weighted average subsidy rate.

4.136 The United States’ second argument – that Canada simply misunderstood the US calculation methodology – is even further from the mark. This methodology is clearly flawed as it places the country-wide benefit in the numerator and only a portion of total shipments in the denominator.

(e) The USDOC impermissibly applied provisional measures in excess of the subsidy preliminarily found to exist

4.137 This is the second problem relating to the application of the effective rate of duty. The United States determined a subsidy rate of 19.31 per cent *ad valorem*, but it employed a different

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<sup>12</sup> In response to a question from the Panel, Canada indicated that it was no longer pursuing this claim. (Canada’s response to Question 37 from the Panel following the second meeting, Annex B-1.)

basis for calculating this rate than it later used in applying the duties. Accordingly, the provisional measures were effectively applied at a higher rate than 19.31 per cent.

4.138 As stated in the preliminary determination, the United States calculated the amount of subsidy on a “first mill” basis. This means that the denominator of the calculation was the value of sawmill shipments, that is, the “first mills” that produce lumber from logs. The denominator did not include the value of shipments by secondary value-added producers of merchandise, or “final mills”, that are also covered by the investigation.

4.139 The United States now claims that, at the time of the preliminary determination, it did not know that the data that it used was first mill data. It further argues that statements by the USDOC indicating that it had used first mill data were “inadvertent” and that it was surprised to find out later that the data was first mill data. Finally, the United States asserts that that the panel must limit its analysis to evidence used by the importing Member in making its determination to impose the measure.

4.140 These arguments are factually incorrect and cannot relieve the United States of its obligation, not to apply a duty that exceeds the subsidy found to exist. The data reported in the investigation was the same sawmill (“first mill”) data that were provided and relied upon in all previous lumber investigations. Furthermore, by the time the USDOC issued its instructions to impose duties, it had received substantial information from Canada confirming that the data used was first mill data. Indeed, the United States acknowledges that Canada made this clarification, but it did not act upon the information. The US application of duties was inconsistent with its preliminary determination, and resulted in application of provisional measures in excess of the subsidy found to exist. As such, it violated Articles 17.2 and 19.4 of the SCM Agreement and Article VI:3 of GATT 1994.

## **2. The Preliminary Critical Circumstances Determination**

4.141 The preliminary critical circumstances determination imposed a retroactive duty liability going back 90 days that amounting to \$300 million and violated the obligations of the United States under Article 20.6 of the SCM Agreement. This provision permits the retroactive application of “definitive duties” following a critical circumstances finding. Article 20 and the SCM Agreement both indicate that “definitive duties” are distinct from preliminary or provisional measures. In the proper context, the term “definitive duties” plainly refers to countervailing duties imposed following a final determination. Consequently, the United States may apply measures retroactively under a critical circumstances finding after it has made a final countervailing duty determination.

4.142 The United States argues that it is permitted to make a preliminary critical circumstances determination and impose provisional measures retroactively. In support of its position, it relies on the findings of the *Hot Rolled Steel* panel and the object and purpose of Articles 17 and 20.

4.143 The *Hot Rolled Steel* panel report concerned a preliminary determination of critical circumstances under Article 10.7 of the *Antidumping Agreement*. The panel confirmed the limited scope of its own findings by observing that measures taken under Article 10.7 were not based on the evaluation of the same criteria as final measures that may be imposed at the end of the investigation. As there is no provision that corresponds to Article 10.7 in the SCM Agreement; the *Hot Rolled Steel* panel report is not relevant.

4.144 The plain text of Article 20.6 also belies the arguments of the United States concerning the object and purpose of this provision. The term definitive means definitive; it does not mean preliminary. The United States concedes as much, as it too equates definitive with final determination. The United States also invokes the object and purpose of Article 17, but neglects consideration of the specific provisions of that Article. Article 17.3 requires that a Member may not

impose provisional measures sooner than 60 days after the date of initiation of the investigation. The preliminary critical circumstances determination imposed measures soon after the date of initiation, immediately violating this provision. Similarly, within a month of the preliminary critical circumstances determination the measures had violated Article 17.4 that limits the application of provisional measures to four months.

4.145 A “critical circumstances” measure must satisfy several requirements under the provisions of Article 20.6; this measure violated all of these requirements.

### **3. US Law is Inconsistent with US Obligations on Expedited and Administrative Reviews**

4.146 The United States violates Articles 19.3 and 21.2 because it does not provide for company-specific reviews where it determines an “aggregate” subsidy level. It also violates Article 19.4, as exporters that would have benefited from these reviews pay more in countervailing duties. Finally, the United States proceeded with the investigation on an “aggregate” basis thereby denying exporters expedited and individual administrative reviews in violation of Articles 19.3 and 21.2.

4.147 Article 19.3 requires WTO Members to provide an expedited review when an exporter requests a review. The United States provides for expedited reviews only in non-country-wide cases. The United States argues that the regulations do not mandate a violation because the USDOC has broad discretion to conduct reviews and has only neglected to promulgate regulations. The United States position is untenable, for four reasons:

- ? First, the United States has the burden of establishing that the measure at issue is “discretionary”. It asserts that the USDOC may conduct reviews, but it failed to create regulations. This explanation is insufficient to discharge this burden.
- ? Second, these regulations are procedural rules relating to every aspect of countervailing proceedings. The neglect of any right as fundamental as an individual review in aggregate cases would be deliberate. The preamble to the US regulations reinforces this conclusion, stating that the USDOC will not individually review firms when it uses a country-wide rate.
- ? Third, it is a basic principle of statutory construction that if a right is provided for in certain circumstances, its deliberate exclusion in other circumstances must be given meaning: that is, that no such right exists in those other cases. In this respect, the practice of the USDOC and its analysis of its own discretion with respect to the regulations concerning voluntary respondents demonstrates that it also interprets US law in this manner.
- ? Finally, the United States argues that it has broad authority under section 751 of the Tariff Act to conduct expedited reviews. This provision relates to annual administrative reviews and other forms of review, but is silent with respect to expedited reviews.

4.148 The United States argues that Article 21.2 does not create an obligation to conduct company-specific administrative reviews. In this instance, the US regulations also expressly prohibit company-specific administrative reviews in aggregate cases. In contrast, the text of Article 21.2 clearly requires company-specific administrative reviews. In *British Steel* the Appellate Body found that Article 21.2 required a Member to review the need for continued imposition of a countervailing duty when appropriate. The Appellate Body also indicated that this provision was designed to ensure that countervailing duties only remained in force long enough to counteract the injury caused by the subsidisation.

4.149 The administrative review provisions also violate Article 19.3 as the single country-wide rate arrived at in an administrative review supersedes all individual rates. Therefore, even if the United States had discretion to grant expedited reviews, in country-wide cases the benefits of those reviews vanish as soon as there is a country-wide rate on an administrative review. Finally, the regulations demonstrate that the discretion provided under s. 751 does not extend to individual

administrative reviews. In fact, these regulations specifically deny the USDOC the discretion to grant individual administrative reviews.

4.150 The United States has argued that a violation of Articles 19.3 and 21.2 exists only where it has expressly refused to grant these reviews. This is not correct. Once the decision had been made to make an aggregate assessment, Canadian exporters could not secure a different form of assessment. Consequently, exporters were effectively denied these reviews as soon as the decision to make an aggregate assessment was made thereby breaching Articles 19.3 and 21.2.

D. FIRST ORAL STATEMENT OF THE UNITED STATES

4.151 In its first oral statement, the United States made the following arguments.

4.152 Although some of the facts of this case are technically complex and can be confusing, in the end the issues are simple. The preliminary record indicates that the Canadian provincial governments provide timber to lumber producers at less than market prices. Under Article 1 of the *WTO Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), that is a subsidy.

4.153 Article 5 of the SCM Agreement states that “No Member should cause, through the use of any subsidy . . . , adverse effects to the interests of other Members, i.e. . . . injury to the domestic industry of another Member . . .” When one Member causes injury to the domestic industry of another Member through the use of *any* subsidy, the injured Member has the right to take countervailing measures. The United States’ preliminary decision to exercise that right was fully warranted in this case.

**1. Preliminary Subsidy Determination**

4.154 Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution by the government that confers a benefit. Thus, there are two elements to a subsidy: financial contribution and benefit.

(a) Financial Contribution

4.155 The USDOC preliminarily determined that the system of timber contracts administered by the Canadian provincial governments constitutes a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement. Although Canada focuses on the complexities of these arrangements, none of those complexities alters the fundamental fact that these provincial programmes provide timber to lumber producers.

4.156 Over 90 per cent of the forested land in Canada is held by the provincial governments (“Crown timber”). Each province administers a system of contracts called tenures or licenses (“timber contracts”) that allow the tenure holder or licensee to harvest the Crown timber.

4.157 There is no dispute that lumber producers participate in provincial timber contracts for one reason – to obtain timber. The definitions discussed in the US first submission leave no doubt that timber is a good within the ordinary meaning of Article 1.1(a)(1)(iii). Nevertheless, Canada argues that when the provinces issue these contracts they are not providing a good – timber – to lumber producers, but the *right to take* timber off the land. Neither the SCM Agreement nor the facts of this case support Canada’s claim.

4.158 Although there are some variations across the provinces, the core elements of all timber contracts are the same, that is, the lumber producer obtains the right to cut timber in a specified area in exchange for an administratively set fee, the “stumpage” fee, and the assumption of certain forest

management obligations. The lumber producer knows the specific area in which it will be able to harvest and knows the timber, that is, the species and quality of the trees. The producer pays stumpage fees only for the volume of timber actually harvested. The lumber producer is therefore obtaining a specifically identified good – timber.

4.159 Moreover, the ordinary meaning of “provide” includes “make available.” Thus, the fact that a lumber producer has to get the timber off the stump is irrelevant. The economic consequences of providing a good or a right to a good are the same. To treat them as distinct would invite circumvention of the subsidy disciplines and seriously undermine their purpose.

4.160 Given the ample evidence that the provinces are providing lumber producers with timber, Canada’s only hope is that the Panel will read into the SCM Agreement an exemption for all extraction and harvesting rights. There is no support in the text for such an exemption, and a treaty interpreter may not read into the SCM Agreement what is not there.

(b) Benefit

4.161 The USDOC preliminarily determined that the provincial governments provide timber for less than adequate remuneration, within the meaning of Article 14(d) of the SCM Agreement, thereby conferring a benefit.

(c) Cross-Border Benchmark

4.162 As the Appellate Body has confirmed, a benefit is conferred when the government’s financial contribution places the recipient in a more advantageous position than would have been the case absent the financial contribution. Moreover, the Appellate Body has recognized that the marketplace provides an appropriate basis for comparison. In the underlying investigation, the USDOC preliminarily determined that no market benchmarks existed in Canada, and therefore used stumpage prices in US states with comparable forests, adjusted to reflect prevailing market conditions in Canada.

4.163 Article 14(d) states that: “The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).” Canada ignores most of that language and argues, in effect, that Article 14(d) says: “The adequacy of remuneration shall be determined in the country of provision or purchase.” The treaty interpreter, however, must give meaning to all the words in the Agreement.

4.164 World market prices can constitute part of the “market conditions in the country of provision.” As the European Communities (“EC”) points out, the relevance of world market prices is recognized in item (d) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement.

4.165 Therefore, the question is not whether Article 14(d) permits a Member to use something other than a domestic benchmark price, but when it is appropriate to do so. The facts more than adequately support the USDOC’s preliminary decision to do so in this case.

4.166 As noted previously, 90 per cent of the forested land in Canada is held by the Crown. The market for timber is therefore dominated by the provincial governments. The impact of the governments’ administratively set prices on the very small residual market is virtually inescapable. Nevertheless, the USDOC did request information on private prices in each of the provinces. Only three of the provinces responded, and the USDOC determined that the prices provided were not market-based. For example, the record contained statements by a Quebec official and a Canadian

forestry expert acknowledging that private timber prices in Quebec are suppressed by the overwhelming market power of low-cost Crown timber.

4.167 It is evident why Canada would insist that the United States use prices in Canada despite the evidence of a market dominated by the provincial governments. Canada would require the United States to measure the governments' prices against prices that reflect the very distortion that we are attempting to measure. Article 14(d) does not require such an obviously flawed and circular methodology.

(d) Benefit Calculation - Indirect Subsidies (Pass-Through)

4.168 The USDOC determined the total amount of the subsidy provided to Canadian producers of the subject merchandise based on aggregate data from the provincial governments. The Department then divided the total subsidy by total sales of the subject merchandise to obtain the subsidy rate. Canada claims that this calculation improperly assumed that benefits to tenure holders passed through to lumber producers. The United States does not, as the EC suggests, concede that this is the case. Some clarification of the facts is necessary to better understand the basis for the USDOC's subsidy calculation and shed light on the flaws in Canada's claim.

4.169 First, an input subsidy under Article 1.1(a)(1)(iii) is a direct subsidy. Under Canada's interpretation, all financial contributions through the provision of a good are transformed into an indirect subsidy under Article 1.1(a)(1)(iv). Canada's submission suggests that there are three distinct industries in Canada: loggers, lumber producers and remanufacturers. This is not the case. The vast majority of the Crown softwood timber is harvested under timber contracts held by integrated producers.

4.170 The vast majority of the timber contracts in Canada are directly between the provincial governments and Canadian forest products producers, or wood processing facilities. In most instances, only wood processing facilities, such as sawmills that produce lumber, are eligible to obtain a timber contract. Thus, Canada's alleged middleman between the provincial governments and the lumber producers is largely a myth.

(e) Benefit Calculation - Denominator

4.171 Canada also claims that the USDOC should have included non-subject merchandise in the calculation of the subsidy. The United States excluded certain Maritime lumber from the scope of the investigation, not producers. Canada nonetheless argues that the calculation of the benefit must exclude Maritime lumber, but the denominator must include Maritime lumber. Canada's reasoning would result in a rate less than the subsidy found to exist with respect to the subject merchandise.

4.172 Canada also argues that the USDOC calculated the subsidy on the basis of the total value of first milled lumber products, but then applied the subsidy rate to the entered value of subject merchandise. Canada's claim ignores the fact that the Department's calculation and application of the subsidy rate was entirely consistent with the preliminary record before the Department at the time of the preliminary determination. As previous panels have stated, the consistency of an authority's decisions must be assessed based on an objective assessment of the facts before the authority at the time the decision was made.

## 2. Critical Circumstances

4.173 Canada's claims relating to the USDOC's imposition of retroactive provisional measures rest on an interpretation of Article 20.6 that would render the retroactive remedies provided for a nullity.

It is beyond dispute that the general principles of treaty interpretation preclude such a reading of the Agreement.

4.174 The general rule in Article 21 that provisional measures and definitive duties are applied prospectively is expressly made “subject to the exceptions set out in [Article 20].” Nothing in Article 20.1 limits the applicability of those exceptions to definitive countervailing duties.

4.175 Article 20.6 defines a set of exceptional circumstances that warrant retroactive relief. Under the text of Article 20.1 those exceptional circumstances apply to provisional measures.

### **3. Reviews**

4.176 Finally, Canada claims that various provisions of US law are inconsistent with its obligations under the SCM Agreement because they preclude reviews in aggregate cases. Under established WTO jurisprudence, a Member’s law breaches that Member’s WTO obligations only if the law *mandates* action that is inconsistent with those obligations. If the law provides discretion to authorities to act in a WTO-consistent manner, the law, as such, does not breach a Member’s WTO obligations.

4.177 US law provides the USDOC with discretion to conduct expedited and administrative reviews in all cases, including aggregate cases. Nothing in the regulations cited by Canada limits that discretion. Thus, US law does not mandate action that is inconsistent with US WTO obligations. The United States is entitled to the presumption that it will implement its obligations in good faith.

#### **E. SECOND WRITTEN SUBMISSION OF CANADA**

4.178 In its second written submission, Canada made the following arguments.

### **1. Introduction**

4.179 This submission responds to the incorrect factual assertions and legal arguments that the United States has continued to make in its Oral Statement and in its Answers (“Answers”) to the Panel’s 26 April 2002 questions. Canada will demonstrate that: the United States misunderstands the “financial contribution” requirement of Article 1.1(a); its cross-border analysis of “benefit” is not permitted by Article 14(d); its response to the “pass-through” question is flawed and exhibits lack of comprehension of the “benefit” analysis that is required; in respect of critical circumstances, it continues to make implausible arguments. As well, Canada seeks to clarify US admissions concerning expedited reviews and will demonstrate that the US position on administrative review misstates US law and SCM Agreement obligations.

### **2. The Preliminary Countervailing Duty Determination**

#### **(a) “Financial Contribution”**

4.180 In its Answers, the United States asserts that, “Canada claims that the *benefit* is received when the timber is harvested.” From this faulty premise, the United States wrongly attributes to Canada the argument that, “the act of harvesting (which is not performed by the government) is the financial contribution.” It then argues that, “[t]he provincial governments provide the timber by placing it at the lumber producer’s disposal under the tenure contract.”

4.181 The US argument distorts Canada's submission and conflates a series of distinct relationships into one transaction. A right to cut a tree is not the same thing as a log; nor are timber harvesters the same as lumber producers.

4.182 Under tenure agreements, timber harvesters have the right to harvest standing timber and undertake a number of forest management obligations. These obligations, such as fire protection and pest control, constitute their share of a fiduciary duty for the public good. Indeed, tenure holders must undertake such costly obligations regardless of whether they harvest any trees. The bundle of rights and obligations that a tenure represents does not admit of simplification into "provision of goods".

4.183 The right to harvest trees is, in law and in fact, distinct from trees themselves (standing timber), which is a physical thing attached to the land. Standing timber is, in turn, different from logs. The cutting down of timber is the point at which "goods" – logs – are produced from natural resources; this is similar to when fish are caught, or water is bottled. Logs are input goods into the production of lumber, which is the subject matter at issue. The right to harvest a tree is, therefore, different from the end results of harvesting (the cutting down of standing timber to produce logs) and processing (turning logs into lumber); this right does not amount to "goods" or "services" within the meaning of Article 1.1(a)(1)(iii). In fact, even the thing in which provincial governments convey an interest – standing timber – is not "goods" or "services".

4.184 The United States attempts to rebut this reading by relying on two arguments, neither of which has merit.

4.185 First, it states that "from the reference in Article 1.1(a)(1)(iii) to goods and services other than 'general infrastructure,' it follows *a contrario* that any specific immovable object may be a covered good." The conclusion in no way follows the premise. The converse of "general infrastructure" is not "any specific immovable object". In any event, "general infrastructure" is an *exception* to "services".

4.186 Second, the United States argues that "the economic consequence of providing a good and providing a right to a good are exactly the same." This argument follows the same faulty logic of the US argument in *Export Restraints* that, "an export restraint is 'functionally equivalent' to an entrustment of or direction to a private body to provide goods domestically." The panel in that case rejected the "functional equivalence" argument on the grounds that the verbs "entrust" and "direct" implied "an explicit and affirmative action of delegation or command." The panel also held that the "financial contribution" element of Article 1 was concerned with actions of governments and not the effects of those actions. The term "provides goods" implies a positive action on the part of the government in respect of the goods themselves.

4.187 The United States then relies on one of several definitions of "provide" set out in one dictionary, to try to persuade the Panel that the term "provide" should be interpreted to mean "make available" in the broadest sense of the phrase.

4.188 The US position is untenable as the more common meaning of "provide" is "supply". As well, the proposed US interpretation encompasses a range of government action that goes far beyond those actions contemplated under Article 1.1(a). To "*make available* services", for example, would include any circumstance in which a government action makes possible the receipt of services.

4.189 Finally, throughout the WTO Agreement, the word "provide" is used to indicate the giving of something rather than the more generally enabling someone to obtain or produce something. For example, the word "provide" in Articles 3.2 and 8 of the Agreement on Agriculture refers not to the availability of subsidies or support to potential recipients, but rather the giving of such support or of subsidies. This is also the case in respect of Article XV:1 of the GATS.

4.190 The US argument also ignores the distinction: between timber harvesters and lumber producers. Timber harvesters produce *logs* from trees; and logs are not subject to the investigation. Timber harvesters “provide” these logs to their own mills or to other mills for the production of lumber or other products. This equation of timber harvesting and production of lumber has serious consequences in two respects.

4.191 First, the repeated and erroneous reference to “lumber producers” diverts attention from the issue before the Panel: the provision of a right to harvest to timber harvesters. Second, it ignores the nature of the rights and obligations contained in tenure agreements. The US assertion is based on its contention that the laws of each province “require the tenure holders be sawmills.” This is simply incorrect.

4.192 In B.C. a tenure holder is not required to build a sawmill. The major forms of tenure may require an applicant to maintain a “timber processing facility,” but that facility can be any of a wide variety of facilities, such as pulp mills, waferboard plants, etc. Moreover, the relevant provisions in the *Forest Act* are more discretionary. Section 13(3)(c) has provisions regarding timber processing facilities, but only if they are required in the invitation for application.

4.193 The United States also argues that in B.C. most loggers operate as employees or contractors for tenure holders rather than as independent entities. There are thousands of Crown tenure holders, unaffiliated with any sawmill, that independently harvest standing timber, produce logs, and either use or sell the logs at arm’s-length to sawmills and other kinds of processors. The record prior to the preliminary determination (PD) documented that of 5,932 Crown tenure holders in B.C. during the POI, only 105, or 1.8 per cent, owned sawmills.

4.194 In Quebec, there are two common forms of tenure. The dominant form of tenure, the TSFMA, can be and is held by any primary processing mill (for example, pulp mill, panel mill, veneer mill, etc.) and is not limited to sawmills. The second common form, the forest management contract (“FMC”), is rarely held by sawmills or even primary processing mills.

4.195 The United States further confuses the issues by leaving out two central facts in its discussion of Ontario tenures. Ontario, like other provinces, routinely grants export licenses for the export of logs. Indeed, Ontario granted export licenses pursuant to all requests.

4.196 Alberta also does not “generally require the tenure holders be sawmills.” The United States misrepresents Alberta’s questionnaire response that “[a]ll forms of commercial tenure own and operate sawmills”. There, Alberta was indicating that when all sawmills are considered together, one will find among them all the types of tenures that exist in the province. Alberta at no point suggested that all tenures were held only by sawmills, or that only sawmills could get a tenure.

(b) “Benefit”

4.197 A benefit analysis under Articles 1.1(b) and 14(d) of the SCM Agreement must use benchmarks “in the country of provision”. Canada’s submissions in this regard are based on three complementary points: first, that the text of Article 14(d) did not permit “cross-border” comparisons; second, that the injunction in Article 14(d) is based on sound economic principles; and third, that, in any event, there were ample benchmarks *inside* Canada that the United States could have used to determine “adequacy of remuneration”.

4.198 The United States argues that the concept of “commercial availability” is incorporated in Article 14(d). Article 14(d) does not refer to “commercial” availability of goods, much less “prices commercially available” for those goods. The term “availability”, read in context, refers not to the price of a good, or commerciality of that price, but whether the goods are available in the country in

question. Article 14(d) reflects a simple economic reality: the availability of a product – its “supply” – has an impact on its price.

4.199 In any event, even if the United States were correct in its interpretation, its conclusions do not follow. The existence of imported goods in a market does not make the price of those goods the “prevailing market condition”. Imported goods may, and often do, command premium prices on domestic markets.

4.200 The United States rejects the use of benchmarks reflecting market conditions prevailing in Canada and justifies the use of US benchmarks on grounds of subsidization and price suppression. The United States then proceeds to “prove” such subsidization and suppression solely on the basis of the US benchmark. Under this standard, any country enjoying a natural comparative or competitive advantage over the United States in anything would automatically be found to be giving countervailable subsidies.

4.201 The United States is also not correct in citing item (d) of Annex I as support for its proposition that “in the country of provision” means outside the country of provision. Item (d) identifies the elements of a specific practice that is considered in itself to constitute a prohibited export subsidy. It in no sense suggests that world prices can be used as a measure of benefit to domestic producers. Item (d) is framed in a way consistent with other items in Annex I, and it has the same relationship to Article 1 of the SCM Agreement as those other items. For example, the first paragraph of item (k) refers to lending at rates below the government’s cost of borrowing. However, that does not mean that a “financial contribution” analysis must always find a cost to government.

4.202 The United States argues that it can do what the specific text of Article 14(d) does not allow, because forestry resources are for the most part owned by the Crown. It asserts that the only way it can determine “benefit” independently of the alleged distortion is to look beyond the borders of the “country of provision”. The arguments of the United States must not prevail, for two reasons.

4.203 First, a “benefit” analysis seeks to identify whether a government practice has had “trade-distorting effects” but only in the sense of Article 1.1(b). The question is whether as a result of the financial contribution by the government, the recipient has got something it could not otherwise have got on its own in the market. Article 14(d), in turn, sets out the benchmark that can be used to determine the existence of “benefit” when the financial contribution in question is in the form of provision of goods. Neither Article 1 nor Article 14 *presumes* the existence of “distortion” because there is a financial contribution by the government. Furthermore, neither of these provisions permits dismissing benchmarks because of a presumption that these benchmarks might be “distorted” by a financial contribution.

4.204 The US argument is circular: market prices can be “suppressed” – driven below “normal” levels – by dominant government prices only if those government prices are below that “normal” level. However, that is the very point a benefit analysis must demonstrate.

4.205 Article 14(d) requires an investigating authority to use in-country benchmarks to determine and measure an alleged benefit. The finding of government dominance in the alleged supply of goods does not establish that the remuneration it receives is not adequate. And the United States did not make such a finding; it only asserted it. A Member also may not short-circuit the “in-country” requirement of Article 14(d) by a finding regarding the market share of the government. Market share does not equal market dominance; and neither may give rise to a presumption of price suppression.

4.206 Second, nothing in Article 1.1(a)(1) or in the jurisprudence of the WTO mentions alleged “price suppression” as a reason for dispensing with the market benchmarks set out in Article 14(d) in

favour of US benchmarks. The benchmark under Article 1.1(b) is not the highest price the recipient might have liked to get, but rather the price prevailing in the market.

4.207 There are good reasons why Article 14(d) was written the way it was: cross border comparisons make no economic sense. The use of US stumpage prices as a benchmark rests on the wholly unsupported premise that “there should be no difference between the private prices in the country of exportation and world market prices, except for import taxes.” In concluding this, the USDOC implicitly made an incorrect assumption that stumpage is a commodity product with negligible transportation and transactions costs.

4.208 In particular, borders affect prices and “thick border effects” are substantial and notoriously difficult to quantify. The border is highly relevant as political boundaries drive differences in government regulatory regimes, tax regimes, investment regimes, currency, banking and financial systems, business practices, and business climate. Government policies and other factors in different jurisdictions may affect economic conditions, including wage rates, taxes, capital costs, and exchange rates.

4.209 A wide variety of complex factors also affect stumpage rates. These factors include locational characteristics, timber characteristics, measurement systems, operating costs, government regulation, economic conditions, and tenure holders’ obligations and responsibilities. Adjustments for these factors are difficult or even impossible to quantify for the following reasons:

- ? **Locational differences:** The PD assumes that tree-growing and harvesting conditions are “comparable” (an ambiguous term the USDOC never bothered to define) between the Canadian and US comparison areas. The USDOC addressed none of the contrary evidence in the record that significant differences in topography, soil conditions, climate, availability of ground and water transport, and distance to mills and to markets differentiate the Canadian and US market conditions.
- ? **Timber differences:** Differences in timber characteristics such as quality and stand density affect stumpage values but the USDOC made no adjustment for these differences
- ? **Differences in Measurements:** Differences in measurement conventions between the scales used to measure timber volumes in the United States and Canada and in the way in which timber is classified as “sawtimber” make cross-border comparisons impossible.
- ? **Differences in economic conditions:** Economic conditions such as wages, capital costs, taxes, and governmental regulatory policies affect stumpage values, and cross border comparisons must take into account these differences. The only economic condition that the USDOC made an adjustment for was in the PD exchange rates.
- ? **Differences in rights and obligations of timber harvesters:** The bundle of rights and obligations under any harvesting programme affects stumpage values. Canadian tenure holders obtain harvesting rights through tenures effectively of indefinite duration. This differs from the transactions used by the USDOC that consisted of short-term timber harvesting rights in US sales. Similarly, the lump-sum payments to obtain timber harvesting rights in the United States are not equivalent to stumpage charges in Canada levied on a volumetric basis that were previously conferred. With only limited exceptions, the USDOC did not attempt adjustments for these differences.

4.210 While Canada believes that the Panel need not address the issue of adjustments, the United States advised the Panel that the USDOC made adjustments. It further asserted that the USDOC examined the obligations that Canadian tenure holders were legally obligated to assume, and calculated a per unit amount for each category, which it then added to the stumpage fee to arrive at a total “price” for stumpage in Canada. The USDOC did not make or even attempt any adjustments for almost all of these factors. Where it did, it did so incorrectly, including as follows:

- ? the USDOC refused to make adjustments for the costs Canadian timber harvesters incur scaling (measuring) provincial logs, because it claimed that “costs related to scaling are not mandatory and are not borne exclusively by tenure holders....”. Provincial regulations across Canada require tenure holders to scale timber to the provinces’ requirements.
- ? the USDOC’s claim that it calculated “a per-unit amount for each category of Canadian obligations that was above and beyond obligations incurred by parties paying stumpage charges in the United States” is equally without foundation. The USDOC did not examine US costs and did not compare US and Canadian obligations, but simply asserted that, where similar costs existed in the United States, no adjustments were necessary.
- ? In Quebec, the USDOC made an adjustment for primary and secondary roads, but refused to make an adjustment for the costs of haulage roads, rather than measuring the difference between haulage road costs in Quebec and Maine. In Ontario, the USDOC used a different methodology, measuring road costs by their in-kind revenue to the Crown, rather than by the actual costs incurred by harvesters.
- ? In relation to B.C., the USDOC refused to adjust for timber sale costs incurred by B.C. licensees, such as the engineering and layout costs incurred to design and layout the appropriate contours and areas for harvesting. In Washington State lands (the benchmark the USDOC used) these costs are not imposed on the tenure holder.

4.211 One of the most significant errors made by the USDOC was the conversion factor it used to compare the stumpage rates in different jurisdictions. Comparing US and Canadian stumpage rates involves different measures of log volumes. Log volumes in several of the US comparison areas used by the USDOC are measured in thousand board feet (MBF) whereas stumpage in Canada is measured in cubic metres (m<sup>3</sup>) using a metric scale designed to measure the total volume of solid wood in logs..

4.212 The issue of conversion rates arises because cubic log scales attempt to measure the total content of each log while the US log scales attempt to measure only that portion of total log volume that would be contained in the lumber produced from each log. This portion varies with the diameter, taper, and length of the log. Further, that portion will vary with which US log scale is being converted (and the United States has many different scales) the scale’s log measurement conventions, and the scale’s allowances for volume deductions for log defects. To accurately compare stumpage rates, the conversion factor must also account for differences in timber size and the utilization standards of the jurisdictions being compared.

4.213 Taken together this means that there is no such thing as a constant log scale conversion factor. Instead, the conversion factor must be specifically chosen to reflect differences in the log scales, the measurement conventions, the current timber profiles and the utilization standards of the jurisdictions being compared. The USDOC did not do this. Instead it took a “national” average factor and applied it across all provinces. The application of a proper conversion factor would have resulted in a rate substantially less than was calculated by the USDOC in the PD.

4.214 The United States continues to assert that “only the governments of Alberta, Quebec and Ontario provided any information” in response to the USDOC’s request for in-country benchmarks, and that only “Quebec and Ontario actually provided private prices.”

4.215 To the contrary, Alberta answered every US question and provided all documentation requested by the United States. Alberta discussed and provided information on wood volumes. Further, Alberta responded fully to a series of follow up questions regarding Alberta’s “private market stumpage figure.” The USDOC’s questions did not include any requests for further documentation of the stumpage value data.

4.216 Ontario provided the USDOC with a study entitled “Ontario’s Private Timber Market” prior to the PD. The study was conducted by Resource Information Systems Inc. and explained that:

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.

4.217 Quebec submitted to the USDOC the results of the private forest stumpage surveys conducted annually for the three years preceding the period of investigation and explained that these surveys are used to determine stumpage rates on public land under the *Forest Act*. Quebec reminded the USDOC that it had accepted earlier versions of the same private forest surveys in *Lumber III* as a benchmark. Quebec also submitted a lengthy study demonstrating that the private forest in Quebec, is an open, competitive, and functioning market. This study analysed the conditions and circumstances of the private forest and found that it exhibited all the indicia of a competitive market.

4.218 Finally, the United States states that B.C. did not provide private stumpage rates. However, B.C. explained on the record before the PD that most private timber transactions are for logs, and log price data was provided.

4.219 The four primary exporting provinces also provided the USDOC with information demonstrating that they were operating their stumpage systems consistently with market principles. This information established that each of these provinces earned substantial profits from timber harvesting rights.

4.220 Finally, B.C. put on the record extensive economic analysis that established that B.C.'s price setting practices were consistent with market principles. This was because provincial stumpage charges were equal to, or even higher, than the prices that would prevail in a competitive market and prices for logs were no lower and quantities no higher than what would prevail in a competitive market. As well, B.C. provided the USDOC with information on competitive sales of stumpage in B.C. through the Small Business Forest Enterprise Programme sales.

4.221 The USDOC rejected the above evidence on the basis that private stumpage prices in Canada were not valid benchmarks for determining and measuring benefit. It stated in the PD:

"Since the stumpage fees on public lands are the price driver for the stumpage market in those provinces, we conclude that the stumpage fees on private lands are largely derivative of the public land prices and are therefore distorted".

and later,

"Because of the provincial government's control of the market through a system of administratively-set prices and other market distorting measures, there is no market-determined price for stumpage that is independent of the distortion caused by the government's interference in the market".

4.222 The USDOC cited the petition in support of its position. In particular, it relied on a letter of the Quebec Minister of Natural Resources to the President of the Wood Producer's Federation of Quebec (an association of private land owners). The United States now argues that this letter, and other outdated and anecdotal evidence, "[indicates] that private stumpage prices were depressed by the overwhelming majority of government-supplied timber in the market."

4.223 The 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 Quebec's parity system, which

itself is used for setting public land stumpage rates. The relevant portion of the letter relied upon by the USDOC states:

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

4.224 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".

4.225 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 Quebec continues to undertake meaningful dialogue with Quebec private landowners.

4.226 The United States also relies on a 1995 paper for its conclusion that Quebec private stumpage prices are distorted. The 1995 paper cites earlier studies (published between 1972 and 1985) that spoke to the Quebec stumpage regime that was replaced in 1989 as support for the relevant passage used by the United States. In *Lumber III*, the Coalition made the same "distortion" argument regarding Quebec private stumpage prices. The USDOC addressed the argument and the evidence at that time as follows:

"The Coalition contends the entire provincial stumpage system in Québec is not "market-based" because private prices in Québec are distorted and depressed by decades of artificially cheap provincial stumpage, and these prices are used to set public stumpage.

Citing a study published in 1988 of the "20 quality zones" in Québec ..., the Coalition asserts the "cost adjustments" which Québec used to make public and private timber comparable are utterly fanciful and lead to anomalous results. Respondents point out that the Aktrin study cited by the Coalition is 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.'

We agree with Respondents that private prices in Québec collected under Québec's own contracted out surveys, which we examined in depth at verification, are a viable benchmark. The evidence cited by the Coalition is either outdated and irrelevant or anecdotal..."

4.227 In *Lumber III* the USDOC, therefore, rejected evidence that was arguably more current, reliable and relevant than the material it is now relying on to arrive at the opposite conclusion.

(c) Pass-Through

4.228 Evidence on the record at the PD demonstrated that some lumber producers had purchased log inputs at arm's-length from timber harvesters; the alleged recipients of the "stumpage" subsidy. The USDOC failed to consider or even acknowledge that evidence and proceeded to grossly overstate the alleged benefit to lumber producers.

4.229 The United States now attempts to argue that it had, in fact, made a finding of no arm's-length transactions in respect of such downstream producers; and that no such analysis was necessary. This attempt must fail, for two reasons.

4.230 First, the US position is internally illogical and contradictory. If it was not necessary to make a finding, then the USDOC presumably did not make such a finding; and if it did make such a finding, it was because it found that the analysis was necessary. Second, the US assertion is simply untrue. The determination does not contain a "pass-through" analysis. In fact, there is no mention of the issue anywhere in the determination. The USDOC undertook no factual enquiry into the question of pass-through; it simply presumed that all lumber producers benefited from alleged subsidies.

4.231 Given the evidence on the record of arm's-length transactions between downstream producers of lumber and timber harvesters, the United States was under an obligation to establish an *indirect* subsidy in the sense of Article 1.1(a)(1)(iv) for all those transactions. In the absence of any such findings, even recognition of the evidence, the United States must be found in violation of its obligations under the SCM Agreement not to impose countervailing measures without first establishing the existence of a subsidy.

4.232 If the United States had examined the evidence on the record, it would have – indeed, should have – determined that, *first*, there were arm's-length transactions in which the pass-through of a subsidy may not be presumed; and *second*, that no subsidy was in fact passed-through from timber harvesters to arm's-length lumber producers. The United States now concedes that, if there were in fact independent loggers who sell logs in arm's-length transactions, then those sales cannot be countervailed, or at the very least, that a pass-through analysis must be conducted. To counter this, the United States claims that it "preliminarily concluded that the overwhelming majority of Crown timber is provided directly to sawmills."

4.233 The following examples provide a sampling of the evidence on the record on this issue. In B.C., more than 30 per cent of the timber harvested on Crown lands is harvested by entities that do not own sawmills. Similarly, in Ontario "approximately 30 per cent of the softwood timber harvested from Crown land during the USDOC's period of investigation was sold by tenure holders to third parties who subsequently processed this timber into forest products." Further, forest management contracts ("FMCs") in Quebec are typically held by municipalities, communities, or non-profit organizations and rarely held by primary processing mills.

4.234 This evidence was not considered by the USDOC and it made no finding on "pass-through" at the PD. The United States has now proceeded, for the first time, to counter the evidence on the record. It claims that there were no "true" independent loggers and cites evidence regarding the harvesting of timber in each province. The attempt by the United States to justify its failure to analyse evidence on the record must fail, for four reasons.

4.235 First, the facts presented by the United States do not support its conclusions. For example, the United States expressly admits that approximately 17 per cent of B.C. Crown timber is "provided under licenses that are normally reserved to entities not owning timber processing facilities," and that, in Saskatchewan, approximately 14 per cent "of the harvest was provided to smaller licenses... some of whom have their own sawmills." The United States also does not claim that all stumpage benefits are direct benefits, only that an "overwhelming majority" of Crown timber is provided directly to sawmills. Thus, notwithstanding that the United States' belated factual conclusion is incorrect, there was uncontroverted evidence on the record demonstrating arm's-length transactions between independent loggers and lumber.

4.236 Second, contrary to the United States's claim, the presence of domestic processing requirements or other regulations in no way preclude arm's-length transactions. The United States

rests on the existence of an additional element in determining what constitutes an “arm’s-length” transaction: the concept of an absence of “outside control or influence” For there to be an arm’s-length transaction, there is no requirement that the Parties must operate independently of all other external influences.

4.237 Third, the US attempt to dismiss the evidence on the record after the fact only further highlights the USDOC’s unjustifiable failure to undertake an indirect subsidy analysis in the preliminary determination . For example, the United States argues that in B.C., most loggers operate as employees or contractors for tenure holders rather than as independent entities. However, as noted above, the evidence on the record indicates otherwise.

4.238 Finally, the United States is simply incorrect to suggest that no pass-through analysis is necessary with respect to arm’s-length purchasers who produce some merchandise that is subject to the investigation. Unaffiliated remanufacturers purchase lumber in arm’s-length transactions from lumber producers. In those arm’s-length transactions, any alleged benefit to the lumber producers would not be passed through to the remanufacturers.

4.239 The United States insists that no analysis of pass-through was necessary in a country-wide investigation. According to the United States, in such cases, “[t]he precise amount of the benefit received by any specific producer would only be determined in a company-specific review.” An investigation undertaken on a country-wide basis does not relieve the United States of its obligation to establish the existence and amount of a subsidy. The effect of the US’ failure to analyse the pass-through of alleged benefits was to countervail in instances where no benefit was received and to sharply increase the countervailing duty rate.

(d) First Mill

4.240 Although the calculation methodology in the survey makes clear that the data provided were from a survey of “sawmills” (also noted as “first mills”), the discussion of the methodology further intended to explain that the data also included a small portion of remanufactured products that were produced by the sawmills. Thus the statement -- “[b]ecause the MSM does not collect commodity data, it was not possible to exclude ‘remanufacturers’ from its results” -- intended to say that “it was not possible to exclude ‘re-manufactures’ from its results.” Canada explained this clearly in its August 21 and August 27 submissions, prior to the time at which the USDOC issued its Customs instructions implementing the decision.

### **3. The Preliminary Critical Circumstances Determination**

4.241 The United States argues that it is not possible for the United States to apply definitive countervailing duties retroactively, if it were not permitted to suspend liquidation *provisionally* with respect to entries made before the PD that may later be subject to a definitive critical circumstances determination. This position is untenable for three reasons.

4.242 First, the essence of the US argument appears to have become this: the only way, under US law, the United States may exercise its right under Article 20.6 to make a definitive critical circumstances determination, is for it to breach that Article by imposing provisional measures not provided for by the Article, to preserve this right. At issue is not what the United States may or may not do under US law, but rather what are the United States’s obligations under Article 20.6. If the United States is concerned about its ability to preserve retroactive imposition of definitive countervailing duties pursuant to a critical circumstances determination, it should ensure that its laws provide for this.. The United States does not lose its ability to impose duties retroactively by virtue of making a final determination of critical circumstances.

4.243 Second, the United States misinterprets Article 20.3 of the SCM Agreement. Article 20.3 in no way limits, or in fact speaks to, the right of Members under Article 20.6 to impose definitive duties retroactively pursuant to a critical circumstances determination. Rather Article 20.3 addresses the *amount* of countervailing duties that may be collected with respect to provisional measures imposed pursuant to a preliminary countervailing duty determination.

4.244 Third, Canada reiterates its position that the United States' reliance on *Hot Rolled Steel from Japan* is misplaced. Article 10.7 of the AD Agreement has no analogue in the SCM Agreement. Further, Article 20.6 does not permit a *preliminary* critical circumstances finding.

#### **4. US Law On Expedited Reviews And Administrative Reviews**

4.245 On the basis of the United States' replies, Canada understands US to have confirmed that:

- ? it has an unconditional obligation under Article 19.3 of the SCM Agreement to provide expedited reviews to any exporter not actually investigated for reasons other than a refusal to cooperate who requests such a review and in doing so promptly establish an individual countervailing duty rate for that exporter; and
- ? it has the discretion to grant such reviews when such a request is made.

4.246 In the light of these statements, Canada further understands that the United States does not propose to argue that its discretion to grant a review includes the discretion to *reject* such a review. Any such argument would directly contradict the US acceptance of its obligation under Article 19.3.

4.247 Canada is not convinced that US law provides the United States with the discretion to meet its obligations under Article 19.3. Nevertheless, its statements to the Panel represent declarations by the United States of both its understanding of its obligations under the WTO Agreement and also the operation of its laws. Therefore, Canada requests that the Panel find that the United States:

- ? has failed to fully implement its obligation under Article 19.3 to provide for expedited reviews in case of specific requests to do so in country-wide cases;
- ? now asserts that it has the lawful "discretion" to conduct such reviews despite the absence of specific statutory or regulatory provisions;
- ? may not exercise its "discretion" to *deny* any request for an expedited review; and
- ? must promptly grant all such requests made in *Lumber IV*, and in any other investigation.

4.248 It is critical that the USDOC give exporters subject to the country-wide countervailing duty rate in *Lumber IV* expedited reviews "promptly," as Article 19.3 requires. Within a few days, these exporters will be required to pay cash deposits at a country-wide CVD rate of 18.8 per cent. Moreover, expedited reviews provided months or years from now cannot, by definition, constitute the "expedited" reviews that Article 19.3 requires.

4.249 With respect to administrative reviews, the United States's responses effectively concede that Canada's understanding that US law prohibits granting exporters individual rates in country-wide cases is correct. In paragraph 67 of its answers, for example, the United States confirms that Section 351.213(b) of the Regulations does not provide for individual reviews in country-wide cases.

4.250 By relying on this section of the regulations, the United States asserts that its obligations with respect to administrative reviews are not to determine individual rates so as to ensure that individual companies are not paying more than the extent of the subsidy they actually receive. Rather, the United States argues that it is required to provide for individual rates only if such a rate turns out to be zero. This interpretation turns Articles 19.3 and 21.2 on their head. If adopted, the US interpretation

would result in these provisions being read in a manner that would reduce the scope of their application far beyond that intended by drafters of the SCM Agreement, something a treaty interpreter must not do.

4.251 Furthermore, if the Panel does not find that the United States must conduct individual administrative reviews in country-wide cases, any relief granted regarding expedited reviews is virtually moot. Exporters and producers would obtain individual cash deposit rates that would be in effect only until completion of the first administrative review, given that the regulations mandate that a single country-wide rate calculated in an administrative review supersedes any individual rate previously determined.

F. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

4.252 In its second written submission, the United States made the following arguments.

**1. Introduction**

4.253 Over the course of this proceeding, the issues have been focused and the facts clarified. If there was ever a doubt, the United States has now demonstrated that the Canadian provincial governments provide timber to lumber producers – that is a financial contribution under the WTO *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).

4.254 The United States and the European Communities (“EC”) also share the view that, in appropriate circumstances, the benefit from the government’s provision of a good may be measured by comparison to commercially available world market prices, consistent with Article 14(d) of the SCM Agreement. Even Canada agrees that the use of import prices may be appropriate in certain circumstances. Therefore Article 14(d) does not prohibit the use of world market prices in appropriate circumstances.

4.255 There has, however, been much debate over whether the USDOC’s recourse to such prices in this case was appropriate. In the end, as discussed below, the evidence demonstrates that the USDOC’s use of US stumpage prices commercially available to Canadian lumber producers was entirely consistent with the SCM Agreement.

4.256 The United States has also amply rebutted Canada’s claim that the USDOC inflated the amount of the subsidy benefit by failing to take into account so-called “independent loggers.” The USDOC’s preliminary determination that the Canadian provincial stumpage systems provide a subsidy to lumber producers was therefore entirely consistent with US obligations under the SCM Agreement.

4.257 Thus, we come full circle to where we began. “No Member should cause, through the use of any subsidy . . . , adverse effects to the interests of other Members, i.e. . . . injury to the domestic industry of another Member.”<sup>13</sup> When one Member causes injury to the domestic industry of another Member through the use of *any* “specific” subsidy, the injured Member has the right to take countervailing measures. The US right to impose provisional measures to counteract the injurious effects of billions of dollars of imports of subsidized Canadian lumber should therefore not be denied.

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<sup>13</sup> Article 5, SCM Agreement.

## 2. Argument

- (a) The USDOC's Preliminary Determination that the Canadian Provincial Governments Provide a Good to Lumber Producers Is Consistent with Article 1.1(a)(1)(iii) of the SCM Agreement

4.258 It should be beyond dispute that the provincial governments are providing a good – timber – to lumber producers, within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. This conclusion is inescapable under any definition of “good” in any language. It should also be beyond dispute that when a government gives a company the right to take a good, whether it is the right to take widgets from a government warehouse or timber from government land, the government is “providing” that good within the meaning of Article 1.1(a)(1)(iii). The Canadian provincial governments give tenure holders the right to take timber off Crown land and, thus, give them the timber itself. The only logical conclusion is that, in doing so, the provincial governments are providing a good within the meaning of Article 1.1(a)(1)(iii).

4.259 Canada's attempts to obfuscate this simple fact rely on logically flawed arguments, and ignore the basic principles of treaty interpretation reflected in Article 31 of the *Vienna Convention on the Law of Treaties*. For example, Canada asks the Panel to infer from the use of the phrase “imported goods” in Article 3.1(b) of the SCM Agreement and the word “products” in Parts III and V of the SCM Agreement, that “goods” can only mean traded goods that fall within the GATT 1994 Article II schedules. The fact that “products” are goods and “imported goods” are goods does not, however, logically give rise to the inference that nothing else can come within the meaning of “goods.”

4.260 To sustain its strained interpretation, Canada simply ignores the most relevant aspect of the ordinary definition of “goods” in the source it relies upon, which is the inclusion of “growing crops, and other identified things to be severed from real property.” Moreover, Canada's attempt to narrow the ordinary meaning of “goods” would render superfluous the only express limitation in the text itself, i.e., the exclusion for “general infrastructure.” If “goods” were intended to be read as narrowly as Canada suggests, it could never encompass *any* infrastructure (e.g., a building, road, etc.), let alone general infrastructure. “Goods” must include some infrastructure, otherwise the specific exclusion in Article 1.1(a)(1)(iii) is superfluous. Thus, the very existence of that express limitation demonstrates that the Members intended “goods” to be read in accordance with its ordinary meaning and therefore to include things other than those listed in the GATT 1994 tariff schedule.

4.261 In addition, Canada's arguments are premised on the notion that the only thing at issue here is an intangible “right” granted by the provincial governments, which Canada then proceeds to totally divorce, analytically, from the object of the right granted. Under Canada's theory, form is everything: what something is called (e.g., an “exploitation right”) is more important than what it actually is. In Canada's truncated analysis, if the government has granted a right, the inquiry stops, regardless of what the “right” entitles the holder of the right to do. By ignoring substance, Canada concludes that, while granting a right may constitute a financial contribution, it can never constitute the provision of a good. However, as the *Export Restraints* panel stated:

We believe, in particular, that the appropriate way to conceive of a “financial contribution” is purely as a transfer of economic resources by a government to private entities in the market, without regard to the *terms* of the transfer.

4.262 Thus, it is in fact the “right,” i.e., the terms under which the provinces transfer timber to lumber producers, that is irrelevant. To determine whether there is a financial contribution, the treaty interpreter should look at the reality of what actually occurs. In the case of provincial tenures, what actually occurs is that the provincial governments grant tenure holders the right “to take” a tangible good – timber – off the land. The right “to take” is, in fact, the mechanism (or terms) by which the

government “provides” the timber, i.e., places the timber at the disposal of the lumber producer. The provincial governments are therefore providing goods within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

4.263 Canada concedes that offering steel producers the opportunity to load and haul (i.e., “to take”) iron ore from a government stockpile would constitute the provision of goods. In reality, there is no meaningful difference between giving lumber producers the right to take trees off Crown land and giving steel producers the right to take iron ore from a government stockpile. While Canada may disagree, the United States is confident that the steel producers and the lumber producers would not.

4.264 The reality of the provincial tenure systems is readily apparent. The evidence demonstrates that companies obtain tenures for the sole purpose of obtaining timber, not to manage the forest. Tenure holders acquire nothing under the tenure but timber, and pay stumpage fees only on the amount of timber actually harvested. These facts leave no doubt that through the tenure systems the provincial governments are “providing” a “good” – timber.

(b) The USDOC Properly Measured the Benefit from Provincial Stumpage Systems Under Article 14(d) of the SCM Agreement

4.265 Canada has made several claims with respect to the USDOC’s measurement of the benefit from provincial stumpage systems. In this section, the United States will address Canada’s claims concerning the USDOC’s selection of a market benchmark for stumpage.

(i) *The Use of Commercially Available World Market Prices Is, in Appropriate Circumstances, Consistent with Article 14(d) of the SCM Agreement*

4.266 As discussed in the US prior submissions, Article 14 of the SCM Agreement sets forth guidelines for determining the benefit conferred by a financial contribution. Prior panel and Appellate Body reports have defined a benefit as some form of advantage that would not otherwise be available in the marketplace, absent the financial contribution. The guidelines in Article 14(d) should therefore be interpreted to achieve an appropriate comparison of the financial contribution to the marketplace, i.e., a comparison that would identify the artificial advantage resulting from the government’s financial contribution.

4.267 Article 14 does not purport to address every conceivable scenario in which a benefit must be determined. For instance, some types of financial contributions are not addressed at all in Article 14 (e.g., grants and debt forgiveness). Thus, authorities have the discretion to develop appropriate methodologies. It is the view of the United States that an appropriate methodology is one that is consistent with the guidelines in Article 14, considered in light of the object and purpose of Article 14 to compare the financial contribution to what would be available to the recipient in the market absent the financial contribution.

4.268 With respect to the provision of a good, Article 14(d) of the SCM Agreement states that the comparison should be made “in relation to prevailing market conditions for the good [] in question in the country of provision . . .”. There is no dispute that the basis for the comparison described in Article 14(d) is the prevailing market conditions in the country under investigation. What constitutes prevailing market conditions is also described in Article 14(d), i.e., “price, quality, availability, marketability, transportation and other conditions of purchase or sale.” Where the United States and Canada disagree is in defining what constitutes the universe of permissible market benchmarks that could be used to measure the adequacy of remuneration “in relation to prevailing market conditions” in the country under investigation, consistent with Article 14(d).

4.269 As the EC stated: “[t]he expression ‘market conditions in the country of provision’ in Article 14(d) of the SCM Agreement is sufficiently broad to allow the consideration of world market prices.” In particular, as noted above, the concept of commercial “availability” is expressly incorporated in Article 14(d). The use of “commercially available” world market prices is also expressly sanctioned in item (d) of the Illustrative List of Export Subsidies, and has been endorsed by the Appellate Body. Prevailing market conditions in the country of provision may therefore encompass prices commercially available on the world market to purchasers in the country under investigation. Commercially available world market prices can therefore be used as a market benchmark, in appropriate circumstances, consistent with Article 14(d).

4.270 As the EC points out, the issue therefore is not whether Article 14(d) permits the use of commercially available world market prices (such as US stumpage prices) *per se*, but rather whether it was appropriate to do so in this case. The facts discussed below demonstrate that the USDOC’s use of commercially available US stumpage prices was appropriate in this case and therefore consistent with Article 14(d) of the SCM Agreement.

(ii) *There Is No Evidence of a Market Benchmark in Canada*

4.271 When considering the entire universe of potential market benchmarks, the United States agrees that prices within the country under investigation should be used whenever possible. Use of prices within the country under investigation is, however, not always possible. The obvious example, which the EC noted, is the case of a government monopoly for the good in question. In such a case there is no “market” benchmark price. That example is no different in principle from the circumstances of this case. The provincial governments control 85 to 95 per cent of the market for timber. There is extremely limited information on non-government prices and the evidence indicates that non-government prices are suppressed by government prices. There is therefore no “market” benchmark price in Canada that could measure the benefit. That conclusion is not based on theory, it is based on the record evidence.

4.272 First, only three provinces provided any private price data in response to the USDOC’s questionnaire. Canada’s claim that there was “extensive evidence” related to private markets in those provinces is simply not supported by the record. The limited data provided by the provinces was inadequate for purposes of establishing a market benchmark. For example, as the United States explained in its response to the Panel’s questions, Alberta stated that it does not have any data on private timber used in sawmills. The so-called “extensive” data provided by Alberta was a two-page excerpt from a KPMG survey, which contained a single estimated stumpage value derived from some price data for log sales. Moreover, Alberta acknowledged that the estimated value was based on information that did not distinguish between private and *Crown* timber.

4.273 Ontario and Quebec submitted market surveys. However, the Ontario survey was flawed in several respects (e.g., it provided no information on quality or grade). Moreover, there was substantial evidence on the record, including statements by an official in Quebec’s Ministry of Natural Resources, that government prices suppressed private prices in the provinces. In fact, one Canadian group said that “downward pressure on the price of private wood is built into the system.” The influence of a dominant owner has been recognized in other markets as well. A study of stumpage trends in South Australia notes:

Of the total [productive forest land] . . . [a]bout 70 per cent of the resource is publicly owned. The percentage of the publicly owned resource was even higher in the past. Hence it is likely that stumpage for public pine logs has held a dominating influence on stumpage for similar logs sold by private growers in [South Australia].

4.274 The remainder of the evidence that Canada cites consists of evidence that does not actually pertain to private prices. That evidence instead largely pertains to whether the provinces recover their costs and earn a profit when they sell timber. The government's profitability is, however, not the issue. It is now well settled that the cost to the government is irrelevant in measuring benefit. Moreover, the purported fact that the provincial governments made a profit does not establish that they sold Crown timber at market prices. The information provided therefore does not address the relevant inquiry, i.e., whether provincial prices for timber are more advantageous than those that would have been available to lumber producers on the market absent the provincial governments' financial contribution.

4.275 As the above analysis of the record demonstrates, there was insufficient evidence of "market" prices in Canada to form a benchmark. As the EC asked, "which other benchmark should be used in [such a case]?" The United States agrees with the EC that, in the absence of market prices in Canada, the use of other prices commercially available to Canadian lumber producers on world markets is a reasonable alternative. As demonstrated below, stumpage prices for comparable timber in the United States are commercially available to lumber producers in Canada.

(iii) *US Stumpage Prices Are Commercially Available to Canadian Lumber Producers*

4.276 Canada agrees that some prices commercially available on the world market, specifically import prices, can provide a benchmark consistent with Article 14(d). Canada argues, however, that it is impossible for there to be import prices in this case. Canada does not claim that Canadian producers cannot or do not harvest timber in the United States, or that US timber cannot be imported into Canada. Canada simply reverts to its argument that the provincial governments are providing a "right," not timber, and that a "right" cannot be imported. Once again, in Canada's view, form is all that matters. As the United States has amply demonstrated above, the provincial governments are not merely providing rights, they are providing timber. US timber can be, and in fact is, imported into Canada.

4.277 More importantly, Canadian lumber producers can and do purchase US timber on the stump for harvesting and import into Canada. The SCM Agreement states that "commercially available means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations." Canadian lumber producers have virtually unrestricted access to US stumpage for import into Canada. US stumpage is therefore commercially available to Canadian lumber producers. Because US stumpage prices are commercially available to Canadian lumber producers, they fall within the universe of benchmarks that can be considered for purposes of measuring the benefit from provincial stumpage, consistent with Article 14(d) of the SCM Agreement.

4.278 In fact, based on commercial considerations, US stumpage prices are the most reasonable world market prices to use because the terrain, topography and species mix for US timber in border states are most comparable to those in Canada, and because the record shows that Canadian companies do in fact purchase US timber. In fact, virtually all of Canada's timber imports come from the United States.

4.279 Furthermore, it is reasonable to conclude that US stumpage prices represent appropriate market-based benchmark prices to measure whether provincial prices confer an artificial advantage. The observed price difference for Canadian and US stumpage does not reflect differences in inherent market characteristics in Canada versus the United States. Rather, it reflects the fact that the Canadian system precludes price arbitrage for timber. There is a fully integrated North American *lumber* market that coexists with a largely segregated North American *timber* market. Canada exports over half of its total lumber production to the United States, but only three per cent of its timber production. The United States exports little lumber to Canada, but exports nearly six times as much

timber. The low volume of timber trade between the two countries is the result of domestic processing requirements in Canada that limit the flow of Canadian logs southward, and the advantageous stumpage prices in Canada inhibit the flow of US logs northward. The segregated timber market in North America allows for virtually no price arbitrage in timber markets across the border.

4.280 The unusual nature of the situation in the North American market is evident when compared to the substantial amounts of lumber and timber exports from other countries with major timber and lumber industries. More importantly, the data indicates that US stumpage prices are comparable to prices in Australia, New Zealand, Finland and Chile.

4.281 The USDOC's use of prices for comparable US timber that is commercially available to lumber producers in Canada was therefore appropriate in this case. Moreover, in establishing the market benchmark, the USDOC took into account other market conditions prevailing in Canada for timber, such as species, quality and tenure obligations. The market benchmark that the USDOC used in the preliminary determination was therefore consistent with Article 14(d).

(c) The USDOC Properly Calculated the Total Amount of the Subsidy to Producers of the Subject Merchandise

4.282 Canada alleges that the USDOC improperly assumed that the benefit from a financial contribution to one entity accrued to another entity. These allegations pertain to three distinct situations: (1) logs harvested by one sawmill and then sold in arm's-length transactions to other sawmills; (2) lumber sold in arm's-length transactions to companies that produce remanufactured lumber products; and (3) timber harvested by independent loggers who sell at arm's-length to lumber mills. In each case, the allegations do not withstand close scrutiny.

4.283 In the first two situations, all of the alleged recipients of the financial contribution and the benefit are producers of the subject merchandise. As discussed previously, in an aggregate case no further analysis of these situations is necessary to perform the aggregate calculation. The numerator (total benefit to the subject merchandise) is properly matched to the denominator (total sales of the subject merchandise). The precise amount of the benefit received by a specific producer would only be determined in a company-specific review.

4.284 Canada's claim with respect to the third situation rests on the assertion that the provincial governments provide a significant volume of Crown timber to independent loggers who then sell the timber at arm's-length to lumber mills. In response to the Panel's questions on this issue, the parties have provided record evidence concerning the operation of provincial tenures, and, in particular, the restrictions that the provinces impose on who may acquire a tenure and what the tenure holder may do with the harvested timber. While it is not the Panel's task to conduct a *de novo* review of those facts, a careful analysis of this evidence demonstrates that it does not support Canada's claim that lumber producers acquire a significant volume of timber from independent loggers.

4.285 First, as the United States has previously demonstrated, the potential volume of timber provided by so-called "independent" loggers is small. Canada's "evidence" to the contrary relies in large part on confusing or irrelevant statistical data. For example, Canada claims that "large numbers of harvesters" are independent loggers. The number of harvesters is, however, irrelevant. The issue is not how many independent loggers there are, but rather whether they provide a significant *volume* of Crown timber to lumber producers. Moreover, it is irrelevant if the harvester is "independent" if the mill owns the license (or is tied to the license contractually, as in Ontario).

4.286 The record demonstrates that the vast majority of the Crown softwood sawlog harvest is, in fact, under tenure to sawmills. This fact is obscured by Canada's province-specific data. For

example, instead of estimating the volume of softwood sawlogs harvested by independent loggers in British Columbia, which is the relevant data, Canada estimates the volume of “timber” harvested by companies “not owning sawmills.” “Timber” includes hardwood as well as softwood, and pulpwood as well as sawlogs. Moreover, it is completely irrelevant that some portion of the Crown timber was harvested by a tenure holder owning a pulpmill rather than a sawmill, if that timber was not used to make subject merchandise. The relevant fact is that more than 83 per cent of the British Columbia Crown softwood timber harvest is provided under tenures that require the tenure holder to own a sawmill.

4.287 Canada’s statements with respect to the potential universe of “independent loggers” in Quebec are perhaps the most difficult to understand because they are almost entirely irrelevant. The issue is the percentage of the *Crown* harvest of softwood sawlogs that is provided to lumber mills by independent harvesters. In Quebec, 99 per cent of the Crown harvest is provided under Timber Supply and Forest Management Agreements (“TSFMA”). The Quebec Forest Act states that “[n]o one except a person authorized under Title IV to construct or operate a wood processing plant is qualified to enter into” a TSFMA. The harvest from Federal lands, which is minuscule (less than 1 per cent), and private lands is irrelevant to the benefit calculation, as is the fact that there are 40,000 registered woodlot owners. Given the TSFMA requirements, it is virtually impossible to have a significant percentage of independent loggers harvesting Crown timber in Quebec.

4.288 Similarly, in Saskatchewan, more than 86 per cent of softwood sawlogs were harvested by tenure holders that own sawmills and process their own timber, and in Manitoba, approximately 95 per cent of the softwood sawlogs were provided directly to sawmills. Alberta also stated that “[a]ll forms of commercial tenure own and operate sawmills.”

4.289 Second, to the extent there may be a small portion of Crown timber harvested by entities that do not own processing facilities, transactions between those entities and the lumber mills are not at “arm’s-length.” A truly arm’s-length negotiation is one where neither party is under any outside control or influence, either from the party with whom they are bargaining, or other parties.

4.290 Canada claims that tenure holders are free to sell their logs to unrelated mills. In fact, the record evidence demonstrates the contrary. For example, Quebec indicated that there were essentially no arm’s-length transactions involving Crown timber sold by independent loggers to sawmills. Moreover, the record establishes that all of the provinces generally require that Crown timber be processed in a mill within the province. Each province also imposes other restrictions that impede a harvester’s ability to negotiate freely and that compel the harvester to sell to particular customers. For example, in Ontario, as a condition of the license, tenure holders are required to sign “wood supply agreements,” in which they agree to supply specific quantities of wood to specific mills. The licenses also provide that the Ministry of Natural Resources can direct excess log production to specific mills. In British Columbia, major licensees are required by law to process their logs or an “equivalent volume” of wood in their mills. Similarly, in Alberta, all licenses on the record specify a particular fixed volume that must be processed in a specific mill. Moreover, the evidence shows that the so-called independent loggers often operate as employees or contractors for tenure holders. In addition, Canada’s claim of significant “sales” by independent harvesters includes transactions that are, in fact, “swaps.”

4.291 In light of this evidence, the only reasonable conclusion is that there are no true arm’s-length transactions for Crown timber between independent loggers and lumber mills. There is therefore no basis for Canada’s claim.

(d) The Preliminary Critical Circumstances Finding Is Consistent with the SCM Agreement

4.292 As fully discussed in the US prior submissions, Canada has failed to make a *prima facie* case that the USDOC's preliminary critical circumstances finding was inconsistent with the SCM Agreement. The USDOC's imposition of provisional measures in this case on merchandise entered during the 90-day period prior to the publication of the preliminary determination was in fact fully consistent with the text of Article 20 of the SCM Agreement, as well as with its object and purpose.

4.293 Article 20.1 expressly provides that the prospective application of provisional measures and final duties is "subject to the exceptions set out in this Article." Article 20.6 provides such an exception, stating that a Member may assess final, definitive duties retroactively for a period "not more than 90 days prior to the date of application of provisional measures" if critical circumstances are present. As discussed in the US prior submissions, retroactive provisional measures (including suspension of liquidation and cash deposits or bonds) are essential to enable a Member to avail itself of the special remedy provided under Article 20.6. It is therefore the view of the United States that a Member may impose retroactive provisional measures if there is a reasonable basis to believe or suspect at the time of the preliminary determination that critical circumstances exist.

4.294 With respect to Canada's remaining critical circumstances claims, the United States will, at this time, rely on its prior submissions.

(e) US Laws Governing Reviews Are Consistent with the SCM Agreement

4.295 No reviews have been requested, much less denied, in this case because the United States has not yet imposed definitive countervailing duties. Canada simply claims that the US laws governing such reviews are inconsistent with the SCM Agreement. Under established WTO jurisprudence, however, a Member's law breaches that Member's WTO obligations only if the law *mandates* action that is inconsistent with those obligations. If the law provides discretion to authorities to act in a WTO-consistent matter, the law, as such, does not breach a Member's WTO obligations.

4.296 For the reasons fully discussed in the US prior submissions, the US laws that Canada challenges clearly do not mandate action inconsistent with US WTO obligations. US law instead gives the USDOC broad discretion to conduct reviews in a WTO-consistent manner.

### 3. Conclusion

4.297 For the reasons set forth above, the United States requests that the Panel reject Canada's claims in their entirety.<sup>14</sup>

#### G. SECOND ORAL STATEMENT OF CANADA

4.298 In its second oral statement, Canada made the following arguments.

##### 1. Introduction

4.299 We are here because the United States, in violation of its WTO obligations, is imposing duties on Canadian softwood industries that are crippling our forest industries. This dispute is not just about trees or logs or lumber. It is, rather, about how the WTO Agreement applies to a Member's

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<sup>14</sup> Canada asserts violations of Articles 10 and 32.1 of the SCM Agreement, which are dependent on the more specific claims addressed herein. The dependent claims are therefore also without merit for the reasons stated above.

management of its natural resources. The United States claims a right to countervail the products of Members who manage their natural resources in a way that differs from the way chosen by the United States. Ignoring the SCM Agreement, the United States simply presumes that the difference between Canadian stumpage fees and US prices is a countervailing subsidy. In effect the US view is that where a government owns natural resources, it may exploit those resources only by auctioning them off in the US style. Of course this is not the way Canada manages its timber resources. And it is not the way the United States manages its natural resources, such as fisheries and mineral rights.

4.300 The US approach is also neither logical nor consistent with economic theory. For example, it is not at all evident that auctioning off stumpage in Canada would result in higher returns than those prevailing under Canada's current systems. However, where there is an abundance of resources and a small market, one would expect prices to be lower. And, the owner of those resources might well command a higher return by setting rates administratively.

4.301 The United States has imposed provisional countervailing measures against practices that are not subsidies within the meaning of the SCM Agreement. The United States has, also, impermissibly imposed retroactive provisional measures pursuant to a "preliminary" critical circumstances determination. Finally, in countrywide cases, the United States does not provide for expedited reviews as required by Article 19.3, and outright prohibits company-specific administrative reviews contrary to Article 21.2 of the SCM Agreement.

## 2. Subsidy

### (a) Financial Contribution

4.302 The distinction between the right to harvest trees, standing timber, and logs, and the distinction between timber harvesters and lumber producers, are at the heart of this dispute. They are as follows:

- ? **the right to harvest trees** is a form of property interest. The owner of this right may go on someone's land and cut down the trees on that land;
- ? **standing timber** refers to trees in the forest, that are incapable of being traded; and
- ? **logs** are what is produced when trees are cut down and prepared for transportation;
- ? Sawmills, in turn, process logs into lumber, which is the subject merchandise.

The second set of distinctions relate to the different players.

- ? **provinces** own most forests in Canada;
- ? **timber harvesters** enter into agreements with provinces to manage these forestry resources. Under these agreements, the tenure holder has the right to harvest trees, but also incurs obligations (including reforestation, and the like), regardless of the quantity of trees harvested. The tenure holder may or may not own a mill; or if it has a mill, it may not be able to process all of the logs that result from its own harvest of standing timber. So the tenure holder could sell logs, process logs itself, or export them; and
- ? **lumber producers** are the sawmill operators that process logs into lumber. They are also secondary manufacturers that buy lumber from sawmills for further processing.

4.303 The United States assertion that provinces provide "timber" to lumber producers is, therefore, incorrect as a matter of fact, and its assertion that provinces "provide goods" when they enter into tenure agreements is incorrect as a matter of law.

4.304 The ordinary meaning of "provide" is to "supply", in the sense of to "give".

4.305 The United States proposes an alternative meaning, to “make available”, in the sense of to “make it possible to obtain”. The verb “provide”, however, does not have such a wide scope:

- ? in subparagraph (iii), the converse of “provide” is “purchase”. Properly construed, therefore, “provide” must mean “give” or “sell”; and
- ? elsewhere in the WTO Agreement, the verb “provide” is used when the drafters intended to denote “give”.

4.306 If the negotiators had wanted to say, “make it possible to obtain”, they would have said so in Article 1. In the light of its context, “provide” means to “give” or to “sell”.

4.307 The term “goods” has the same meaning in Article 1 as elsewhere in the SCM Agreement and the WTO Agreement. “Goods” in Article 1 are the “goods” to which the modifier “imported” is applicable in Article 3; they are the same “goods” that are the subject of Article II of GATT 1994 and the Customs Valuation Agreement. “Goods” are tradable items – products – that are capable of bearing a tariff, and exclude real property, intellectual property and other property interests.

4.308 Moreover, the terms “goods” and “products” are used interchangeably in the WTO Agreement. Article II of GATT 1994 refers to “products” in paragraph 1(b) and “goods” in paragraph 1(c) – and both refer to items that may be subject to tariff bindings. The term “goods” is translated into “*biens*” and “*bienes*” in Article 1 of the French and Spanish versions of the SCM Agreement, and “*produits*” and “*productos*” in Article 3. The term “goods” is also translated into “*marchandises*” and “*mercancías*” in the French and Spanish versions of the Customs Valuation Agreement. “Goods”, “*biens*”, “*bienes*”, “*produits*”, “*productos*”, “*marchandises*”, “*mercancías*” – all mean the same thing: tradable items, or *products* in the sense of Article II of GATT 1994.

4.309 The United States persists in its argument that providing the right to produce goods is in effect the same as providing goods. In this respect, the United States is rehashing its failed “functional equivalence” arguments from *United States – Export Restraints*. Subparagraph (iii) does not refer to the *effects* of a government action, but the action itself. This government action is entering into a tenure agreement, one element of which is a right to harvest trees.

4.310 The question before you is the scope of the phrase “provides goods” and not Article 1.1(a) of the SCM Agreement more generally. The United States tries to justify its stretching of “provides goods” by saying that Canada’s objections elevate form over substance. On the contrary, it is evident that the drafters of the SCM Agreement made conscious and careful choices in defining “financial contribution” under the SCM Agreement, and we ask the Panel to give effect to those choices.

(b) Benefit

4.311 The Parties agree: that there is a “benefit” where “the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market”; where the alleged financial contribution is a government provision of goods, Article 14(d) of the SCM Agreement is the relevant guideline; and that Article 14(d) requires an investigating authority to determine adequacy of remuneration in relation to prevailing market conditions in the country of provision of the goods. The United States now concedes that “[t]here is no dispute that the basis for the comparison described in Article 14(d) is the prevailing market conditions in the country under investigation.”

4.312 This is a significant departure from the USDOC’s position in the preliminary determination (PD) and from the position the United States took earlier in this case. In the PD, the USDOC found that in-country benchmarks were not required. In its First Written Submission, the United States argued that Article 14(d) “requires [an] authority to determine the adequacy of remuneration with

reference to market prices for transactions that, while not necessarily between buyers and sellers within the country of provision, are (or could be adjusted to be) comparable to the government transactions ...”.

4.313 The United States now argues that out-of-country benchmarks are “commercially available” in Canada. For the United States, it is no longer the case that “in” means “out” – rather, it is that “out” really means “in”: that is to say the prevailing market conditions in the United States are somehow “available” in Canada, the appropriate benchmarks *in* Canada are those to be found in the United States

4.314 Moreover, Article 14(d) does not refer to “commercial” availability of the goods in question, much less “prices commercially available” for those goods. Rather, “availability”, read in context, refers to whether the *goods* are available in the country of provision.

4.315 The United States argues that the US stumpage prices from selected lands it used as benchmarks in this case are “world market prices”. This is untenable. Goods that are capable of having a “world market price” are essentially homogeneous commodities or ones whose characteristics can be defined so that they are interchangeable. Standing timber is not such a commodity. This is why the USDOC used six different US benchmarks

4.316 The United States also argues that US stumpage prices are comparable to stumpage prices in other parts of the world and are, therefore, “appropriate” and consistent with Article 14(d). It asserts that support for its position can be found in item (d) of the Illustrative List of Export Subsidies and case law - *Canada – Dairy*.

4.317 With respect to item (d), Canada has explained that its only possible relevance to this dispute is that it equates “goods” with “products”. Further, *Canada – Dairy* is not relevant because the phrase “commercial availability” relates only to item (d) and there was no decision concerning this provision, as the Panel’s findings were rendered moot and of no legal effect by the Appellate Body (AB). If anything, the significance of this decision is limited to the conclusion of the AB that world market prices did not provide a valid basis for determining whether there were “payments” under Article 9.1(c) of the Agreement on Agriculture. The AB found that a comparison between commercial export milk prices and world market prices gave no indication as to whether Canadian export production had been given an advantage.

4.318 Not only are US prices not “world market prices”, they are also not “available” in Canada. According to the United States, US stumpage is commercially available “in” Canada for two reasons: (1) because Canadian producers can purchase US timber on the stump for harvesting, and (2) because logs produced from timber harvested in the United States can be exported to Canada. Neither reason is valid.

4.319 First, the fact that a Canadian can bid on timber in the United States does not make that standing timber available in Canada. Second, that some Canadian firms can use logs produced from US timber does not mean that they can use US timber harvesting rights in Canada. Rights to harvest timber in the United States are available only in the United States

4.320 Moreover, US law prohibits the export of logs from the public lands in the western US that the USDOC used as benchmarks for B.C. (Washington), Alberta (Montana) and Saskatchewan (Montana). Thus, the United States has used as benchmarks, stumpage from public lands where the export of logs is prohibited.

4.321 At the time of the PD the USDOC had before it ample evidence of benchmarks in Canada that it chose to ignore. The United States initially asserted that the in-country benchmarks were unusable

because they were artificially suppressed by government involvement in the marketplace. However, the rejection of an in-country benchmark as “distorted” because of government involvement is not supported by the SCM agreement.

4.322 The United States now argues that the evidence was inadequate to establish a market benchmark. Yet the USDOC did no analysis of this evidence. Alberta, Ontario and Quebec all provided evidence on private sales of timber harvesting rights. B.C. provided private log price data. Alberta and B.C. also provided information on competitive tenures.

4.323 In addition, these four provinces, which represent 96 per cent of softwood lumber exports from Canada provided the USDOC with information demonstrating that they were operating their stumpage systems consistently with market principles. The United States attempts to dismiss this evidence on the basis that “cost to government” is irrelevant in determining benefit. But the point has nothing to do with “cost to government”. Rather, the substantial profits show that the provinces are acting consistently with market behaviour.

4.324 Moreover, the US position cannot be reconciled with the USDOC’s own regulations, which provide for analysing consistency with market principles as a way to evaluate adequacy of remuneration. The USDOC has consistently determined adequacy of remuneration using this benchmark where it has found that the government played a dominant role in the market. Finally, the USDOC ignored evidence that there is no benefit to lumber producers when the situation in Canada is compared with results that would be produced in a competitive market. Regardless of what the United States now says respecting the adequacy of this evidence, the USDOC had an obligation to analyse it. It did not do so.

(c) Pass-through

4.325 The United States has not demonstrated that a subsidy exists in this case. Rather, it has improperly *presumed* the existence of a “subsidy” to producers of subject merchandise that buy their inputs at arm’s-length.

4.326 The United States has admitted that *at least* 17 per cent of Crown timber harvest is done by independent harvesters in B.C., 14 per cent in Saskatchewan, and 5 per cent in Manitoba, and that a pass-through analysis is required at least in respect of companies that do not produce subject merchandise. Prior to the PD, the record evidence indicated even higher percentages. The requirement for a pass-through analysis, however, goes beyond this and includes instances of arm’s-length transactions for inputs (logs or lumber) into the production of the subject merchandise. In all these cases, the United States has failed to demonstrate the existence of a subsidy because it has not undertaken the required pass-through analysis.

4.327 The United States now attempts to justify this violation by arguing that it does not need to undertake a pass-through analysis in countrywide cases. This argument is not relevant because it ignores the required elements of Article 1. More specifically, the United States has failed to establish that governments have made a financial contribution or that the financial contribution confers a benefit on a recipient. In arm’s length transactions the profit maximizing recipient of an alleged subsidy must be presumed to have retained subsidies it received. Under the SCM Agreement, there are *no* exceptions to the obligation to establish the existence of a subsidy.

(d) First mill

4.328 The USDOC calculated the subsidy rate on a first-mill basis, but applied it on an entered-value basis, with the effect of significantly increasing the countervailing measures applied. There is no dispute that the data used was first mill data. Therefore, there should be no dispute that the United

States violated its obligations. The United States has attempted to excuse its violation, claiming that the USDOC did not know that the data it used was first mill data. This claim is not credible. The United States has acknowledged that the USDOC received clarification of the information provided to it before it made its decision to impose measures on a final mill basis.

### **3. Critical circumstances**

4.329 The United States argues that the term “definitive duties” in Article 20.6 also refers to preliminary measures, because, first, Article 20.1 refers to both definitive duties and preliminary measures. And second, Article 20.3 prohibits the collection of preliminary duties in an amount greater than definitive duties. The United States then argues that it must be permitted to breach Article 20.6 in order to be able, under its domestic law, to exercise the right to collect retroactive duties.

4.330 Article 20.1 prohibits retroactive application of preliminary measures and countervailing duties subject to exceptions listed in the rest of the Article. Each of the exceptions is applicable only to the extent relevant; Article 20.6 refers to definitive duties and not preliminary measures; it does not, therefore, create an exception in respect of preliminary measures.

### **4. Expedited review and Administrative review**

4.331 The USDOC has posted a notice indicating that it will accept requests for expedited reviews in the *Lumber IV* case. The notice contains no information on timelines or procedures for these reviews or whether the reviews will actually be conducted for all requesting companies.

4.332 In the light of these considerations, and to ensure that there is no doubt as to the substance of the obligations under Article 19.3, Canada requests the following findings:

- ? First, that the United States is required under Article 19.3 to grant expedited reviews upon request and to establish an individual countervailing duty rate;
- ? Second, as the United States has repeatedly stated, nothing in US law or regulations prohibits the United States from granting expedited reviews in all instances upon request and establishing individual countervailing duty rates for requesting exporters; and
- ? Third, that the United States has no discretion to refuse to grant expedited reviews upon request or to establish an individual countervailing duty rate for the requesting exporter.

4.333 Accordingly, Canada asks that the Panel recommend that the United States may conform to its obligations under Article 19.3 only where it grants expedited reviews upon request and establishes individual countervailing duty rates for requesting exporters in countrywide cases at least in accordance with the timetable and procedures applicable to other expedited review requests.

4.334 The United States continues to deny its obligations under Article 21.2 of the SCM Agreement and maintains that it has provided for some form of administrative review in countrywide cases. US arguments in respect of Article 21.2 ignore two critical points.

4.335 First, the first sentence of Article 21.2 refers to “the duty”. This can only mean the “countervailing duty” mentioned in Article 21.1. Accordingly, Article 21.2 should be read in the light of the preceding paragraph, which reads, “A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.” This means that the review must also consider the level of the countervailing duties. Second, there are *three* elements in Article 21.2. Article 21.2 requires that a Member review, “the need for the continued imposition of the duty ... upon request by any interested party which submits positive information substantiating the need for a review”. It gives a right to an interested party to request such reviews in respect of

“whether the continued imposition of the duty is necessary to offset subsidization” and whether injury would continue if the duty were removed *or varied*. And it requires that the authorities terminate the duty if it is no longer warranted.

4.336 Read together, in the light of Article 21.1, the obligation becomes clear: the United States must provide for, and conduct, administrative reviews upon request to determine not only whether countervailing duties are necessary at all, but also to establish company-specific rates.

4.337 The United States is in breach of Article 21.2 because it expressly denies administrative reviews in countrywide cases. The United States persists in arguing that it has the “discretion” to grant administrative reviews in certain limited circumstances and subject to certain qualifications. This is not enough. The “discretion” in question is to grant an administrative review only “where practicable” and then only when there is a request for a “zero rate”.

4.338 Finally, if individual administrative reviews are not necessary in aggregate cases, any relief relating to expedited reviews becomes moot. This is because the aggregate rate determined at the first administrative review supersedes all other previously determined rates.

#### H. SECOND ORAL STATEMENT OF THE UNITED STATES

4.339 In its second oral statement, the United States made the following arguments.

##### 1. Financial Contribution

4.340 The provincial governments identify specific stands of timber and enter into tenure agreements that allow companies to harvest that timber, that is, to take the timber off the land, in exchange for a fee based on the volume of timber harvested. The provincial governments are therefore providing a good within the meaning of Article 1.1(a)(1)(iii) of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).

4.341 Canada’s attempts to argue to the contrary defy general principles of treaty interpretation, the rules of logic and common sense. The essence of Canada’s argument is that when the provincial governments grant lumber producers the right to take timber from government land, the producers actually provide *themselves* with a good when they cut down a tree. To support this rather extraordinary proposition, Canada ignores the ordinary meaning of “goods,” which includes things to be severed from the land, such as timber. In Canada’s view, a government can identify a whole forest of trees and give a specific lumber company the right to take those trees for free. The violence such a theory does to the subsidy disciplines is obvious.

4.342 Canada’s strained interpretation is not supported by the text of the SCM Agreement. Based on the ordinary meaning of the text, when the provincial governments grant companies the right to take an identified good – timber – from government land, the government makes a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the Agreement.

##### 2. Benefit

4.343 A financial contribution confers a benefit if it provides some form of artificial advantage that would not otherwise be available in the marketplace absent the government’s financial contribution. Under the guidelines in Article 14(d), the benefit from a government’s provision of goods is to be determined in relation to the prevailing market conditions for the good in the country of provision. The United States shares the view of the European Communities that the concept of “prevailing market conditions in the country of provision” is sufficiently broad to permit consideration of prices

for competitive goods commercially available on the world markets to purchasers in the country of provision.

4.344 That interpretation is firmly grounded in the text of the SCM Agreement and commercial reality. “Commercially available,” as defined in the SCM Agreement, means that the choice between domestic and imported goods is unrestricted and depends solely on commercial considerations. Commercially available goods, both imported and domestic, compete in the domestic market and constitute the supply available to purchasers in the country of provision, that is, goods that the purchasers could obtain in the market absent the government’s financial contribution.

4.345 Canada has acknowledged that “prevailing market conditions” in the country of provision include the available supply and that imports, which are part of the available supply, can, in appropriate circumstances, provide a market benchmark consistent with Article 14(d). Even under Canada’s reading of Article 14(d), therefore, prices for competitive goods commercially available on world markets fall within the universe of potential market benchmarks in certain cases. Because prices for competitive goods commercially available on world markets fall within the ordinary meaning of the terms used in Article 14(d), there is no basis to interpret that provision as precluding the use of such prices, under any circumstances.

4.346 As the Canada Aircraft panel stated, the purpose of a benefit analysis is to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case *but for* the financial contribution. Likewise, the Appellate Body stated that the analysis is to determine whether the recipient is better off than it would otherwise have been *absent the financial contribution*. Private prices for a good that are driven by government prices for that good do not represent prices that would otherwise have been available in the market *absent* the government financial contribution. The USDOC’s preliminary investigation indicates that such is the case with respect to private stumpage prices in Canada.

4.347 The USDOC found that the provincial governments control approximately 90 per cent of the softwood timber supply. Moreover, tenure holders consistently harvest less than their annual allowable cut (“AAC”) and, if necessary, a tenure holder may harvest in excess of its AAC. These undisputed facts indicate that Canadian lumber producers would have no incentive to purchase private stumpage unless the private seller was willing to meet, or better, the government’s administratively set stumpage price. The record facts, when taken as a whole, support the USDOC’s conclusion that private stumpage prices in Canada are integrally linked to the government prices and therefore could not logically serve as a benchmark.

4.348 Stumpage prices in contiguous US states were the most logical choice. US stumpage is commercially available to Canadian producers and the contiguous forests are generally comparable. The United States is the only country from which Canada obtains significant amounts of softwood timber. Canadian companies own timberland in the United States, bid on US stumpage and regularly import US timber.

4.349 In sum, the Panel should find that Article 14(d) permits the use of prices commercially available on world markets in appropriate circumstances. The Panel should also find that the use of such a benchmark was appropriate under the specific facts of this case.

### **3. Critical Circumstances**

4.350 Canada argues in its second submission that, if the United States wishes to preserve the possibility of retroactively imposing definitive countervailing duties pursuant to a critical circumstances determination, it should provide in its laws for retroactive assessment. That is, however, precisely what suspension of liquidation does. Furthermore, Canada’s assertion that US

Customs' practice resolves this issue is incorrect. Under US law, an entry that is not liquidated within one year from the date of entry is deemed liquidated by operation of law at the rate of duty in effect at the time of entry. Countervailing duty investigations frequently take more than a year to complete; the SCM Agreement permits the investigation to go as long as 18 months. Entries during the 90-day retroactivity period would, in such cases, be liquidated by operation of law and no retroactive countervailing duties could be imposed.

4.351 The United States also notes that Canada's flexible interpretation of Article 20.3 stands in stark contrast to its restrictive reading of Article 20.1. The United States therefore takes little comfort in Canada's assertion that Article 20.3, which on its face does not contain the limitations assumed by Canada, would not be interpreted as precluding the imposition of retroactive duties where the amount of the duties has not been guaranteed by cash deposit or bond.

#### **4. Expedited Reviews**

4.352 The United States has demonstrated that US law provides the USDOC with discretion under section 751 of the statute to implement the United States' obligations under Article 19.3. Canada nonetheless asks the Panel to find "for the sake of clarity" that the United States has failed to implement its obligations under the SCM Agreement. Moreover, Canada even goes so far as to ask the Panel to make findings that the United States must implement its obligations in a specific fashion, not just in this case, but "in any other investigation." Such a request is, to say the least, inappropriate.

4.353 Where a Member's laws do not mandate WTO-inconsistent action, the Member is accorded the presumption that it will implement its obligations in good faith. The United States has demonstrated that the laws and regulations at issue do not mandate WTO inconsistent action or preclude it from implementing the obligations in Article 19.3 of the SCM Agreement. Therefore, the measures are not inconsistent with the SCM Agreement. No further findings or recommendations are necessary or appropriate.

4.354 Canada has also misstated the United States' position with respect to administrative reviews. Canada notes that the United States stated that Section 351.213(b) of the USDOC's regulations does not apply to aggregate cases. Canada fails to note, however, that the United States also stated that the regulation does not restrict the USDOC's authority to conduct reviews. More importantly, however, the regulations cited by Canada govern only assessment proceedings and Article 21.2 does not address assessment proceedings.

#### **5. Factual Support for the Preliminary Determination**

4.355 The factual record at the time of the preliminary determination consists largely of the information that Canada submitted in its initial responses to the USDOC's questionnaire. The United States has provided the Panel with a great deal of that information. The United States therefore finds very disturbing Canada's serious and entirely baseless accusation that the United States has wilfully misrepresented certain facts concerning tenures in Alberta. The documents provided by the United States speak for themselves.

4.356 Canada also argues at length in its second submission about the USDOC's preliminary adjustments. Although the United States could refute those claims, they are not before the Panel for the simple reason that Canada has not challenged those adjustments in this proceeding. Canada's eleventh hour attempt to expand the Panel's terms of reference is improper and should, therefore, be rejected.

4.357 Moreover, Canada cites its criticisms of the adjustments in an attempt to bolster its argument that the use of a cross-border comparison is prohibited *per se*. In doing so, Canada attempts to give

the impression that the study relied upon by Canada to support this argument is the only record evidence on this issue. In fact, the record at the time of the preliminary determination contains extensive evidence that the US stumpage prices in contiguous states provide a very reasonable and logical basis for determining the market value of Canadian timber.

4.358 Canada also accuses the United States of engaging in post hoc rationalizations. Canada has not, however, claimed that the preliminary determination is inconsistent with Article 22 of the SCM Agreement regarding public notice and explanation of determinations.

4.359 The United States would now like to turn the Panel's attention to certain record facts before the USDOC at the time of the preliminary determination. The debate over the record facts has primarily centered on two issues: processing requirements imposed on tenure holders by the provincial governments and private stumpage prices in Canada.

(a) Processing Requirements - Independent Loggers

4.360 With respect to tenure processing requirements and the existence of so-called independent loggers, the United States would stress at the outset that the benefit calculation was based solely on the volume of Crown timber that went into the production of softwood lumber. Data pertaining to other tenure types, to timber from private lands or to timber going to the production of other types of products are entirely irrelevant.

4.361 In addition, the record at the time of the preliminary determination indicates that the vast majority of Crown timber obtained by lumber producers was provided by the provinces directly to those producers. The record also indicates that, due to the restrictions imposed by the provinces, any truly arm's-length transactions for the small amount of timber that a lumber producer may have acquired outside its own tenure are insignificant. In short, the record at the time of the preliminary determination does not indicate that pass-through is an issue, nor did Canada raise it as an issue until the day before the preliminary determination.

(b) Private Prices

4.362 Canada attempts to argue around the fact that only three provinces provided any information concerning non-government prices for stumpage. The fact remains that Alberta provided a single estimated stumpage value for all species and quality of trees; a value that is calculated by the province for the purpose of settling disputes over damaged timber. The United States provided the Panel with a copy of the Resource Information Systems study, which Ontario submitted to the USDOC. I refer the Panel to the United States' previous comments on the study and to the study itself, which we believe confirm the validity of the USDOC's assessment. With respect to Quebec, the United States notes that the record evidence of suppression of private stumpage prices that the United States has cited is only a sample of the record evidence.

4.363 Moreover, as discussed previously, this was not the only evidence on the record. Other facts concerning the governments' position as the dominant supplier of timber are consistent with the various statements on the record concerning price suppression. All of the evidence of the dominant influence of the provincial government on private stumpage prices, taken together, is more than sufficient to support the USDOC's preliminary determination that private prices could not logically serve as a valid market benchmark.

## 6. Standard of Review

4.364 As previous panels have recognized, what constitutes sufficient evidence to support a determination varies depending on the nature of the determination in question. At the time of the

preliminary determination the investigation was, of course, incomplete. Canada appears to be asking the Panel to resolve the outstanding issues and render its own findings of fact. Accordingly, Canada has spent a great deal of time explaining the facts and statements it provided to the USDOC prior to the preliminary determination and even supplementing those facts with references to evidence submitted *after* the preliminary determination. In this proceeding, however, the preliminary record must speak for itself.

4.365 The question in this proceeding is whether Canada has established, based on the evidence before the USDOC at the time of the preliminary determination, that there is a breach of the cited WTO provisions. If there is a reasonable basis for the preliminary determination, as there is in this case, there can be no breach of the SCM Agreement. Moreover, Canada, as the complainant, bears the burden of establishing a *prima facie* case of a breach. Therefore, if the balance of evidence is inconclusive with respect to a particular claim, Canada must be held to have failed to establish that claim.

4.366 It is the view of the United States that an objective assessment of this matter, as presented here and in our prior submissions, and a proper application of the standard of review will lead the Panel to conclude that Canada has not established a breach of the cited WTO provisions.

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, the European Communities, India and Japan, as contained in their written submissions and oral statements are summarized below.

### A. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

5.2 In its written submission, the European Communities made the following arguments.

#### 1. Scope of the term “good” under Article 1.1(a)(1)(iii) of the SCM Agreement

5.3 The question whether stumpage is covered by the term “goods” can be determined at least in two different ways:

5.4 First, stumpage presupposes the provision of land on which the harvester exercises its right. As “land” is an “immovable” good, Article 1.1(a)(1)(iii) of the SCM Agreement may apply. The term “good” is commonly defined as, *inter alia*, “property or possessions; esp. movable property, saleable commodities, merchandise, wares” or “tangible or moveable personal property, other than money; esp., articles of trade or items of merchandise”. The French text of the SCM Agreement uses the term “biens”, which is defined as, *inter alia*, “domaine, possession, propriété”. Finally, the Spanish version refers to the word “bienes”, which encompasses “inmobiliario” as well as “mobiliario”. Therefore, from the ordinary meaning of the word the term “goods” can not only apply to “movable” but also to “immovable” objects, including “land”.

5.5 Contextually, such an understanding is corroborated by Article 1.1(a)(1)(iii) of the SCM Agreement, which refers to “(...) goods or services *other than general infrastructure* (...)” (emphasis added). According to this wording even streets, railways or channels - which are all immovable objects - are to be considered as a “good” to the extent that they are not “general”. It follows *a contrario* that any “individual” immovable object may also be covered by Article 1.1(a)(1)(iii) of the SCM Agreement.

5.6 Second, stumpage gives a right to harvest a movable “good”, i.e. the log, but it does not provide the object as such. In the EC’s view even a “right to a good” might be sufficient for Article 1.1(a)(1)(iii) of the SCM Agreement because if one were to deny such a possibility Members

could easily circumvent the obligations of the Agreement. As the economic consequences would be the same in both instances, the SCM Agreement should apply equally to both cases.

5.7 In the light of the complex nature of stumpage, the EC cautions that it would be necessary to carefully assess all the rights and obligations related to stumpage in the light of Article 1.1(a)(1)(iii) of the SCM Agreement. This is especially true because each province maintains a specific stumpage system. In this respect, the EC notes that all of the Canadian stumpage programmes appear to provide the beneficiary with the right to cut trees on certain “land”. Furthermore, stumpage seems to be closely related to a defined movable good, which is the actual log to be harvested. In that respect, the EC finds it pertinent that, according to the main parties, the stumpage fee is calculated on the basis to the volume of the trees cut down and that applicants for stumpage are usually required to own a wood-processing facility.

## **2. Determination of a “benefit” under Article 1.1(b), 14(d) of the SCM Agreement**

5.8 The starting point for the benefit analysis under Article 14(d) of the SCM Agreement should be the prices in the country of provision, here Canada. This is not contested by the main parties.

5.9 The term “distortion”, which is used by the United States, is not mentioned in Article 14(d) of the SCM Agreement as being relevant to the benefit analysis. The EC considers that much care should be paid in determining the correct benchmark for the existence and amount of a benefit. As Article 14(d) of the SCM Agreement does not set explicitly forth a hierarchy of methodologies, the Panel should refrain from imposing any such hierarchy.

5.10 Article 14(d) of the SCM Agreement requires investigating authorities to use domestic price information as long as these prices are *market-driven* and *prevailing*. The notion of market implies “an opportunity for buying and selling”, “a place or group with a demand for a commodity or service or sale as controlled by supply and demand”. Indeed, where prices are controlled or imposed by the government and not market-driven, i.e., not freely negotiated between suppliers and purchasers, such prices would not fulfil the key “market” criterion under Article 14(d) of the SCM Agreement. In that respect, the EC would agree with the United States that in case of a state monopoly, there would be no *market* conditions in the country of provision.

5.11 Yet, this might be a rather exceptional situation. In the case at hand, the United States has not shown that the price for private stumpage in Canada is not market-driven. The United States has not demonstrated that the prices paid for stumpage rights on private lands, which may amount to 10 – 30 per cent of the provincial markets in Canada, are no longer determined by supply and demand.

5.12 Where the government manages the supply of natural resources from state owned property, it may be that the domestic industry satisfies additional demands from the private market or through the importation of additional resources. The EC fails to see why those domestic prices should *not* be assumed to be driven by supply and demand. Also, the EC does not understand why those private stumpage prices are not *prevailing*.

5.13 Thus, the mere assumption that prices on the private stumpage market are affected by the governmental stumpage system is not sufficient to establish that no domestic *market* within the meaning of Article 14(d) of the SCM Agreement exists.

5.14 Regarding the consideration of world market prices in the benefit determination under Article 14(d) of the SCM Agreement, the EC suggests to distinguish two situations. First, imports at world market prices may form part of the domestic market conditions. Second, world market prices may be a last resort where no domestic market exists.

5.15 The expression “market conditions in the country of provision” in Article 14(d) of the SCM Agreement is sufficiently broad to allow the consideration of world market prices. The term “market” defined as “an opportunity for buying and selling” suggests that world market prices may be relevant if the product at hand is commercially available to the recipient in the country of provision.

5.16 The consideration of all commercially available prices is clearly allowed in the benefit analysis under Article 14(b) and (c) of the SCM Agreement which only refer to “the market” but do not contain any territorial restriction. The principal relevance of world market prices is also recognised in the benchmark for export subsidies defined in item (d) of the Illustrative list of export subsidies in Annex I of the SCM Agreement. There, the domestic market price is only a relevant benchmark “provided such terms or conditions are more favourable than those commercially available on world markets to their exporters”.

5.17 A proper analysis of the “market conditions in the country of provision” may thus include all commercially available alternative sources for the recipient, including the price for imports into that market.

5.18 The EC considers that the United States did not sufficiently explain why prices for imports from the United States into Canada are not “distorted” by the Canadian stumpage schemes or by the different market conditions in the United States. Where imports take place, the respective prices form part of the “prevailing market conditions in the country of provision”, i.e., Canada, and should have been considered together with the price information on private stumpage.

5.19 If the Panel found that the US correctly dismissed all price information relating to the domestic market, including also the prices in Canada’s maritime provinces, the EC takes the view that world market prices may serve as a subsidiary means of establishing the existence of a benefit.

5.20 As shown above, the text of Article 14(d) of the SCM Agreement does not exclude the recourse to world market prices as a benchmark. The alternative use of the cost to government standard does not necessarily measure the price at which the private recipient could have obtained the good or service in the marketplace absent the financial contribution. According to Appellate Body jurisprudence, the existence of a benefit must be measured from the perspective of the recipient. To serve that purpose, there is a logical preference for taking account of actual prices at which the recipient might have obtained the good, because a cost to government standard appears to be a less precise measure whether the recipient is better off.

5.21 Finally, the EC emphasises that price information is not the sole criterion to determine the prevailing market conditions in the country of origin. Article 14(d) of the SCM Agreement requires the investigating authority to assess the adequacy of the remuneration in relation to all factors affecting the “prevailing market conditions for the good in question in the country of provision”. These include not only the price, but according to Article 14(d) of the SCM Agreement also “quality, availability, marketability, transportation and other conditions of purchase or sale”.

5.22 A high standard of demonstration is placed on the investigating authority through the introductory sentence of Article 14(d) of the SCM Agreement. Thus, great care should be taken before rejecting benchmarks in the country of exportation, particularly if this ultimately leads to the use of the petitioner’s prices in the country of exportation.

### **3. The determination of a “pass-through” Benefit**

5.23 The EC reserves its position on this claim because it is linked to Canada’s allegation that no expedited reviews are foreseen under US law where the investigation has been conducted on an aggregate basis.

**4. No application of Article 20.6 of the SCM Agreement to provisional countervailing duties**

5.24 A critical circumstances determination under Article 20.6 of the SCM Agreement cannot apply to a provisional countervailing duty. Apart from the plain language of Article 20.6 of the SCM Agreement, which only relates to “definitive” countervailing duties, the context as well as the purpose of this provision prevent any other approach.

5.25 Article 20.1 of the SCM Agreement provides for the general rule that neither provisional nor definitive duties shall be applied retroactively. This concept reflects a fundamental WTO principle. Therefore, exceptions to this rule should be stated *expressis verbis* in the Agreement and they should be interpreted narrowly. Article 20.6 of the SCM Agreement is such an exception regarding definitive countervailing duties. Thus, any extension of this provision to provisional countervailing duties by way of analogy would run counter to this general principle.

5.26 Furthermore, the retroactive application of provisional measures under Article 20.6 of the SCM Agreement would contradict the time constraints set out in Article 17.3 of the SCM Agreement. Under this provision provisional measures shall not be applied any earlier than 60 days from the date of initiation of the investigation. Yet, if Article 20.6 of the SCM Agreement were applicable to provisional measures, provisional duties could be imposed 90 days before the application of a provisional measure, thus, even to imports that enter before the time of the initiation of the investigation. While it is true that Article 20.6 of the SCM Agreement provides exactly for this consequence in case of a definitive countervailing duty, it has also to be born in mind that Article 17.3 of the SCM Agreement contains a specific time frame for provisional measures. What is more, by its very nature provisional measures may be reversed in the final determination. Yet, a retroactive application of a provisional measure would place an additional burden on the exporter if this provisional duty would be reversed in the final definitive determination.

**5. Requested recommendation**

5.27 Canada’s requested recommendation would involve an element of retroactivity, which is contrary to the general prospective nature of WTO remedies.

**B. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES**

5.28 The European Communities, in its oral statement, made the following arguments.

**1. Introduction**

5.29 In its written submission, the EC has already addressed certain legal issues, in particular on:

- ? the interpretation of the term "good" under Article 1.1(a)(1)(iii) of the SCM Agreement;
- ? the determination of a "benefit" in the meaning of Article 14(d) of the SCM Agreement;
- ? the restricted application of Article 20.6 of the SCM Agreement to "definitive" countervailing duties.

5.30 In its oral statement, the EC does not intend to dwell further on these aspects, but rather address two equally important questions of the case, i.e.:

- ? Canada's claim on the impermissible "pass through" determination of the benefit, and

? The scope of Article 19.3 of the SCM Agreement in view of an expedited review.

## 2. A "pass-through" benefit determination

5.31 In its first written submission, Canada takes issue with the US determination that the "financial contribution" to timber harvesters conferred a "benefit" on softwood lumber producers. In Canada's view, the United States incorrectly concluded that the benefit to harvesters "passes through" to softwood lumber producers. Such a determination could according to Canada only be made under Article 1.1(a)(1)(iv) of the SCM Agreement, which conditions were not fulfilled in the case at hand<sup>15</sup>.

(a) Article 1.1(a)(1)(iv) of the SCM Agreement not the relevant benchmark for a "pass through" benefit determination

5.32 In the EC's view, Canada erred in its assumption that the determination of a "pass through" benefit must be based exclusively on Article 1.1(a)(1)(iv) of the SCM Agreement.

5.33 First, Canada's position conflicts with the circumstance that under Article 1 of the SCM Agreement the term "financial contribution" and the notion of a "benefit" have to be clearly distinguished. Article 1.1(a)(1)(iv) of the SCM Agreement is only relevant with regard to the "financial contribution", as is evidenced by the chapeau of Article 1.1(a)(1) of the SCM Agreement. Furthermore, in the case *Brazil – Aircraft* the Appellate Body considered it as a "mistake" to "import the notion of benefit into the definition of a financial contribution"<sup>16</sup>.

5.34 Article 1.1(a)(1)(iv) of the SCM Agreement cannot, therefore, be relevant for the determination of whether a "benefit" "passes through" from one recipient to another. The EC would underline that, in particular, there is no requirement of identity between the recipient of a "financial contribution" and the "benefit" thereby conferred. For instance, the case *Brazil – Aircraft* involved an export credit programme where the government issued bonds to a financing bank. The beneficiary, and therefore, recipient of the benefit, however, was the aircraft manufacturer.

5.35 Second, the EC notes that the purpose of Article 1.1(a)(1)(iv) of the SCM Agreement is to clarify under which conditions payments made by private bodies can be imputed to governments. Governments do not escape their obligations under the SCM Agreement by using a private entity to confer a "financial contribution".

5.36 Yet, the case at hand differs from this scenario. The Canadian government does not use timber harvesters to distribute "financial contributions". Timber harvesters rather act autonomously when entering into contractual relationships with lumber producers.

5.37 The EC, therefore, considers that Article 1.1(a)(1)(iv) of the SCM Agreement is not relevant in this case.

(b) Determination of a "benefit" according to Article 1.1(b) of the SCM Agreement

5.38 In the EC's view any "benefit" determination, including a case of an alleged "pass through", has to abide by the normal rules as laid down in Article 1.1(b) and 14 of the SCM Agreement. Therefore, it is essential to determine whether the downstream producer has received a "benefit" and whether a causal link between the "financial contribution" and the "benefit" exists.

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<sup>15</sup> Canada's first written submission, paras. 54 to 68.

<sup>16</sup> Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, para. 157.

5.39 In this context, the EC would recall the jurisprudence on Article VI:3 of GATT 1947, which might give further guidance on this issue. In *United States – Pork from Canada*, the panel explicitly stated that a countervailing duty may only be imposed on a downstream product "if a subsidy has been determined to have been bestowed on the production of [that product]".<sup>17</sup> It further held that any subsidy granted to the upstream producer could only be considered to be bestowed on the downstream producer if this has led to a decrease in the level of prices for the primary product below the level that would be commercially available from other sources of supply.<sup>18</sup>

5.40 The EC considers that in the case at hand, the United States appears not to have carried out a proper "pass through" analysis with respect to those producers operating at arm's length from Canadian harvesting companies. It has also not correctly determined the existence of a "benefit" for downstream producers under Article 14(d) of the SCM Agreement<sup>19</sup> nor established a causal linkage between the "financial contribution" and the "benefit".

### **3. The scope of Article 19.3 of the SCM Agreement for an "expedited review"**

5.41 Canada claims that the United States implemented incorrectly Article 19.3 of the SCM Agreement by denying the possibility of an individual expedited review in case of an investigation that was conducted on a country-wide basis.<sup>20</sup> Canada argues that Article 19.3 of the SCM Agreement applies also to provisional measures by virtue of Article 17.5 of the SCM Agreement.<sup>21</sup>

5.42 Article 19.3 second sentence of the SCM Agreement refers only to a "definitive countervailing duty". Yet, as Article 17.5 of the SCM Agreement provides that "the *relevant* provisions of Article 19 shall be followed in the application of provisional measures" (emphasis added) the key issue before the Panel is to determine whether Article 19.3 second sentence of the SCM Agreement is pertinent.

5.43 In the EC's view, Article 19.3 second sentence of the SCM Agreement does not apply to provisional countervailing duties. The EC basis its conclusion on the following reasons:

5.44 First, the plain language of Article 19.3 second sentence of the SCM Agreement refers, *expressis verbis*, only to a "definitive" countervailing duty. This restriction is all the more significant as Article 19 of the SCM Agreement elsewhere uses the broader notion of "countervailing duties" without any further indication whether this encompasses "provisional" as well as "definitive" duties. The explicit limitation in Article 19.3 therefore strongly indicates that Article 19.3 second sentence of the SCM Agreement applies only to "definitive" countervailing duties and cannot be one of the "relevant provisions" under Article 17.5 of the SCM Agreement.

5.45 Secondly, the predecessor to Article 19.3 of the SCM Agreement, Article 4.3 of the Tokyo Round Subsidies Agreement, did not mention the requirement of expedited review. Article 5.4 of the Tokyo Round Subsidies Agreement, which is the predecessor to Article 17.5 of the SCM Agreement, could therefore not refer to such an obligation simply because it did not exist. To restrict Article 19.3 second sentence of the SCM Agreement to "definitive" countervailing duties (as the language indicates) would thus be in line with the legal situation, which existed already under the Tokyo Round Subsidies Agreement. Indeed, if the drafters of the SCM Agreement had intended to broaden the scope of Article 17.5 one would have expected to do so explicitly.

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<sup>17</sup> GATT Panel Report, *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R, adopted 11 July 1991, BISD 38/30, para. 4.5.

<sup>18</sup> *Id.*, para. 4.9.

<sup>19</sup> EC third party submission, paras. 10 to 35.

<sup>20</sup> Canada' first written submission, paras. 147 to 178.

<sup>21</sup> *Id.*, footnote 87.

5.46 Finally, the EC considers that the restriction of an expedited review to "definitive countervailing duties" is also justified in view of the specific nature of a provisional measure. In fact, every provisional measure is by itself subject to a review because the investigating authorities will always have to determine whether or not they impose a definitive countervailing duty. In this respect, the EC notes that Article 17.4 of the SCM Agreement limits the application of a provisional measure to a maximum of four months. Thus, extending Article 19.3 second sentence of the SCM Agreement to provisional measures would place a heavy burden on the investigating authorities as they were at the same time obliged to complete the normal countervailing duty investigation.

#### 4. Conclusion

5.47 To sum up, the EC considers that

? the determination of a "pass through" benefit has to establish, first, a benefit within the meaning of Article 14(d) of the SCM Agreement and, second, a causal link between the "financial contribution" and the "benefit".

? Article 19.3 second sentence of the SCM Agreement does not apply to "provisional" countervailing duties.

#### C. THIRD PARTY ORAL STATEMENT OF INDIA

5.48 India did not make a written submission. In its oral statement, India made the following arguments.

5.49 This dispute raises several issues of systemic interest. One such issue is whether the SCM Agreement permits the use of "cross-border" benchmarks to find and measure "benefit".

5.50 In this dispute, the USDOC sought to establish that Canadian stumpage practices "conferred" a benefit by comparing stumpage charges levied in Canada with stumpage prices levied in certain parts of the United States, on the basis that such prices are "commercially available world market prices..." to softwood lumber producers in Canada. Finding the US stumpage prices to be higher than the charges levied in Canada, the USDOC concluded that Canadian stumpage charges conferred a benefit. The USDOC thus derived the "stumpage subsidy" from the comparisons of stumpage charges in Canada and cross-border prices for stumpage in the United States.

5.51 India does not consider that the SCM Agreement permits such comparison.

5.52 Article 1.1 of the SCM Agreement provides that a subsidy exists where there is a financial contribution by a government and "a benefit is thereby conferred". The Appellate Body considered the meaning of "benefit" in Article 1 of the SCM Agreement in the dispute, *Canada – Aircraft* (DS70). According to the Appellate Body, "the word 'benefit', as used in Article 1.1(b) implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market".<sup>22</sup>

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<sup>22</sup> Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 157.

5.53 In the case of a government provision of goods, the question is therefore whether the purchaser of a good from the government is "better off" than other purchasers who buy the same good from other sellers in the country subject to the investigation. This is confirmed by Article 14(d) of the SCM Agreement, which sets out guidelines to calculate the amount of a subsidy based on a "benefit to the recipient" test in cases of an alleged government provision of goods. It provides that:

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

5.54 The words of Article 14(d) are clear and unambiguous. The expression "in the country of provision or purchase" means "in the country of provision or purchase". It does not mean prevailing market conditions in *some other country*. Similarly, Article 14(d) does not allow adequacy to be determined as against market conditions *internationally*. We agree with Canada that nothing in the text, context, object and purpose of Article 14(d) of the SCM Agreement permits reading "in" as anything other than "in"; "in" manifestly does not mean "out"; "in the country" does not admit of "cross-border" analysis. Therefore, it is not open to an investigating authority to look outside the country of provision.

5.55 For the purposes of Part V of the SCM Agreement, the proper benchmark in a provision of goods context is therefore the home market price of a good, and not its price in some other market. A cross-border analysis using transactions in another country is thus inconsistent with Articles 1 and 14 as interpreted by the Appellate Body, and viewed in context and in the light of the object and purpose of the SCM Agreement.

D. THIRD PARTY WRITTEN SUBMISSION OF JAPAN

5.56 In its third party written submission, Japan made the following arguments. Japan did not make an oral statement.

**1. Introduction**

5.57 A standing timber price, which is included in log production cost, generally forms a part of production cost of lumber. Assuming that the cost of processing logs into lumber is fixed, when a standing timber price gets higher, the production cost of lumber using that standing timber as raw material would rise, and it works on the direction where production of lumber is discouraged. On the contrary, when the standing timber price is set significantly low, the production cost of lumber would also remain low, and it works on the direction that production of lumber is encourage. It can also lead to lowering a price of lumber by producers.

5.58 The issue before this Panel, however, is not the adequacy of Canadian lumber export pricing itself. Issues presented in this proceeding are whether the United States may countervail the stumpage programmes of Canadian provinces in accordance with the provisions of the SCM Agreement and Article VI:3 of GATT 1994.

5.59 Japan has no intention to argue whether assessment of underlying facts in the specific circumstances of this case is consistent with the SCM Agreement. This case, however, raises certain important systemic issues. In the interests of the sound interpretation of the SCM Agreement, Japan respectfully submits the following comments.

## 2. Arguments

### (a) Indirect Subsidies

5.60 According to Canada, provincial stumpage programmes are granted to timber harvesters, and timber is further processed by downstream producers in Canada into lumber, some of which in turn are exported to the United States.

5.61 Article VI:3 of GATT 1994 and footnote 36 of the SCM Agreement provide that an importing Member may impose countervailing duties on a product for the purpose of offsetting any subsidy granted (or bestowed), "directly or *indirectly*, on the manufacture, production or export of" such product. (Emphasis added.)

5.62 Article VI:3 and footnote 36 also provide that in order to be countervailable a subsidy does not have to be granted directly on manufacture of a product. Such subsidy may be granted on exported products "indirectly". A subsidy may be countervailable even if the subsidy is granted on manufacture of exported products through something else. For example, a subsidy may be countervailable when the subsidy is granted to the raw material supplier upon its sales of its raw material to producers of an exported product, if a benefit accrues to such producers by the subsidy. But it should be noted that the term "indirectly" may not be construed beyond its meaning.

5.63 Japan respectfully requests that this Panel make its finding on the countervailability of the Canadian stumpage programme based on our consideration stated above.

### (b) Existence of a financial contribution by a government

5.64 Canada claims that stumpage programmes are not governmental provision of "goods or services other than general infrastructure" in Article 1.1(a)(1)(iii) of the SCM Agreement, and thus the provincial governments have not provided "a financial contribution" under Article 1.1(a)(1) of the SCM Agreement. Canada further claims that the stumpage is a right to exploit an *in situ* natural resource, and therefore, this right is not a good or service within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement<sup>23</sup>.

5.65 Canada explained in paragraph 33 of its first submission that timber harvesters are given the right to harvest standing timber under stumpage programmes. These harvesters pay actual stumpage charges to provincial governments not when they acquire and maintain the right to harvest standing timber, but when they cut and acquire the timber. The amount of consideration is decided by multiplying the wood volume by unit prices defined by the provincial government. Although stumpage could be a "right" instead of "good" itself as Canada mentioned, a person given such a right will acquire the timber after all.

5.66 Japan respectfully requests that this Panel provide its finding of whether this stumpage should be distinguished from governmental provision of "goods or services other than general infrastructure".

### (c) Benefits conferred

5.67 The other question that Japan wishes to address in this submission is how "financial contribution" of a good should be adequately measured. This question is equivalent to whether the provision of a good is made for less than adequate remuneration "in relation to *prevailing market conditions* for the good or service in question *in the country of provision or purchase* (including price

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<sup>23</sup> Canada's first written submission, at para. 34.

quality, availability, marketability, transportation and other conditions of purchase or sale)" (emphasis added) under Article 14(d) of the SCM Agreement.

5.68 The USDOC found in its preliminary determination that the financial benefit conferred by the Canadian provincial governments be valued by comparing the stumpage charge with stumpage prices in the United States with comparable forests<sup>24</sup>. Canada claims that this "cross-border" analysis is inconsistent with Article 14(d) of the SCM Agreement because the Article does not mean that adequacy can be based on prevailing market conditions in some other country or internationally<sup>25</sup>.

5.69 In Japan's view, this Article means that the adequacy of remuneration be based, in principle, on prevailing market conditions in the territory of the exporting Member. Firstly, the text of Article 14(d) does not explicitly permit "cross-border" analysis. Secondly, the interpretation by the United States of Article 14(d) would create incongruous results. When the interpretation by the United States is strictly followed, in order to avoid granting a subsidy, a Member would be required to review prices in all foreign markets, to which a product would be exported, when the Member sells or purchases the product. This interpretation imposes an unreasonable burden on Members.

5.70 However, the question whether "cross-border" analysis has no ground for justification under any circumstances, or if it is ever permissible, and what are the conditions for a Member to use such an analysis, still remains. Japan hopes this question would be properly addressed in this Panels findings.

## **VI. INTERIM REVIEW**

6.1 On 19 August 2002, the United States submitted a written request for review by the Panel of particular aspects of the interim report issued on 26 July 2002. Canada did not provide any comments on the interim report. Canada commented on the United States' request for interim review on 26 August 2002. Neither party requested an additional meeting with the Panel.

6.2 We have reviewed the comments presented by the United States and the reaction thereto by Canada and have finalized our report. We note that in response to the comments received, the Panel corrected typographical and other clerical errors throughout the interim report.

6.3 The United States requested changes to the last sentence of paragraph 7.59 of the interim report. The United States posited that the Panel should have declined to consider the issue of adjustments to the benchmark price used by the USDOC, as this issue did not form part of the Panel's terms of reference. Canada urged the Panel to reject the United States' suggestion. Canada argued that its claim relating to the USDOC's determination and measurement of benefit was sufficiently identified in its request for establishment of a panel. According to Canada, the US was confusing "claims" and "legal arguments". We considered that paragraph 7.59 of the interim report referred to certain arguments which had been developed by Canada before us as part of its claim relating to the measurement of benefit by the USDOC. In particular, we were of the view that Canada's arguments concerning the appropriateness of the adjustments used by the USDOC to calculate the benchmark stumpage price formed part of Canada's claim concerning the benchmark for measuring the benefit, as set forth in its panel request. Canada developed a number of arguments under this claim, and as we had already found against the US on this claim on the basis of other more principal arguments, we saw no reason to address this additional Canadian argument in support of its claim. We have adjusted the drafting of paragraph 7.59 to clarify this point.

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<sup>24</sup> US first written submission at para. 50.

<sup>25</sup> Canada's first written submission at para. 44.

6.4 The United States further took issue with the Panel's statement in the first sentence of paragraph 7.74. According to the US, it had not conceded, as the Panel suggested, that in a certain number of cases the lumber producers were independent from the tenure harvesters and may have had to pay an arm's-length price to obtain the allegedly subsidized logs from the harvesters. The US also commented that the last sentence of the preceding paragraph 7.73 referred to arm's-length purchases of timber from private lands or from US suppliers, not purchases of Crown timber. The US therefore requested the Panel to revise the first sentence of paragraph 7.74. Canada commented that in its view the Panel's factual conclusion in paragraph 7.74 was correct and that the US was simply disagreeing with the Panel's appreciation of the evidence on the record. Moreover, Canada argued that the passage quoted by the Panel in the last sentence of paragraph 7.73 also referred to lumber producers purchasing logs at arm's-length in addition to lumber producers purchasing logs from private lands and US suppliers. We considered that the facts set out in paragraph 7.73, which had been confirmed by the US in its answers to questions from the Panel, were not contested. According to these uncontested facts, a certain percentage of Crown timber harvest is done by independent harvesters (i.e. harvesters that are not related to lumber producers). As the evidence on the record showed, this percentage differed from province to province. In the first sentence of paragraph 7.74, we only summarized that the factual information provided to us by the US in the course of the proceedings showed that in a certain number of cases, the lumber producers were independent from the tenure harvesters and may have had to pay an arm's-length price to obtain the logs from the harvesters. We acknowledge that the US has on various occasions during the proceedings argued that the evidence does not support Canada's claim that there is a significant volume of Crown timber that the provincial governments provide to truly independent loggers who then sell the timber at arm's-length to the lumber mills. However, as paragraph 7.74 did not state that the US conceded that there was a significant number of such transactions nor that the US conceded that these transactions were "actual" arm's-length transactions between "truly" independent harvesters, we saw no reason to amend the text of paragraph 7.74 as suggested by the US.

6.5 The United States finally requested a change to footnote 146 regarding the US position. We decided to amend this sentence taking into account the comment made.

## VII. FINDINGS

7.1 Canada is challenging the imposition of provisional measures by the United States on imports of softwood lumber from Canada on the basis of the United States Department of Commerce (USDOC) Preliminary Countervailing Duty Determination (hereafter: the "Preliminary Determination") and the USDOC Preliminary Determination of Critical Circumstances (hereafter: the "Preliminary Critical Circumstances Determination"). In addition, Canada is challenging certain provisions of the US laws and regulations concerning expedited and administrative reviews. We will discuss these three sets of claims in the order in which they were presented to us by Canada. We will therefore first address the first set of claims which relates to the preliminary findings and determinations of the USDOC concerning subsidization of softwood lumber from Canada as set out in the USDOC Preliminary Determination. We will then discuss the second set of claims which concerns the USDOC's preliminary determination of the existence of critical circumstances which formed the basis for the retroactive application of provisional measures in this case. Finally, we will examine the third and final set of claims which refers to the consistency of the US legislation with the WTO Agreement, in particular, US countervailing duty laws and regulations on expedited and administrative reviews as well as the application of the legislation in the challenged investigation of softwood lumber from Canada.

7.2 As a preliminary matter, we note that in the course of these proceedings, we decided to accept for consideration one unsolicited *amicus curiae* brief from a Canadian non-governmental organization, the *Interior Alliance*. This brief was submitted to us prior to the first substantive

meeting of the Panel with the parties and the parties and third parties were given an opportunity to comment on this *amicus curiae* brief. After this meeting, we received three additional unsolicited *amicus curiae* briefs. For reasons relating to the timing of these submissions, we decided not to accept any of these later briefs.

A. CLAIMS RELATING TO THE PRELIMINARY COUNTERVAILING DUTY DETERMINATION

1. Introduction

7.3 Canada is challenging the USDOC's Preliminary Countervailing Duty Determination with respect to certain softwood lumber from Canada of 9 August 2001. Canada argues that the USDOC preliminary findings and determinations and the imposition of provisional measures by the US are inconsistent with its obligations under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") because:

- (a) the Canadian "stumpage"<sup>26</sup> practices in question are not "subsidies" as defined in Article 1 of the SCM Agreement. Specifically:
  - ? "stumpage" is not a "financial contribution" within the meaning of Article 1.1(a) of the SCM Agreement,
  - ? even if stumpage were a financial contribution, the USDOC's determination and measurement of a "benefit" is based on a "cross-border" methodology that is not permitted by the SCM Agreement, and
  - ? even if a cross-border methodology were permitted, the USDOC's determination assumes holders of harvesting rights pass through an alleged benefit to softwood lumber producers, without any basis for the assumption;
- (b) the USDOC impermissibly inflated the alleged subsidy rate by calculating a country-wide rate based on only a portion of Canadian production and exports of softwood lumber<sup>27</sup>, and
- (c) the USDOC impermissibly inflated the provisional measures imposed by applying them on an entered value basis after having calculated the subsidy rate using first mill value.

7.4 Canada therefore requests that the Panel find that the Preliminary Countervailing Duty Determination of the United States in the softwood lumber case violates Articles 10, 14, 17.1, 17.2, 17.5, 19.4 and 32.1 of SCM Agreement and Article VI:3 of the GATT 1994.

7.5 The United States asserts that the USDOC correctly determined the existence of a subsidy to Canadian softwood lumber producers in accordance with the SCM Agreement as it found that the Canadian provincial stumpage programmes conferred a benefit on Canadian softwood lumber

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<sup>26</sup> Canada uses this term to refer to the "right to harvest standing timber on Crown land". Canada's First Written Submission, para. 18.

<sup>27</sup> This claim by Canada related to the exclusion of the Maritime provinces from the country-wide duty rate. In response to a question from the Panel after the second meeting, Canada stated that it was "no longer pursuing its claims in respect of the "Maritimes" question in this proceeding". Canada's Answers to Questions from the Panel after the Second Meeting, para. 69. In light of this statement, we consider that there is no need for us to address this claim, and neither will we make any ruling in respect of this claim.

producers. The US therefore requests the Panel to reject all of Canada's claims relating to the Preliminary Countervailing Duty Determination.

**2. Claim 1: inconsistent finding of the existence of a financial contribution.**

(a) Arguments of the parties

(i) *Canada*

7.6 Canada considers that the USDOC erred in determining that "stumpage" is a financial contribution in the form of the provision of a good by the government.<sup>28</sup> Canada argues that the practice of stumpage, which it views as a right to exploit an in situ natural resource, or more specifically, the right to harvest standing timber, is not a financial contribution. According to Canada, it is a form of a property right which cannot be equated to the provision of a good or a service by the government as required by Article 1.1(a)(1)(iii) SCM Agreement.<sup>29</sup> In Canada's view, rights such as *profits à prendre* and licences (two different forms of stumpage) are not included within the scope of the Agreement.<sup>30</sup> In Canada's view, the ordinary meaning of a "good" in the SCM and GATT/WTO context is tangible or movable personal property; and as an intangible real property right, stumpage is thus not a good. Canada also refers to the negotiating history of Article 14 SCM Agreement in support of its argument that harvesting rights like stumpage are not "goods".<sup>31</sup> Canada submits that even if one were to consider that in fact it is standing timber, rather than harvesting rights, which is made available through the tenure or licence agreements, standing timber is not a "good" in the sense of Article 1.1(a)(1)(iii) SCM Agreement. Furthermore, in Canada's view, the term "goods" in Article 1.1(a)(1)(iii) SCM Agreement has the same meaning and scope as "products" used elsewhere in the SCM Agreement and the WTO Agreement, in particular Article II of GATT 1994, i.e. tradeable items with an actual or potential customs classification. According to Canada, standing timber which cannot be traded across borders is, for this reason as well, not a "good" in the sense of Article 1.1(a)(1)(iii) SCM Agreement.

7.7 In addition, Canada submits, to "provide goods" implies a positive action on the part of the government in respect of the goods themselves, and not any other action that merely allows someone to obtain goods or which has the same economic effect as the government action which consists of

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<sup>28</sup> The USDOC Preliminary Determination equates stumpage to the provision of a good. See USDOC Preliminary Countervailing Duty Determination ("USDOC Preliminary Determination"), 66 Fed. Reg., p. 43,192. (Exhibit CDA-1). Canada submits that Commerce's legal analysis and conclusion with respect to the requirement of a "financial contribution" consists, in its entirety, of two sentences:

"We preliminarily determine that the provision of stumpage by the provincial governments constitutes the provision of a good or service under section 771(5)(D)(iii) of the [Tariff Act of 1930, as amended]. Thus, we preliminarily determine that the provincial governments have provided a financial contribution as defined under section 771(5)(D) of the Act to Canadian softwood lumber producers."

<sup>29</sup> In Canada's view, the cutting down of timber is the point at which the "goods" – logs- are produced from natural resources.

<sup>30</sup> Canada notes that a stumpage charge is not money paid to obtain the right to harvest timber, but rather a levy on the exercise of the existing right to harvest timber. According to Canada, it should be viewed as a form of revenue collection by the government and the equivalent of a tax. Canada's Oral Statement at the First Meeting of the Panel with the Parties (hereafter: "Canada's First Oral Statement"), para. 13.

<sup>31</sup> Canada's First Written Submission, para. 30. According to Canada, an earlier draft of what later became Article 14 SCM Agreement mentions harvesting rights separately from "goods or services". This, in Canada's view, demonstrates that harvesting rights are a category separate from goods. Canada argues that, as harvesting rights are not mentioned in Article 1.1(a)(1) (iii) SCM Agreement, but only "goods or services", the granting of harvesting rights cannot constitute the provision of a financial contribution under subparagraph (iii) of Article 1.1 SCM Agreement. Exhibit CDA-20, p.17.

providing goods.<sup>32</sup> Canada asserts that the United States' broad interpretation of the word "provide" as "to make available" is untenable, for it offers an interpretation of the term "provide" that makes little sense in context and that is not consistent with the way that term is used throughout the WTO Agreement. Throughout the WTO Agreement, the word "provide" is used to indicate the giving of something, rather than more generally enabling someone to obtain or produce something. According to Canada, the more common meaning of "provide" is "supply".<sup>33</sup> Canada argues that, given the use of the word "purchase" as an opposite of "provide" in subparagraph (iii), this sense of provide, implying to give or to sell, is far more contextually logical than the general term "make available". Canada further asserts that the proposed United States interpretation encompasses a range of government actions that go far beyond those contemplated under Article 1.1(a)(1)(iii) SCM Agreement. According to Canada, to "make available services", for example, would include in the US interpretation any circumstance in which a government action makes possible the receipt of services. Canada submits that the financial contribution test is not concerned with the *consequences* of a government action, however, but with those actions themselves.<sup>34</sup>

7.8 Canada submits therefore that the USDOC Preliminary Determination that the right to harvest standing timber (stumpage) constitutes a "financial contribution" is inconsistent with Article 1.1(a) SCM Agreement and as a result violates Articles 10, 17.1(b), 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994.

(ii) *United States*

7.9 The United States is of the view that the Canadian provincial stumpage programmes provide a financial contribution, in the form of a good, standing timber, to the softwood lumber producers in Canada. The United States argues that the ordinary meaning of a "good" includes an "identified thing to be severed from real property".<sup>35</sup> According to the United States, Canada is elevating form over substance when it argues that stumpage only confers the *right to harvest* timber. In the view of the United States, there is no meaningful distinction between providing standing timber as such or providing the right to harvest standing timber as the clear purpose of the stumpage programmes is to provide timber to Canadian mills that make lumber or wood pulp. According to the United States, the ordinary meaning of "to provide", the verb used in Article 1.1(a)(1)(iii) SCM Agreement, is "to make available".<sup>36</sup> In the US view, Canada is certainly making the standing timber available to the loggers by providing the right to harvest the timber standing on Crown land.

7.10 The US argues that there is no "natural resources" exception in the SCM Agreement, and that the provision of a good, like timber, thus constitutes a financial contribution in the sense of Article 1.1(a)(1)(iii) SCM Agreement. The only exception provided for in the Article is for general infrastructure. The United States asserts that the context, object and purpose of Article 1 SCM Agreement confirm that if the government provides a good in the form of a natural resource which constitutes the major input for a product, this practice is covered by Article 1 SCM Agreement as it is

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<sup>32</sup> Canada rejects the United States argument that "the economic consequence of providing a good and providing a right to a good are exactly the same." In Canada's view, this argument follows the same faulty logic of the earlier argument of the United States before the *Export Restraints* panel that, "an export restraint is 'functionally equivalent' to an entrustment of or direction to a private body to provide goods domestically." Canada's Second Written Submission, para. 12, referring to *United States – Measures Treating Export Restraints as Subsidies*, Report of the Panel, WT/DS194/R, adopted 23 August 2001, at para 8.22.

<sup>33</sup> Canada points out that the Concise Oxford Dictionary does not list "make available" as a meaning for "provide". See *The Concise Oxford Dictionary of Current English*, 8<sup>th</sup> ed. (Oxford: Clarendon Press, 1990), at 962. (Exhibit CDA-79)

<sup>34</sup> Canada's Second Written Submission, para. 13.

<sup>35</sup> *Black's Law Dictionary*, 7<sup>th</sup> ed. (St. Paul: West, 1999), p. 701 –702. Exhibit CDA-17.

<sup>36</sup> The US argues that according to the *New Shorter Oxford English Dictionary*, "provides" means to "make available" in addition to "supply or furnish for use." Exhibit US-5.

a practice through which the government has the ability to provide an advantage that would not be available on the market. According to the US, the "negotiating history" to which Canada refers in support of its argument that harvesting rights are excluded from the scope of Article 1 SCM Agreement is an informal discussion paper which does not shed light on the consensus view. The United States therefore requests the Panel to reject Canada's claim concerning the USDOC's Preliminary Determination of the existence of a financial contribution.

(b) Analysis

7.11 Canada claims that the USDOC Preliminary Determination that the Canadian provincial stumpage programmes constitute a financial contribution in the form of the provision of a good is inconsistent with Article 1.1 (a) SCM Agreement. Article 1.1 SCM Agreement provides as follows:

*Article 1*

*Definition of a Subsidy*

"1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

- (a)(1) there is **a financial contribution by a government** or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
  - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
  - (iii) a government provides goods or services other than general infrastructure, or purchases goods;**
  - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

- (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

- (b) a **benefit** is thereby conferred." (emphasis added)

7.12 Article 1.1 SCM Agreement defines a subsidy as a financial contribution by the government which confers a benefit. An investigating authority, in a countervailing duty (CVD) investigation will thus as a first step need to establish the existence of a financial contribution by the government.

Subparagraph (iii) of Article 1.1(a)(1) SCM Agreement states that a financial contribution exists if the government provides "goods or services other than general infrastructure". In its Preliminary Determination, the USDOC stated that :

"We preliminarily determine that the provision of stumpage by the provincial governments constitutes the provision of a good or service under section 771(5)(D)(iii) of the [*Tariff Act of 1930*]. Thus, we preliminarily determine that the provincial governments have provided a financial contribution as defined under section 771(5)(D) of the Act to Canadian softwood lumber producers."<sup>37</sup>

7.13 In order to determine whether the USDOC correctly concluded that "stumpage" by the government constitutes the "provision" to the Canadian softwood lumber industry of a "good", in the sense of the SCM Agreement, we consider that it is important to first clarify the exact meaning and operation of the Canadian provincial stumpage programmes in question. We will then examine whether these stumpage programmes constitute the "provision of a good" in the sense of Article 1.1(a)(1)(iii) SCM Agreement. We recall that in the interpretation of this provision we are guided by the customary rules of interpretation of public international law, as laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention on the Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

(i) How do the stumpage programmes operate?

7.14 On the basis of the information and documents on the record of the investigation concerning the operation of stumpage programmes, including the forest legislation and various timber sales agreements submitted by Canada<sup>38</sup>, and as clarified by the parties before us, we understand that most forest land in the covered provinces<sup>39</sup> of Canada is Crown land<sup>40</sup> and that interested persons who want to harvest on such Crown land have to enter into tenure or licensing agreements with the provincial governments.<sup>41</sup> In general, such tenure and licensing agreements, the terms of which may vary slightly from province to province, allow the licensee or tenure holder (hereafter referred to as the "tenure holder") to harvest the standing timber on a particular parcel of Crown land. In return, the tenure holders commit themselves to a number of obligations, including at a minimum (i) service and maintenance obligations, such as road-building and maintenance, and protection against fire, disease, and insects; (ii) implementation of forestry management and conservation measures, including silviculture and reforestation; and (iii) payment of a volumetric "stumpage charge" that is levied upon the exercise of the harvesting right.

7.15 The Canadian provinces as the owners of the land and the trees standing thereon typically employ these tenure arrangements or licenses to confer rights to harvest standing timber. Canada agrees that if any company wants to log trees standing on Crown land for *inter alia* further processing or sale, it will have to enter into tenure or license stumpage agreements with the provincial government. Canada further acknowledges that the tenure agreements contain various processing requirements as well as certain minimum and maximum cut requirements. For example, tenure

<sup>37</sup> USDOC Preliminary Determination, p. 43,192.

<sup>38</sup> Exhibits CDA-63, 64, 67 and 68 are some examples of such provincial tenure agreements which, according to Canada, are generally representative of the long term and short term tenures found in Canada.

<sup>39</sup> We recall that the USDOC Preliminary Determination excluded softwood lumber from the Maritime provinces.

<sup>40</sup> The term Crown land refers to land that is not privately owned.

<sup>41</sup> Exhibit CDA-69 for example includes Alberta's Forest Act. Under this Act, the Crown may provide the exploitation of timber in one or more of the following ways: through forest management agreements; through the sale of timber quota certificates; and through the issuance of timber permits.

agreements in Alberta, Ontario and Québec contain maximum cut limits. According to Canada, Ontario and Québec have no minimum cut requirements. Canada further asserts that some of Alberta's tenures also contain minimum cut requirements, but that they are not enforced. In British Columbia, licensees under certain designated types of tenures are subject to minimum cut requirements, which require the harvester to harvest plus or minus 50 per cent of the annual allowable cut for that licensee in any given year, and plus or minus 10 per cent over a five year period.<sup>42</sup>

(ii) Do stumpage programmes provide standing timber?

7.16 Canada seems to suggest that a distinction should be made between a government extending a right to take the trees from its land, and that government selling the trees as such. In our view, however, and according to the record, the trees which grow on the publicly owned Crown land are government owned.<sup>43</sup> We consider that there are a number of ways in which the government may be providing timber, by auctioning off the trees as such, by entering into short term tenure agreements or by concluding long term tenure or licence agreements. The conclusion of tenure or licence agreements is in our view one way in which the government supplies timber. When the government enters into a contract with a harvesting company whereby it allows this company to exercise this right and to cut the trees, it is in fact supplying trees, standing timber, to such companies.<sup>44</sup> The fact that the main purpose of the stumpage programmes is to provide trees to harvesting companies is confirmed by the various processing requirements as well as the minimum and maximum cut requirements in most stumpage agreements.<sup>45</sup> In fact, if a company does not cut and process a certain number of trees for a determined period of time, it risks losing the licence. We wish to note that we do not deny that the Canadian provinces may well be pursuing broader forestry management policy goals in addition to ensuring the appropriate exploitation of the forestry resources when entering into stumpage arrangements with the harvesting companies. Indeed, it is normal that when a government makes a financial contribution, including where it provides a subsidy, that there is a mix of policy objectives. However, the fact of the matter remains that, from the harvesting company's point of view, the only reason to enter into such tenure or licensing agreements is to cut trees for processing or sale. As Canada acknowledged, the main interest of tenure holders is the end-product of the harvest.<sup>46</sup> Ultimately, and in this context, from the tenure holder's point of view, there is no difference between receiving from the government the right to harvest standing timber and the actual supply by the government of standing timber through the tenure holder's exercise of this right.

7.17 Canada argues that even if one were to accept that the issuance of harvesting rights by the provincial governments is equal to the provinces making standing timber available to the loggers, this still does not qualify as the "provision" of a good. According to Canada, "to provide" means "to give" or "to sell" and not just "to make available". We note that both parties agree that the ordinary meaning of the verb "to provide" is "to supply".<sup>47</sup> Canada is right that the provinces do not provide

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<sup>42</sup> Canada's Answers to Questions from the Panel after the Second Meeting, paras. 33 –36.

<sup>43</sup> Canada states that "the Canadian provinces have title to the majority of public property and exercise exclusive jurisdiction to legislate in relation to the development, conservation and management of" *inter alia* forestry resources. According to Canada, "In the various provincial systems, the provinces retain ownership of the land, typically employing tenure agreements or licences that confer rights to exploit the resource". Canada's Answers to Questions from the Panel after the First Meeting, paras. 21 -22.

<sup>44</sup> It is interesting to note in this respect that a Canadian court has recognized that "Stumpage is the price a licensee must pay the Crown for its timber". *British Columbia v. Canadian Forest Products* (8 February 1998). US Answers to Questions from the Panel after the First Meeting, para.13, footnote 31.

<sup>45</sup> A discussion of the minimum and maximum cut requirements per province may be found in Canada's Answers to Questions from the Panel after the Second Meeting, paras. 33 –36.

<sup>46</sup> Canada's Answers to Questions from the Panel after the Second Meeting, para. 37.

<sup>47</sup> *The Concise Oxford Dictionary*, ninth edition, Clarendon Press, Oxford p. 1102. See US Second Written Submission, footnote 5; Canada's Second Written Submission, para 13.

logs to lumber producers when they make it possible for timber harvesters to harvest trees.<sup>48</sup> In our view, however, the issue is whether the provinces supply standing timber, not logs, to the tenure holders who harvest the trees and turn the timber into logs. In our view the only way to supply *standing* timber to harvesting companies is by allowing them to harvest the timber. We consider that this is precisely what the stumpage agreements do. We therefore find that standing timber is provided to the tenure holders through the provincial stumpage programmes.

7.18 In sum, and in the context of Article 1.1(a) (1)(iii) SCM Agreement, we are of the view that where a government allows the exercise of harvesting rights, it is providing standing timber to the harvesting companies.<sup>49</sup> From the perspective of the harvesting company the situation is clear: most forest land is Crown land, and if the company wants to cut the trees for processing or sale, it will need to enter into a stumpage contract with the provincial government, under which it will have to take on a number of obligations in addition to paying a stumpage fee for the trees actually harvested. We thus view the service and maintenance obligations, the obligations to undertake various forestry management, conservation and other measures, combined with the stumpage fees required by the stumpage agreements, as the price the tenure holder has to pay for obtaining and exercising its harvesting rights.

(iii) Is standing timber a "good"?

7.19 We recall that Article 1.1 (a) (1) (iii) SCM Agreement provides that:

"1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is **a financial contribution by a government** or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: ...

**(iii) a government provides goods or services other than general infrastructure, or purchases goods;**

7.20 We concluded above that when a provincial government enters into tenure or licence stumpage agreements, it is in fact "providing" the trees that stand on Crown land. The question we will need to answer next is whether the USDOC correctly determined that the supply of standing timber through the provincial stumpage programmes constitutes the provision of a good under Article 1.1(a)(1)(iii) SCM Agreement, in short, whether standing timber is a "good" in the sense of this provision.<sup>50</sup>

7.21 The term "goods" has been defined in many ways in various dictionaries. Black's Law Dictionary, for example, defines "goods" as "tangible or movable personal property other than money; especially articles of trade or items of merchandise <goods and services>".<sup>51</sup> Black's Law Dictionary adds that "[g]oods means all things, including specially manufactured goods, that are movable at the

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<sup>48</sup> Canada's Oral Statement at the Second Substantive Meeting of the Panel with the Parties, para 22.

<sup>49</sup> We note that of course there will be technical differences between the various ways of supplying timber, which will no doubt be reflected in for example the costs for obtaining the timber.

<sup>50</sup> We recall that Article 3.2 DSU requires a panel to interpret the Agreement in accordance with customary rules of interpretation of public international law, as laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention on the Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

<sup>51</sup> *Black's Law Dictionary*, p. 701 (Exhibit CDA-17). See also *New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993), p. 1116 ("Saleable commodities; merchandise, wares; [in singular] a type of merchandise") (Exhibit CDA-18).

time of identification to a contract for sale and future goods. The term includes the unborn young of animals, growing crops, and other identified things to be severed from real property ...".<sup>52</sup>

7.22 Other dictionaries define a "good" as "personal property having intrinsic value but [usually] excluding money, securities, and negotiable instruments."<sup>53</sup> The ordinary meaning of the word "goods" is thus very broad and in and of itself does not seem to place any limits on the kinds of "tangible or movable personal property, other than money" that could be considered a "good".

7.23 In Article 1.1(a)(1)(iii) SCM Agreement, "goods" is used in the context of "goods or services other than general infrastructure". We consider that the context in which the term "goods" is used in Article 1.1(a)(1)(iii) SCM Agreement confirms the broad ordinary meaning of "goods" as tangible or movable personal property, other than money. In our view, the sentence "goods or services other than general infrastructure" refers to a very broad spectrum of things a government may provide. The fact that the only exception provided for in subparagraph (iii) is general infrastructure reinforces our view concerning the unqualified meaning of the term goods as used in this provision.

7.24 The object and purpose of Article 1.1 SCM Agreement is to provide a definition of a subsidy for the purposes of the SCM Agreement. Article 1.1(a)(1) SCM Agreement provides that the first element of a subsidy is a "financial contribution by the government". Subparagraphs (i) through (iv) then explain that a financial contribution can exist in a wide variety of circumstances including, of course, the direct transfer of funds. But subparagraphs (ii) and (iii) show that a financial contribution will also exist if the government does not collect the revenue which it is entitled to or when it gives something or does something for an enterprise or purchases something from an enterprise or a group of enterprises. Subparagraph (iv) ensures that government directed transfers effected through a private entity do not thereby cease to be government transfers.<sup>54</sup> In other words, Article 1.1(a)(1) SCM Agreement provides that a *financial* contribution can exist not only when there is an act or an omission involving the transfer of money, but also in case goods or certain services are provided by the government. In short, Article 1.1(a)(1)(iii) SCM Agreement in its context and in light of its object and purpose establishes that a *financial* contribution also exists in case *goods* or *services* are provided which can be valued and which represent a value to the beneficiary in question. The word "goods" in this context of "goods or services" is intended to ensure that the term financial contribution is not interpreted to mean only a money-transferring action, but encompasses as well an in-kind transfer of resources, with the exception of general infrastructure.

7.25 Canada argues that rights to exploit *in situ* natural resources are not covered by Article 1.1(a)(1) (iii) SCM Agreement. Canada can not point to any provision in particular in the Agreement in support of this view, but instead reaches this conclusion on the basis of a working paper from the time of the Uruguay Round negotiations which explicitly mentioned *harvesting rights* separately from goods or services.

7.26 We note that the text of the SCM Agreement does not in any way provide an exception for the right to exploit natural resources.<sup>55</sup> The only exception from the term "goods or services" provided for

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<sup>52</sup> *Black's Law Dictionary*, p. 701 (Exhibit CDA-17).

<sup>53</sup> *Webster's Ninth New Collegiate Dictionary* (Markham: Merriam-Webster, 1991), p. 527. (Exhibit CDA-19).

<sup>54</sup> We note here the finding of the Panel in the case *United States – Measures Treating Export Restraints as Subsidies*, that "Subparagraph (iv) ensures that the same kinds of *government* transfers of economic resources, when undertaken through explicit *delegation of those* functions to a private entity, do not thereby escape disciplines". Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS 194/R, adopted 23 August 2001, para. 8.73.

<sup>55</sup> We agree with the Appellate Body that "a proper interpretation is first of all a textual interpretation". Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, page 17.

in Article 1.1(a)(1)(iii) SCM Agreement is general infrastructure, not natural resources. Moreover, the paper referred to by Canada in support of its argument that harvesting rights are not covered by Article 1.1(a)(1)(iii) SCM Agreement, called Discussion Paper No. 6, is an "informal discussion paper" from the Chairman of the Negotiating Group on Subsidies and Countervailing Measures dated 4 September 1990, which together with six other "informal discussion papers" was circulated in preparation for the issuance of a revised version of the Chairman's draft text of the SCM Agreement.<sup>56</sup> Canada argues that this Discussion Paper reflects an understanding at the time of the SCM Agreement negotiations of the fundamental difference between tangible commercial inputs and intangible real property rights.<sup>57</sup> We note however that, as stated in the Chairman's Note accompanying the discussion paper, this paper was circulated solely to "facilitate" discussions and that it did not reflect the Chairman's view of "what may be included in the subsequent revision", nor did it "have any status relating [it] to the Chairman's paper."<sup>58</sup> The Note further states that some of the views expressed in the discussion papers "are purposefully provocative in order to make evident technical complexities and/or workability (or its lack) of certain approaches."<sup>59</sup> In our view, this Discussion Paper thus has little if any probative value, especially in light of the fact that the reference to "harvesting rights" as separate from "goods" was not included in the final text of the Agreement.<sup>60</sup>

7.27 Canada further argues that the reference in Article 1.1(a)(1)(iii) SCM Agreement to the provision of "goods" is to be interpreted as referring to tradable products for which there is a tariff line. Canada's argument in favour of such a very narrow interpretation of the word *goods* is basically that, in Canada's view, it is used throughout the GATT and WTO Agreements as an equivalent of *products* on which tariff concessions may be given under Article II GATT 1994.<sup>61</sup> Canada thus submits that standing timber which is not capable of being traded across borders is not a "good".

7.28 In our view however, although in many cases the general word "good" may indeed be used as an equivalent of the term "products", this does not imply that this necessarily is always so, precisely because "goods" is a term with a broad and general meaning. Canada refers to certain provisions which contain the term "imported goods", and concludes on that basis that wherever the term "goods" is used in the Agreement, it refers to products which are capable of being imported and traded across borders. We find no basis for such a conclusion in the text of the SCM Agreement. Although "goods" in Article 1.1(a)(1)(iii) SCM Agreement certainly includes tradable products, there is no reason to limit its meaning to only such products, particularly where the immediate context in which the term is

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<sup>56</sup> In particular Canada relies on the proposed draft for Article 14.4 (A) which read in relevant part:

"(a) the amount of subsidy arising from government provision of goods, services, or extraction/harvesting rights shall be determined by comparing the difference between prices charged by the government to certain enterprises within its jurisdiction and the benchmark price ..."

<sup>57</sup> "Article 14: 'Criteria for the calculation of the amount of a subsidy'," Informal Discussion Paper No. 6, Negotiating Group on Subsidies and Countervailing Measures, 4 September 1990, p. 17 (Exhibit CDA-20). Discussion Paper No. 6 was based on US practice in subsidy calculation. See T.P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Boston: Kluwer, 1993), p. 935 (Exhibit CDA-21).

<sup>58</sup> Informal Discussion Paper: Note by the Chairman, Negotiating Group on Subsidies and Countervailing Measures, 4 September 1990 (Exhibit CDA-20).

<sup>59</sup> *Id*

<sup>60</sup> Neither do we consider that it is our task to guess what the drafters could have meant, if anything, by not explicitly mentioning harvesting rights alongside of "goods or services" in Article 1.1(a)(1)(iii) SCM Agreement. What is clear from the text of this provision of the SCM Agreement is that harvesting rights are not excluded in the same way as general infrastructure is.

<sup>61</sup> Canada argues that "this meaning of the term "goods" as articles of trade or saleable commodities is the only meaning that could have been intended by the negotiators of the WTO Agreements. The term "goods" is used throughout the Agreements, yet is nowhere defined. As evidenced by the "General interpretative note to Annex 1A" to the WTO Agreement "goods" subject to the GATT 1994 are those things in respect of which a tariff binding may be negotiated: in other words, tradable things. Accordingly, things that are inherently incapable of being traded across borders are not "goods" for the purposes of the WTO Agreements." Canada's First Oral Statement, para. 21.

used does not suggest such a limitation. In particular, this provision states that when the government provides "goods or services", this constitutes a financial contribution. The "goods" in question are not imported or exported, simply provided by the government, and nothing suggests therefore that the goods in question need to be tradeable products with a potential or actual tariff line. Goods in this context are distinguished from services, and in our view the two cover the full spectrum of in-kind transfers the government may undertake by providing resources to an enterprise. Our view is reinforced by the fact that there is only one exception among all possible goods and services that could be provided by the government - general infrastructure - which is explicitly defined as not constituting a financial contribution. We thus find that there is no basis in the text of the SCM Agreement to conclude that "goods" in Article 1.1 is limited to products with an actual or potential tariff line.

7.29 In sum, we find that through the Canadian provincial government stumpage programmes, Crown timber is being supplied to the tenure holders. Standing timber is the valuable input for logs which may be processed by sawmills into softwood lumber.<sup>62</sup> In light of our finding that there is no basis in the text of the SCM Agreement to limit the term "goods" to tradeable products with a potential or actual tariff line, we consider that standing timber, trees, are goods in the sense of Article 1.1(a)(1)(iii) SCM Agreement.<sup>63</sup>

(c) Conclusion

7.30 We therefore conclude that the Canadian provincial stumpage programmes involve the provision by the government of standing timber and, as such, the provision of a good in the sense of Article 1.1(a)(1)(iii) SCM Agreement. We therefore find that the USDOC determination that the provision of stumpage constituted a financial contribution, in the form of the provision of a good or service, is not inconsistent with Article 1.1 SCM Agreement, and therefore reject Canada's claims in this respect.

**3. Claim 2: inconsistent determination of benefit**

(a) arguments of the parties

(i) *Canada*

7.31 Canada argues that, even if one were to accept that the provision of stumpage constitutes a financial contribution in the form of the provision of a good under Article 1.1(a)(1)(iii) SCM Agreement, the USDOC erred in finding that the Canadian provincial stumpage programmes *conferred a benefit*. The USDOC compared the Canadian stumpage prices to those charged in the United States, which, in the USDOC's view, correspond with "commercially available world market prices". Canada is of the view that the USDOC's use of a benchmark for determining benefit based on conditions outside the country of the alleged provision of goods, was inconsistent with Article 14(d) SCM Agreement. Canada asserts that whether a "benefit" is conferred by the alleged provision of goods by the government (stumpage) depends on whether the Canadian producers were better off than other purchasers who buy the same good from other sellers *in the country subject to the investigation*.<sup>64</sup> Canada argues that a cross-border analysis using transactions in another country to

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<sup>62</sup> We note that even Canada seems to acknowledge that "goods" in subparagraph (iii) refers to "inputs". Canada's Answers to Questions from the Panel after the First Meeting, para. 7.

<sup>63</sup> We note that in its Sale of Goods Act, the Canadian province of British Columbia, the prime exporter of softwood lumber to the US, defines "goods" as including "growing crops, [...], and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale". This definition seems to include standing timber as a good.

<sup>64</sup> Canada's First Written Submission, para. 43.

determine the existence of a benefit, and to measure it, is inconsistent with Article 1 and Article 14 (d) SCM Agreement.<sup>65</sup>

7.32 Canada further asserts that there was sufficient information on the record concerning private stumpage prices in Canada that could have been used by USDOC in determining the amount of the alleged benefit.<sup>66</sup> Canada submits that neither Article 1 nor Article 14 SCM Agreement presumes the existence of "distortion" of any kind simply because there is a financial contribution by the government, nor does either permit dismissing an in-country benchmark because of a presumption that that benchmark is or might be "tainted" or "distorted" by the financial contribution in question.<sup>67</sup>

7.33 In addition, Canada argues, there are a number of factual differences between the rights and obligations involved in acquiring harvesting rights in the United States and in Canada which invalidate the use of the United States' system as a benchmark and which demonstrate that cross-border comparisons make no economic sense.<sup>68</sup> Canada asserts that a wide variety of complex factors affect stumpage rates, such as locational characteristics, timber characteristics, measurement systems, operating costs, differences in economic conditions and tenure holders' rights and obligations. In Canada's view, the USDOC failed to make proper adjustments and ignored other obvious differences between the two markets.

7.34 Canada, therefore, claims that the USDOC Preliminary Determination which measured the benefit under the "adequacy of remuneration standard" by reference to conditions in another country rather than the prevailing market conditions in Canada is inconsistent with Articles 1 and 14 SCM Agreement.

(ii) *United States*

7.35 The United States observes that, in accordance with Article 14 (d) SCM Agreement, the adequacy of the remuneration and the existence of a benefit must be determined "*in relation to* the prevailing market conditions in the country under investigation" and not necessarily "*in the country under investigation*".<sup>69</sup> The US argues that this "market" benchmark may refer to the entire market available to the subsidized producers.<sup>70</sup> According to the US, the concept of "prevailing market

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<sup>65</sup> Canada also refers to the protocol of accession of China which explicitly, and in its view, exceptionally allows for the use of a benchmark outside of China. In Canada's view, there would be no need to include such a provision in a protocol of accession if, as the US is arguing, the language of Article 14 already allows for the use of cross-border benchmarks.

<sup>66</sup> Canada provides a complete discussion of the data provided by the Canadian provinces in this respect in its Second Written Submission, paras. 53 –62.

<sup>67</sup> Canada's Second Written Submission, para. 35. Canada notes that the USDOC did not have any evidence of alleged price suppression, but simply relied on an erroneous translation of a letter of the Quebec Minister of Natural Resources which formed part of the petition, which in fact merely stated that public land stumpage charges could have an indirect influence on the private market. Canada argues that a doctoral thesis further relied on in this respect by the United States before the Panel is outdated and the information on which it is based has earlier been rejected by the USDOC in the earlier investigation of imports of lumber from Canada (*Lumber II*) as evidence of alleged price suppression.

<sup>68</sup> This, Canada argues, USDOC recognized in the first three investigations on imports of lumber from Canada (*Lumber I –III*) in which, in an identical factual setting, it rejected the use of cross-border benchmarks. Canada discusses the practical problems relating to the use of US benchmarks in this case in its Second Written Submission paras. 44 – 52.

<sup>69</sup> According to the US, "in relation to" means "with reference to" and thus, under Article 14 (d) the prevailing conditions in the country of provision are a reference point, not necessarily an end point, for the market benchmark. US First Written Submission, para. 43

<sup>70</sup> The US refers to the Appellate Body report in the case *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products ("Canada –Dairy")*, *Recourse to Article 21.5 DSU* (DS103AB/RW, para 84) and item (d) of the Illustrative List of Export Subsidies in Annex I SCM Agreement.

conditions in the country of provision" is sufficiently broad to permit consideration of prices for competitive goods commercially available on the world markets to purchasers in the country of provision.<sup>71</sup> The US argues that commercially available goods, both imported and domestic, compete in the domestic market and together constitute the supply available to purchasers in the country of provision, that is, goods that the purchaser could obtain in the market absent the government's financial contribution.<sup>72</sup>

7.36 According to the US, in this particular case, the provincial governments completely dominate the market in those provincial markets and are virtually the sole providers of timber. In the US' view, the evidence indicates that Canadian provincial governments so dominate the Canadian market for timber<sup>73</sup> that below-market government prices suppress prices in the small private market for timber in Canada. Therefore, the US submits, in the absence of market prices in Canada, the use of other prices commercially available to Canadian lumber producers on world markets is the only reasonable alternative. In light of the object and purpose of Article 14 SCM Agreement it would not make sense to use prices determined or influenced by the government to measure the adequacy of the remuneration for the goods. According to the US, the comparison in Article 14 (d) SCM Agreement is intended to identify the potentially trade-distorting artificial advantage resulting from the government's provision of a good, and the market conditions referred to in Article 14 (d) SCM Agreement thus relate to what the market price would have been absent the financial contribution. The US asserts that the USDOC used stumpage prices in various US states with comparable forests and adjusted such prices to reflect prevailing market conditions in Canada.<sup>74</sup> According to the US, the USDOC's use of US prices is supported by ample record evidence indicating that many Canadian companies do, in fact, import US logs and bid on US stumpage.<sup>75</sup> The US submits that US timber is therefore "commercially available" to Canadian lumber mills, and in light of the specific facts of this case, the USDOC's use of US prices for stumpage that is commercially available to lumber producers in Canada was appropriate and consistent with Article 14(d) SCM Agreement.

7.37 In any case, the US submits, only three provinces (Alberta, Quebec and Ontario) provided any information on private stumpage prices and such limited information was inadequate to serve as a benchmark for those provinces. Similarly, the US notes that it had no or insufficient information on stumpage prices in the Maritime provinces, the lumber originating from which the USDOC excluded from the investigation on the grounds that it was not subsidized.

7.38 For all these reasons, the US requests the Panel to reject Canada's claim concerning the inconsistency of the use of US stumpage prices as a benchmark to measure the amount of benefit conferred on Canadian lumber producers through the provincial stumpage programmes.

(b) Analysis

7.39 Article 1.1 SCM Agreement provides that a subsidy in the sense of the SCM Agreement shall be deemed to exist when a financial contribution confers a benefit. In light of our findings above concerning the USDOC Preliminary Determination that the provision of stumpage by the Canadian provincial governments constitutes a financial contribution by the government under Article 1.1(a)(1)(iii) SCM Agreement, we will therefore need to examine whether the USDOC

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<sup>71</sup> US Oral Statement at the Second Meeting of the Panel with the Parties ("US Second Oral Statement"), para. 7.

<sup>72</sup> US Second Oral Statement, para. 8.

<sup>73</sup> In para. 26 of its Answers to Questions from the Panel after the First Meeting, the US argues that the Canadian provincial governments' share of the market was 90 per cent or more.

<sup>74</sup> The US refers to the Report of the Panel in *Canada-Dairy* in support of its argument in this respect. Panel Report, *Canada – Dairy*, WT/DS103/R, adopted as modified by WT/DS103/AB/R on 27 October 1999, para. 7.54.

<sup>75</sup> US Second Written Submission, para. 27; US Second Oral Statement, para. 18.

determination that this financial contribution conferred a benefit was made in a manner consistent with the US obligations under the Agreement. The issue before us is whether the USDOC determined the existence and amount of benefit to the Canadian softwood lumber producers in a manner consistent with Articles 1.1 and 14 of the SCM Agreement. We recall that Canada raises two claims relating to the USDOC's benefit determination. First, Canada challenges the use of US stumpage prices as the benchmark to assess the adequacy of the remuneration and thus the existence and amount of the benefit. We will discuss this claim in this section. Second, Canada claims that the USDOC failed to properly examine and properly determine that the benefit was conferred on the producers of the subject merchandise, softwood lumber. This claim will be discussed in the following section.

7.40 In its Preliminary Determination, the USDOC compared the stumpage fees set by the Canadian provincial governments with stumpage sales prices in the United States in order to determine the amount of benefit to Canadian lumber producers. According to the USDOC, "The point of comparison for measuring the benefit from these types of subsidies is the market-place free of government interference".<sup>76</sup> The USDOC concluded that:

"there is no market determined price for stumpage within Canada that is independent of the distortion caused by the government's interference in the market. Therefore we preliminarily determine that we cannot use private transaction prices provided by the provincial governments.

Information on the record of this investigation indicates that there are prices from the world market for comparable goods which can be used to determine whether the provincial stumpage programmes provide a good or service to softwood lumber producers for less than adequate remuneration. For the reasons detailed below, we preliminarily determine that stumpage prices from the United States qualify as commercially available world market prices because it is reasonable to conclude that US stumpage would be available to softwood lumber producers in Canada at the same prices available to US lumber producers".<sup>77</sup>

7.41 Canada argues that as a matter of principle a cross-border price analysis is not permitted under Article 14 (d) SCM Agreement. Even if it were in theory permitted, Canada submits that there was sufficient evidence on the record of private stumpage prices in Canada which, in accordance with Article 14 (d) SCM Agreement could have and should have been used by the USDOC in determining benefit. In addition, Canada argues that in any event, under the facts of this case, the specific US benchmark used, was not an appropriate benchmark because of the factual difficulty in comparing prices for standing timber in the US and Canada.

7.42 The US argues that the benchmark used by the USDOC is consistent with the guidelines of Article 14 (d) SCM Agreement since the US stumpage prices are commercially available to Canadian lumber producers and, therefore, constitute part of the prevailing market conditions for the sale of stumpage in Canada.<sup>78</sup> The US submits that the USDOC properly rejected private prices for domestic timber as a benchmark because the weight of the evidence at the time of the Preliminary Determination indicated that such prices were driven by the government-provided timber, the financial contribution at issue.<sup>79</sup> Thus, in the US view, such prices are uninformative as to the adequate remuneration inquiry, i.e., a comparison of the government price to prices otherwise available in the market *absent* the financial contribution.

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<sup>76</sup> USDOC Preliminary Determination, p. 43193.

<sup>77</sup> USDOC Preliminary Determination, p. 43195.

<sup>78</sup> US Answers to Questions from the Panel after the Second Meeting, para. 85

<sup>79</sup> US Answers to Questions from the Panel after the Second Meeting, para. 92.

7.43 Article 14 (d) is the relevant provision in the SCM Agreement for measuring the amount of benefit to the recipient by determining whether the government has provided a good or service, within the meaning of Article 1.1(a)(1)(iii) SCM Agreement, for less than adequate remuneration. Article 14 (d) SCM Agreement provides as follows:

*Article 14*

*Calculation of the Amount of a Subsidy in Terms  
of the Benefit to the Recipient*

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

- (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
- (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
- (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
- (d) **the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale). (emphasis added)**

7.44 Article 14 (d) SCM Agreement thus provides that the provision of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than *adequate remuneration*. The adequacy of the remuneration charged by the government shall be determined "**in relation to the prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)**". We find that the text of Article 14 (d) SCM Agreement is very clear: the adequacy of remuneration is to be determined in relation to *prevailing market conditions* for the good or service in question *in the country of provision or purchase*. It further specifies market conditions that have to be taken into account: price, quality, availability, marketability, transportation and other conditions of purchase or sale. The text of the Agreement thus clearly requires that the prevailing market conditions to be used as a benchmark are those in the

country of provision of the goods, in this case Canada. The words "in relation to" in our view, mean "on the basis of" or "in comparison with" and indicate in this context that the adequacy of the remuneration charged by the government is to be compared with the prevailing market conditions in the country of provision. We therefore disagree with the US that "the prevailing market conditions in the country of provision are a reference point, not necessarily an end-point for the market benchmark".<sup>80</sup> The prevailing market conditions in the country of provision *are* the benchmark and operate as the reference point or the point of comparison for the adequacy of the remuneration. We therefore find, on the basis of a plain reading of Article 14 (d) SCM Agreement, that the ordinary meaning of this provision excludes an analysis based on market conditions other than those in the country of provision of the goods, i.e. Canada.

7.45 We note that, in its arguments before us, the US "agree[d] with Canada that, as the text of Article 14 (d) states, the relevant 'prevailing market conditions' are those in the country of provision, not some other country".<sup>81</sup> The US argues however that "[b]ecause US stumpage prices are commercially available to Canadian lumber producers, they fall within the universe of benchmarks that can be considered for purposes of measuring the benefit from provincial stumpage, consistent with Article 14(d) of the SCM Agreement."<sup>82</sup> The issues in dispute are thus (i) whether the concept of "prevailing market conditions in the country of provision" includes *world market prices*, as the US is suggesting, and hence whether US stumpage prices are part of the prevailing market conditions in Canada, and, if so, whether a price benchmark for the purposes of Article 14 (d) SCM Agreement can be *exclusively* based on such prices; and (ii) whether the USDOC had valid reasons in this case to disregard Canadian private stumpage prices.

(i) Are US prices part of the prevailing market conditions in Canada?

7.46 In our view, there is no basis in the text of the SCM Agreement to conclude that the market conditions in the country of provision could mean anything else than the conditions prevailing in the market of that country, and not those prevailing in some other country. Article 14 (d) SCM Agreement does not just refer to "market conditions" in general, but explicitly to those prevailing "in the country of provision" of the good. The US argues, that because "conditions of purchase or sale" and "availability" are listed as market conditions in Article 14 (d) SCM Agreement, US stumpage which is available to Canadian producers and which may be purchased by Canadian producers is part of the market conditions in Canada. However, the fact that a good may also be bought on a market outside the country of provision, does not, in our view, imply that the prices for those goods in that other country become part of the market conditions "in the country of provision". To accept the US argument would imply that the phrase "prevailing market conditions in the country of provision" in fact refers to the world market conditions for the good in question, which is not what the text of the SCM Agreement says. In light of the clear language of Article 14 (d) SCM Agreement, the "availability" of the good, the "conditions of purchase or sale", the "price", are various aspects of the market conditions existing in the country of provision, and refer to the price for the good in that country, its availability in that country, the conditions of sale as they are prevailing in that country. In our view, the bracketed language in Article 14 (d) SCM Agreement specifies what the market conditions referred to in the preceding sentence are, and, as is the case for the "market conditions", they also all relate to the country of provision, and not some other country.

7.47 We consider that a proper interpretation is one which gives meaning to all the terms in the treaty and does not reduce certain parts of the treaty to redundancy or inutility.<sup>83</sup> We consider that the

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<sup>80</sup> US First Written Submission, para. 43.

<sup>81</sup> US Answers to Questions from the Panel after the Second Meeting, para. 82

<sup>82</sup> US Second Written Submission.

<sup>83</sup> As the Appellate Body stated in the *United States – Standards for Reformulated and Conventional Gasoline* case: "... One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that

US is reading Article 14 (d) SCM Agreement to mean that the benchmark to be used should be "market conditions" in general. In our view, to adopt the US approach that the market refers to the entire market available to the allegedly subsidized producers, would effectively read out of the SCM Agreement the explicit reference to the country of provision, as the country the prevailing market conditions of which have to be used as a benchmark.

7.48 In support of its argument that the "market", as generally referred to in the SCM Agreement, is not restricted to the exporting country, but rather "encompasses the entire market available to the subsidized producer or exporter", the US refers to item (d) of the Illustrative List of Export Subsidies of Annex I of the SCM Agreement. We note that item (d) of the Illustrative List establishes conditions under which certain instances of provision of goods constitute *export* subsidies. Thus, item (d) is concerned with a significantly different situation from that addressed by Article 14 (d). While it is true that item (d) of the Illustrative List contains explicit language requiring as a second part of the test that it establishes that the terms of provision of the good be more favourable "than those commercially available *on world markets*", we recall that item (d) of the Illustrative List is not before us in this dispute. The text of Article 14 (d) SCM Agreement, the provision that is before us, does not provide for such a world market test. The fact that in the different context of criteria for a similar measure to constitute a prohibited export subsidy there is an explicit requirement to look at commercially available world market prices, cannot mean that any reference to the "market" in the SCM Agreement necessarily refers to the world market, or some portion thereof, particularly when the language in the provision clearly states otherwise.<sup>84</sup> We note that the prices of *imported* goods in the market of provision can indeed form part of the prevailing market conditions in the sense of Article 14 (d) SCM Agreement.<sup>85</sup> But this is not the same as the price for those goods prevailing in the country of export. Nor does this imply that import prices necessarily can be the exclusive basis to determine prevailing market conditions. To us, the US chain of reasoning seems to be the following: Canadian lumber producers can purchase standing timber and logs in the United States, and some do, therefore, the prevailing US stumpage prices form "part of" the prevailing market conditions for stumpage in Canada, and therefore US stumpage prices represent and can be used as the exclusive benchmark for the prevailing market conditions for stumpage in Canada. For the reasons set forth above, we cannot accept such reasoning. In sum, we find that US stumpage prices cannot be considered to constitute prevailing market conditions in Canada, the country of provision of the good (standing timber).

(ii) Did there exist valid reasons not to use Canadian private stumpage prices?

7.49 The US justifies its reliance on US prices as the benchmark by arguing that, although the use of Canadian private stumpage prices would have been the preferred option to calculate the amount of benefit, in this particular case it was not possible to use such prices as the benchmark because they were distorted and suppressed by the very large number of government sales. According to the US,

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interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* case, WT/DS2/AB/R adopted on 20 May 1996, p.23.

<sup>84</sup> The US has also referred to various statements of the Panel and the Appellate Body in the *Canada – Dairy* case. We are of the view that these reports are of little, if any relevance to the case in question as both dealt with certain provisions concerning export subsidies under the Agreement on Agriculture. We note that the Panel report was overturned on appeal, and that the Appellate Body itself rejected the use of world market prices as a benchmark. See Appellate Body Report, *Canada – Dairy*, WT/DS103/AB/RW, adopted on 18 December 2001, para. 84.

<sup>85</sup> We note that in its Third Party submission, the European Communities submits that "a proper analysis of the "market conditions in the country of provision" may include all commercially available alternative sources for the recipient, including the price for imports into that market". European Communities Third Party Submission, para. 26.

the trade-distorting potential of the government's provision of a good can be identified only by reference to an independent market price, i.e., a price that is unaffected by the very trade distortion the test is designed to identify.<sup>86</sup>

7.50 In our view, however, the "prevailing market conditions" of Article 14 (d) SCM Agreement do not refer to a theoretical market free of government interference as the US seems to be suggesting. Article 14 (d) SCM Agreement provides that the "prevailing" market conditions in the country of provision of the goods are to form the basis for the comparison. The ordinary meaning of the term "prevailing" market conditions is the market conditions "*as they exist*" or "*which are predominant*".<sup>87</sup> Considering that the only qualifier used to the "market conditions" in question is that they be "prevailing", we are of the view that the text of Article 14 (d) SCM Agreement does not in any way require the "market" conditions to be those of a hypothetical undistorted or perfectly competitive market.

7.51 Moreover, the chapeau of Article 14 SCM Agreement clearly states that Article 14 SCM Agreement establishes guidelines for the calculation of "benefit" *to the recipient*.<sup>88</sup> We are of the view that in order to calculate the benefit to the recipient, an authority is to compare the price the recipient paid the government with the prices prevailing in other market transactions. We do not consider that the goal of the examination of the benefit enjoyed by the recipient is to determine what the market price would have been absent the government's financial contribution, as the US is suggesting<sup>89</sup>, or to measure the trade distorting potential of the government's financial contribution.<sup>90</sup> The text of Article 14 SCM Agreement does not require a general "*but for*" test to the prevailing market conditions. We are thus of the view that Article 14 (d) SCM Agreement does not require that the authority construct a market price that could have existed but for the government's involvement, nor does it allow the authority to decline to use in-country prices because they may be affected by the government's financial contribution.

7.52 We consider that if the drafters of the SCM Agreement had wanted to exclude the use of market prices in case of price suppression due to the government's involvement, they would have explicitly provided so, but they have not. The opposite is the case. As we found above, when it comes to the market conditions, the only qualifier in the text of the Agreement is "prevailing". Thus, the

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<sup>86</sup> We note, however, that, as mentioned earlier (para. 7.36 of our Report), the United States has recognised that US timber is commercially available to Canadian lumber mills. This assertion would contradict the US rejection of the existence of a competitive timber and /or lumber market in Canada.

<sup>87</sup> Concise Oxford Dictionary, Ninth Edition, p. 1084..

<sup>88</sup> We note that the US agrees that "As stated in the chapeau to Article 14, and confirmed by the Appellate Body, the benefit for purposes of paragraph 1 of Article 1 is the benefit to the recipient." US Answers to Questions from the Panel after the First Meeting, para. 41. The Appellate Body in the *Canada – Measures Affecting the Export of Civilian Aircraft* case interpreted the term "benefit" in the SCM Agreement in the following manner:

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

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

<sup>89</sup> US Answers to Questions from the Panel after the First Meeting, paras. 23 – 24.

<sup>90</sup> We thus disagree with the US that the market conditions referred to in Article 14 (d) SCM Agreement relate to what the market price would have been absent the financial contribution.

market conditions are those that are actually existing in the country and are those faced by the recipient of the financial contribution. The reference prices are those that the producer would have had to pay if it had to buy the goods now provided by the government from a different and independent seller.

7.53 We wish to note that even if in certain exceptional circumstances it may prove difficult in practice to apply Article 14 (d) SCM Agreement, that would not justify reading words into the text of the Agreement that are not there or ignoring the plain meaning of the text. In our view, the text of Article 14 SCM Agreement leaves no choice to the investigating authority but to use as a benchmark the market, for the good (or service) in question, *as it exists* in the country of provision.

7.54 Canada also argues that the USDOC was not justified in rejecting private stumpage sales in Canada as providing a benchmark for market conditions in Canada. We note that the USDOC in its preliminary CVD determination found that

"the softwood harvest from Crown lands accounts for approximately 70 to 90 per cent of the stumpage sold in each province. Therefore, between 70 and 90 per cent of the good or service within each of the provinces is provided by the government."<sup>91</sup>

7.55 We conclude from this statement in the Preliminary Determination that between 10 and 30 per cent of the good within each province was not provided by the government. In the course of the proceedings before us, we requested further clarification from the parties as to the record evidence on the percentage of softwood lumber harvest in each province in Canada that took place on Crown land versus private land. The US stated that the evidence on the record at the time of the Preliminary Determination indicated that private stumpage sales represented 2 per cent in Alberta, 6 per cent in Manitoba, 8 per cent in Ontario, 10 per cent in British Columbia, 10 per cent in Saskatchewan and 17 per cent in Quebec.<sup>92</sup>

7.56 Finally, the US argues that as a practical matter, the USDOC could not have calculated the benefit on the basis of the private sales prices even if it had wanted to, since the Canadian provinces failed to provide the necessary information. We note first of all that, while the US has argued before us that private sales data were not provided, it is clear from the Preliminary Determination that this was not an element in the USDOC's decision to use a cross-border price analysis. In fact the USDOC clearly acknowledged that the Canadian provinces reported private stumpage prices but that "an examination of the information on the record demonstrates that the private stumpage prices reported by the Provinces do not constitute market determined prices ...".<sup>93</sup> The alleged lack of information is thus not mentioned by the USDOC as a consideration which led to its decision to use a cross-border price analysis. In any case, even the US acknowledges that at least two provinces (Quebec and Ontario) did provide private market standing timber prices.<sup>94</sup> Nevertheless, even for those two

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<sup>91</sup> USDOC Preliminary Determination, p. 43195.

<sup>92</sup> US Answers to Questions from the Panel after the First Meeting, para. 39. At the second meeting, we asked both parties the similar question of what percentage of the softwood harvest for sawmills took place on Crown land. Both parties provided essentially the same figures as in the US response at the first meeting. The one significant difference is that Canada reported that in respect of Quebec, 77 per cent of the logs processed in sawmills came from Crown land, and 23 per cent came from private land or from outside Quebec. The difference between the 23 per cent figure reported by Canada and the 17 per cent reported by the United States as the non-Crown timber harvest is accounted for by timber from outside Quebec that was processed in Quebec. US and Canada's answers to question 1 of the second set of questions. Exhibits US-55 and CDA-107.

<sup>93</sup> USDOC Preliminary Determination, p. 43194.

<sup>94</sup> US Answers to Questions from the Panel after the First Meeting, para 29. In fact the US admits that a third province, Alberta also provided some private sales information, but asserts that "the only information Alberta provided was a two page excerpt from a KPMG survey" without any supporting evidence or source information. US Answers to Questions from the Panel after the First Meeting, paras. 30 -31

provinces no private stumpage sales data were used as a benchmark, because of the alleged price suppression.<sup>95</sup>

7.57 Accordingly, based on our interpretation of the text of Article 14(d) SCM Agreement, which does not require the prevailing market conditions to be those of an "undistorted" market, we consider that the USDOC provided no rationale in the context of Article 14 (d) SCM Agreement for rejecting Canadian private stumpage prices as the basis for calculating the benefit.<sup>96</sup>

7.58 We note, moreover, that the domestic markets of the member countries of the WTO are not identical – nor are they expected to be – and that there is nothing in the WTO or SCM Agreement indicating that, in order to qualify as such, markets must meet specific qualitative requirements, as the US would seem to suggest. A contrary conclusion would lead to a result in which the importing country would have a very broad scope to choose another market, including its own, in order to determine benefit. Such a result would clearly distort the letter and purpose of Article 14 (d) and vitiate its intended application. We further note that using the US methodology for determining a benefit from the provision of government-owned resources that are not in themselves tradable across borders and not sold at public auction would lead to the virtual automatic determination of the existence of subsidization in a resource-rich exporting country, even where the perceived price difference was simply a reflection of the exporting country's comparative advantage in the product

(c) Conclusion

7.59 We therefore find that by using prevailing *US* stumpage prices, which by definition do not constitute the prevailing market conditions in *Canada*, the USDOC acted inconsistently with Article 14 and 14 (d) SCM Agreement in determining the benefit to the recipient, and therefore also acted inconsistently with Article 1.1 SCM Agreement in determining the existence of a subsidy. As for the issue of the appropriateness of the actual adjustments used to calculate the benchmark stumpage prices in this case, our understanding is that Canada raised this point as factual support for its basic legal argument that the cross-border methodology used by the USDOC was invalid, and that Canada has raised no separate claim in this regard. Given this, and given our conclusion above, we do not need to consider this issue.

**4. Claim 3: failure to examine and determine the existence of benefit to the producers of the subject product**

(a) Arguments of the parties

(i) *Canada*

7.60 Canada asserts that the USDOC impermissibly assumed that the alleged financial contribution to timber harvesters through the stumpage rights conferred a benefit on the downstream producers of

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<sup>95</sup> US Answers to Questions from the Panel after the First Meeting, para. 40. In addition, Canada notes that the four primary exporting provinces, among which British Columbia - which represents about 60 per cent of Canada's softwood lumber production according to the US - provided information to the USDOC demonstrating that they were operating their stumpage systems consistently with market principles. Canada adds that the information that for example British Columbia provided consisted of data on the volume and value of competitive sales of stumpage, sold through a competitive auction on the basis of price. Canada's Answers to Questions from the Panel after the First Meeting, paras. 62 –67.

<sup>96</sup> The USDOC determined that "since stumpage fees on public lands are the price driver for the stumpage market in those Provinces, we conclude that the stumpage fees on private lands are largely derivative of the public land prices and are therefore distorted", and for that reason decided that they could not be used as a benchmark to determine the amount of benefit to the lumber producers. USDOC Preliminary Determination, p. 43195.

softwood lumber. Canada notes that standing timber is harvested and processed into logs which are then processed in sawmills and pulp mills to produce a wide variety of products including softwood lumber, and that the lumber may then be sold at arm's-length as an end-product or sold to re-manufacturing industries that make a vast array of products. Canada argues that it is not the case, as the US is suggesting, that all tenure or licence agreements require tenure/licence holders to own a sawmill. Nor are there in general any requirements either by law or by the terms of tenure that require tenure holders to sell to specific mills or to sell at specific prices or under specific terms and conditions. Canada argues that only in certain cases are tenure holders required to construct or maintain a facility with the ability to mill harvested timber.<sup>97</sup> Stumpage tenure holders are therefore in general free to sell their logs to unrelated sawmills.<sup>98</sup>

7.61 Canada asserts that the evidence on the record demonstrates that a significant portion of harvesting is done by entities operating at arm's-length from lumber producers, and logs produced by such independent entities are sold to lumber producers in arm's-length transactions. In such cases, according to Canada, the USDOC should have conducted a pass-through analysis to determine whether the alleged benefit from the stumpage programmes was passed through to the lumber producers.

7.62 Canada argues that the record indicates that for British Columbia, 30.09 per cent of timber from Crown licenses was harvested by companies that do not have sawmills (33.0 per cent if private land logging is included); in Quebec, apart from a certain type of tenures (Timber Supply Forest Management Agreement (TSFMA) tenures in particular), 27 per cent of the provincial harvest was sold through arm's-length transactions from private lands and Forest Management Contracts (FMC); in Ontario, 30 per cent of harvested timber from Crown land was sold to third parties who processed it into forest products; in Alberta, 6 per cent of total softwood logs harvest were sold at arm's-length in the sense that the transactions were between totally unrelated parties. Canada argues in addition that at least 8 primary mills requested an exclusion as they purchased all their log inputs in arm's-length transactions. Canada further asserts that a large number of unaffiliated remanufacturers purchase lumber in arm's-length transactions from lumber producers. Canada argues that in those arm's-length transactions, any alleged benefit to the lumber producers would not be passed through to the remanufacturers and that, therefore, remanufactured products cannot be presumed to be subsidized.<sup>99</sup> In any case, Canada submits, even prices between related parties may and often are also arm's-length prices because they are freely negotiated without regard to any relationship of the parties.<sup>100</sup>

7.63 According to Canada, when transactions take place at arm's-length, the recipient of a subsidy is presumed to have retained the benefit. Canada submits that since the USDOC failed to conduct an analysis of whether any benefits were passed along in such arm's-length transactions in the case at hand, its finding of a benefit conferred to the Canadian softwood lumber producers by the alleged provision of stumpage to the upstream log producers is inconsistent with the SCM Agreement.<sup>101</sup>

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<sup>97</sup> Canada's Answers to Questions from the Panel after the First Meeting, para. 33.

<sup>98</sup> Canada's Answers to Questions from the Panel after the First Meeting, para. 34. According to Canada, the exception is Quebec where under the Timber Supply Forest Management Agreement mills hold the tenure and timber harvested under that tenure must be processed at that mill.

<sup>99</sup> Canada's Second Written Submission, para. 83.

<sup>100</sup> Canada's Answers to Questions from the Panel after the First Meeting, para. 49 –61.

<sup>101</sup> Canada argues that a subsidy is either direct in the case it confers a benefit on the recipient thereof (Article 1.1(a)(iii)), or is indirect in case a private entity is entrusted or directed by government to provide goods in a manner that confers a benefit (Article 1.1 (a) (iv)). In Canada's view, since in this case the alleged financial contribution (standing timber) was provided to the log producers and not to the downstream lumber producers, Article 1.1(a)(iv) SCM concerning indirect subsidies applies. In such a case, Canada argues, an investigating authority must also always establish both elements of a subsidy as regards a downstream producer that has allegedly been subsidized: a financial contribution to that downstream producer, and a benefit. According to

(ii) *United States*

7.64 The United States proffers two main arguments against the need for a pass-through analysis for determining benefit to the lumber producers. First, the US argues that no truly arm's-length transactions between independent harvesters and independent lumber mills existed. Second, the US asserts that a pass-through analysis was not required in this case as the investigation was conducted on an aggregate basis.

7.65 Concerning the first point, the US argues that no pass-through analysis was required because the subsidies were bestowed directly on the producers of the subject merchandise, since the entity receiving the financial contribution (standing timber) and the entity receiving the benefit (a below-market stumpage price) are "generally one and the same".<sup>102</sup> The United States asserts that a very significant number of timber harvesters also own sawmills and are therefore at the same time producers of softwood lumber. In other words, according to the US, most lumber producers are also harvesters of standing timber, which they obtain through the conclusion of tenure agreements with the Canadian provincial governments. The United States asserts that in fact each Canadian province generally requires that tenure holders be sawmills or own a sawmill.<sup>103</sup> The small portion of Crown timber harvested by tenure holders that do not own sawmills is subject to restrictions that tie the timber to specific sawmills in Canada.<sup>104</sup> In such circumstances, the US argues, the loggers and the lumber producers (sawmills) are thus not operating at arm's-length with each other<sup>105</sup>, and there is no need to examine the pass-through issue. Thus, according to the US, the evidence indicates that there are virtually no truly arm's-length transactions between harvesters and lumber mills, and the independent logger is therefore "largely a myth".<sup>106</sup>

7.66 The US argues that, in Canada's view, in two other situations involving arm's-length transactions a pass-through analysis was required:(i) in case logs are harvested by one sawmill and then sold at arm's-length to another sawmill, and (ii) when lumber is sold at arm's-length to companies that produce remanufactured lumber products. The US submits that in those two situations, no pass-through analysis is required in an aggregate case as all of the entities involved are producers of the subject merchandise.<sup>107</sup> The US is of the view that for remanufacturers who produce merchandise within the scope of the investigation, it is only in the context of determining a company-specific subsidy rate that a pass-through analysis may be necessary.<sup>108</sup> The US asserts that, as a result, the USDOC did not request any information on these types of transactions. According to the US, the precise amount of the benefit received by individual producers (for example, whether the benefit

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Canada, in addition to failing to determine any benefit, the USDOC failed to establish that the lumber producers received a financial contribution, as it did not demonstrate that the Canadian provinces directed the log producers to provide a financial contribution (logs) to the lumber producers. Canada's Answers to Questions from the Panel after the First Meeting, para. 81.

<sup>102</sup> US Answers to Questions from the Panel after the First Meeting, para. 43.

<sup>103</sup> US Answers to Questions from the Panel after the First Meeting, para. 1.

<sup>104</sup> US Answers to Questions from the Panel after the First Meeting, para. 9.

<sup>105</sup> US Answers to Questions from the Panel after the First Meeting, para. 87.

<sup>106</sup> US Answers to Questions from the Panel after the First Meeting, para. 44.

<sup>107</sup> US Answers to Questions from the Panel after the First Meeting, para. 48. According to the US, "in an aggregate case, the Commerce Department determines the total amount of the subsidy to producers of the subject merchandise and allocates that amount over all sales of the subject merchandise. Thus, when all of the alleged recipients of the financial contribution and the benefits are producers of the subject merchandise, no further analysis is required to perform the aggregate calculation. Benefits that potentially shift from one producer to another in an arm's-length transaction would still be part of the overall numerator (either remaining with the original recipient or "traveling to" the purchaser), as long as both companies produce subject merchandise". US Answers to Questions from the Panel after the First Meeting, para 76.

<sup>108</sup> US Answers to Questions from the Panel after the First Meeting, para. 50.

stayed with the original recipient or “travelled to” the purchaser) would only be determined in a company-specific review.

7.67 In sum, the US argues that, given this evidence, it was not necessary for the USDOC to conduct a pass-through analysis in order to determine the existence of benefit to Canadian softwood lumber producers by the government provision of stumpage.<sup>109</sup>

(b) Analysis

7.68 Article 1.1 (b) SCM Agreement establishes that a subsidy shall be deemed to exist if there is a financial contribution by the government and a benefit is thereby conferred on the producers of this subject product, in this case softwood lumber. The USDOC determined that the provision of stumpage, standing timber, constituted a financial contribution by the government. However, the subject product of the USDOC’s countervailing duty investigation is the downstream product, softwood lumber, which is processed from logs, which in turn have been processed from standing timber. The various forms of stumpage agreements in the form of tenures or licenses are all concluded between timber harvesting companies/loggers and the provincial governments.

7.69 We consider that the question before us is whether under the facts of this case, the USDOC was required to examine whether, in certain transactions covered by the investigation, some or all of the alleged benefit to the tenure holders from the stumpage programmes was passed through to the producers of the subject merchandise exported to the US. These transactions were not only the case where a sawmill buys logs in an arm’s-length transaction but also where a re-manufacturer buys lumber for further processing in an arm’s-length transaction. Thus, conceptually, for some remanufactured products that are subject merchandise the issue of quantifying pass-through of benefit could involve two separate arm’s-length transactions.

7.70 We note that the US agrees that if a government makes a financial contribution to an entity which does not produce the subject merchandise, it would be necessary to analyze whether that financial contribution benefitted another entity that does produce the subject merchandise.<sup>110</sup> The US also acknowledges that, in theory, an arm’s-length transaction between an independent tenure holder and an unrelated lumber mill may give rise to the issue of whether the financial contribution to the tenure holder conferred a benefit on the lumber producer.

7.71 We are of the view that an authority may not assume that a subsidy provided to producers of the “upstream” input product automatically benefits unrelated producers of downstream products, especially if there is evidence on the record of arm’s-length transactions between the two.<sup>111</sup> Rather,

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<sup>109</sup> The US argues that if the government made the financial contribution to an entity that does not produce the subject merchandise, it would be necessary to analyse whether that financial contribution benefitted another entity that does produce the subject merchandise. In this case, according to the US, the only allegation of a financial contribution to an entity that does not produce the subject merchandise is Canada’s claim that there is a significant volume of Crown timber that the provincial governments provide to independent loggers who then sell the timber at arm’s-length to lumber mills. However, the US submits, the evidence does not support Canada’s claim. The US refers to its discussion in paras. 1–11 of its answers to questions from the Panel. US Answers to Questions from the Panel after the First Meeting, paras. 46–47.

<sup>110</sup> US Answers to Questions from the Panel after the First Meeting, para. 46.

<sup>111</sup> We note that in the *United States - Pork* case, the Panel stated that the parties “did not dispute that Canada had granted subsidies to swine producers, that swine producers and pork producers are separate industries operating at arm’s-length and that the subsidies granted to swine producers could have indirectly bestowed a subsidy on the production of pork”. For all these reasons, the Panel concluded that the DOC should have examined whether and to what extent the subsidies bestowed on the upstream producers benefited the downstream producers. Panel Report, *United States, Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R, adopted on 11 July 1991, 38S/45.

we consider that in such circumstances the investigating authority should examine whether and to what extent the subsidies bestowed on the upstream producers benefited the downstream producers. In this respect, we recall that in the *US – Lead and Bismuth II* case (WT/DS138/AB/R) the Appellate Body concluded in a different context involving subsidies provided to entities subsequently privatized, that an entity other than the original recipient of the subsidy should not be deemed to have received a benefit in the case where an arm's-length price was paid to acquire the entity that had received the subsidies:

“68. The question whether a "financial contribution" confers a "benefit" depends, therefore, on whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. In the present case, the Panel made factual findings that UES and BSplc/BSES paid fair market value for all the productive assets, goodwill, etc., they acquired from BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995 and 1996. We, therefore, see no error in the Panel's conclusion that, in the specific circumstances of this case, the "financial contributions" bestowed on BSC between 1977 and 1986 could not be deemed to confer a "benefit" on UES and BSplc/BSES. (emphasis added)<sup>112</sup>

7.72 Canada and the US agree that the evidence on the record demonstrates that a large number of tenure holders own a sawmill and are thus at the same time softwood lumber producers. It is clear that in such circumstances of complete identity between the tenure holder/logger and the lumber producer, no pass-through analysis is required. Canada argues however that in a significant number of cases, lumber producers purchase logs at arm's-length from unrelated tenure holders. In addition, Canada argues that logs are traded at arm's-length between lumber producers and that lumber is sold at arm's-length by sawmills to remanufacturers who also produce the subject merchandise. According to Canada, in all these situations, USDOC failed to examine whether the subsidy passed through to the producers of the subject merchandise, softwood lumber. The US submits that the evidence does not support Canada's argument concerning independent loggers. As far as the two other categories is concerned, the US submits that the question of pass-through is moot in an aggregate investigation since all of the entities concerned are also producers of the subject merchandise.

7.73 We first examine the evidence on the record with regard to the relationship between the lumber producers and the tenure holders/loggers. The USDOC Preliminary Determination and additional clarifying statements of the US in the current proceedings reveal that not all logging companies are at the same time softwood lumber producers. For Ontario, the USDOC states in its Preliminary Determination that lumber producers may obtain the forest products they need in five ways. One such way is to pay the government stumpage fees and harvest the timber themselves, but another way is to purchase logs at arm's-length from a company that harvested them from Crown lands.<sup>113</sup> As the US clarified before the Panel, the record shows that for British Columbia, between 9

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<sup>112</sup> Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, ("US - Lead and Bismuth II"), WT/DS138/AB/R, adopted on 7 June 2000, para. 68. We further note that the Panel in the *US – Lead and Bismuth II* case (WT/DS138/R) observed in a footnote that:

in 69. " ... a "financial contribution" does not have to be bestowed directly on a company in order to confer a "benefit" on that company. For example, one company may be found to "benefit" from a "financial contribution" conferred on another company. Furthermore, in certain circumstances an untied, non-recurring "financial contribution" bestowed directly on, and benefiting, a prior company may be deemed to have been bestowed indirectly on the successor company".

Panel Report, *US - Lead and Bismuth II*, WT/DS138/R, adopted as upheld by the Appellate Body Report WT/DS138/AB/R on 7 June 2000, footnote 69.

<sup>113</sup> USDOC Preliminary Determination, p. 43203

and 17 per cent of Crown timber harvest is done by independent harvesters.<sup>114</sup> For Alberta, the US states that 95 per cent of softwood timber was provided to tenure holders who own sawmills. This suggests that some 5 per cent of the timber provided would have been sold to sawmills by unrelated loggers. For Saskatchewan and Manitoba, the US gives a similar figure of 95 per cent of softwood timber which was provided to entities that also hold provincial licences to operate sawmills.<sup>115</sup> The USDOC also acknowledged that it received a number of company specific requests for exclusion, thirteen of which from companies "purchasing logs at arm's-length, from private lands, or from US suppliers".<sup>116</sup>

7.74 We find that the US has thus conceded before us that in a certain number of cases, the lumber producers were independent from the tenure harvesters and may well have had to pay an arm's-length price to obtain the allegedly subsidized logs from the harvesters. Nothing in the record indicates, and the US does not argue, that in such cases where the harvesters and lumber producers are unrelated, the USDOC examined whether the prices charged between the harvester and its customer, the unrelated lumber producer, were at arm's-length, and hence whether any benefit passed through. We find that in such circumstances, where a downstream producer of subject merchandise is unrelated to the allegedly subsidized upstream producer of the input, an authority is not allowed to simply assume that a benefit has passed through. We further consider that conducting the investigation on an aggregate basis versus a company-by-company basis is irrelevant to this issue. The fact that in the large majority of cases the lumber producers and the harvesters are related, does not imply that it is no longer necessary in cases where there is no such relationship to examine and determine whether a benefit existed for the independent producers of the subject merchandise including independent re-manufacturers. By failing to examine whether the independent lumber producer paid arm's-length prices for the logs that they purchased, the USDOC determined the benefit to the producers of the subject merchandise inconsistently with the SCM Agreement.

7.75 The US argues, with regard to the situations of sawmills buying logs from other sawmills at arm's-length and of remanufacturers purchasing lumber from unrelated sawmills, that no pass-through analysis was required as all of the entities involved are producers of the subject merchandise. In sum, the US position, both in the investigation and before us, is that in an aggregate case, no pass-through analysis is necessary where all of the entities involved are producers of the subject merchandise. We find no basis in the SCM Agreement for this argument, however. In our view, the purpose of the original investigation is precisely to determine whether and to what extent a subsidy has been granted to the producer of the subject merchandise. An authority cannot simply assume the existence of such a benefit in the original investigation. As the Appellate Body in the *Lead and Bismuth* Case stated:

"In an original investigation, the investigating authority must establish that *all* conditions set out in the *SCM Agreement* for the imposition of countervailing duties are fulfilled."<sup>117</sup>

7.76 Here we recall that any calculation of the rate of subsidization in a countervailing duty investigation involves three distinct steps. First is the calculation of the total amount of the subsidy provided during the period of investigation (the establishment of the numerator of the equation). Second is the calculation of the total amount of relevant sales to which the subsidy amount can be attributed (the establishment of the "sales denominator"). Third is the calculation of the rate of

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<sup>114</sup> US Answers to Questions from the Panel after the Second Meeting, para. 18.

<sup>115</sup> US Answers to Questions from the Panel after the Second Meeting, paras. 21-23.

<sup>116</sup> USDOC Preliminary Determination, p. 43188

<sup>117</sup> Appellate Body Report, *US - Lead and Bismuth II*, WT/DS138/AB/R, adopted on 7 June 2000, para. 63.

subsidization, by dividing the subsidy amount numerator by the denominator of relevant sales. The result is an *ad valorem* rate of subsidization of the subject merchandise.<sup>118</sup>

7.77 In this dispute, the US seems to be approaching the issue of pass-through of benefits as if it can be resolved solely by correctly identifying the value of relevant sales of the subject merchandise (softwood lumber) to be used as the denominator. This appears to be the reasoning behind the US position that a pass-through analysis for the purchases of inputs by unrelated producers of softwood lumber would be unnecessary where the calculation is performed on an aggregate basis. We disagree. In our view, the issue of pass-through has to do in the first instance with correctly establishing the amount of the subsidy benefiting the producers of the subject merchandise, i.e. the numerator. That is, alleged benefits from the stumpage programmes can only be included in the total subsidy amount to the extent that they benefit the producers of the subject merchandise, softwood lumber. Where a given producer of the subject merchandise itself harvests logs, and thus itself is the recipient of the alleged benefit, the entire amount of the alleged benefit to that recipient can be included in the subsidy amount (numerator) without further analysis. Where, however, a producer of softwood lumber does not itself harvest logs, but instead buys logs or lumber from unrelated suppliers, any alleged benefit from the stumpage programmes that may have benefitted the producer of the logs or lumber involved could only be included in the total subsidy amount to the extent that it has been established as a factual matter that the purchaser has received some or all of the benefit.

7.78 We find particularly important in this respect that, as Canada pointed out<sup>119</sup>, prior to the Preliminary Determination, the USDOC had applications for exclusion from 98 producers who purchased logs or lumber from unrelated suppliers.<sup>120</sup> Of these, 78 were remanufacturers unrelated to firms with harvesting rights and at least 8 were first mills that purchased all of their log inputs from unrelated suppliers. In light of the fact that, at the Preliminary Determination, the USDOC had knowledge of a sizeable number of lumber producers purchasing log and lumber inputs from unrelated suppliers allegedly at arm's-length, the USDOC should have examined, in calculating the total amount of the alleged subsidy, whether and to what extent any benefit passed through to those lumber producers.

(c) Conclusion

7.79 In sum, we find that in this case, there was evidence on the record of a certain amount of sales by producers of logs that did not own a lumber-processing facility, and were not related to the downstream lumber producers to which they sold their logs. In addition, there is evidence on the record that USDOC was aware of the fact that a number of lumber producers buy logs or lumber inputs from unrelated sawmills. We therefore find that, given such record evidence, the absence of any examination of these transactions by the USDOC was not consistent with the SCM Agreement. The USDOC should have examined, in the original investigation, whether, in cases where the tenure holders were not at the same time processing the logs in their own sawmills, the lumber producers benefited from the financial contribution given to the tenure holders. We therefore conclude that the USDOC imposed a provisional countervailing duty without determining the existence and amount of the benefit conferred on the allegedly subsidized product, and, therefore, in a manner inconsistent with the SCM Agreement.<sup>121</sup>

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<sup>118</sup> This is of course without prejudice to other bases for calculating the rate for the levying of countervailing duties such as on a per unit basis, by using as the denominator the number of units of relevant sales.

<sup>119</sup> Canada's Answers to Questions from the Panel at the First Meeting, para. 60.

<sup>120</sup> See Letter to the Honourable Donald L. Evans from Weil, Gotshal & Manges, Certain Softwood Lumber From Canada: Company Exclusions, p. 3-4 and appendices A-F (August 8, 2001) (Exhibit CDA-44).

<sup>121</sup> In light of this finding, we see no need to address the issue raised by Canada in footnote 101.

**5. Claim 4: impermissible application of a provisional duty in excess of the subsidy rate**

(a) Arguments of the parties

(i) *Canada*

7.80 Canada argues that the US calculated the subsidy rate of 19.31 per cent *ad valorem* on a first mill basis, but applied it on an entered value basis with the effect of significantly increasing the provisional measures applied to a considerable portion of Canadian exports of softwood lumber to the United States. Canada argues that in all of the subsidy calculations, the denominator was the value of sawmill (first mill)<sup>122</sup> exports. Nevertheless, in a decision memorandum<sup>123</sup> accompanying the USDOC's instructions to Customs, the USDOC claims that the record for the Preliminary Determination supports the collection of countervailing duty deposits on an entered value basis. Canada submits that this practice implies that the importer of the value-added product faces an actual duty of above 19 per cent of the first mill value. This application of a duty in excess of the rate is inconsistent with the SCM Agreement.

7.81 Canada asserts that the statement by Statistics Canada on which the USDOC based its decision in this regard, which stated that the data provided related to both first-mill and "re-manufacturers" reflects a typographical error. Canada argues that, in actuality, the statement which caused the alleged confusion intended to say that "it was not possible to exclude 're-manufactures from its results.'" Canada argues that the actual calculation methodology in the survey makes clear that the data provided were in fact from a survey of "sawmills" (also noted as "first mills"), and that the discussion of the methodology further intended to explain that the data also included a small portion of remanufactured products that were produced *by the sawmills*. According to Canada, this is because Statistics Canada stated that it was unable to isolate the small portion of further millwork or value added that was performed *within* the sawmills, and therefore, such values were included in the reported data. Canada argues that it explained this clearly in its 21 August and 27 August submissions to the USDOC, *prior to* the time at which the USDOC issued its Customs instructions implementing the decision on a final mill basis.<sup>124</sup> However, Canada submits, even though Canada had fully

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<sup>122</sup> Sawmills produce lumber from logs and ship the lumber to either end-users or downstream value-added re-manufacturers (final mills) that use lumber inputs and produce further processed lumber products..

<sup>123</sup> Memorandum from M.G. Skinner, Director, Office of AD/CVD Enforcement VI to B.T. Carreau, Deputy Assistant Secretary, AD/CVD Enforcement, re "Basis of the Countervailing Duty Deposit Rate," dated 31 August 2001, p. 3. (Exhibit CDA-31)

<sup>124</sup> See, e.g., Letter from Weil, Gotshal & Manges, counsel for the Government of Canada, to the Department of Commerce regarding Certain Softwood Lumber Products from Canada: StatsCan Data Based on "First Mill" Values, dated 21 August 2001 (Exhibit CDA-96), where Canada explained:

Confusion on this issue arose as a result of a statement in the GOC Questionnaire Response that, "[b]ecause the MSM does not collect commodity data, it was not possible to exclude 're-manufacturers' from its results." See Questionnaire Response on Behalf of the GOC, Volume I, Exhibit GOC-GEN-2 ("Calculation Methodology Summary") (28 June 2001) [Exhibit US-13]. As was explained in the meeting with the Department, however, this statement does not mean that the data on the record relate to any manufacturers other than "sawmills." Rather, when read in context (*i.e.*, in relation to the Monthly Survey of Manufacturing for the Sawmills industry), the explanation simply indicates that, if a primary sawmill performed additional manufacturing within its own mill, such additional millwork would be included in the data, because commodity details on the production of sawmills are not broken out in the survey. Any such further processed products of the sawmills would, moreover, be "first mill" products. As is demonstrated in the Attachment to this letter, the

explained that the data used in the preliminary calculations did not contain any final mill sales, the United States applied provisional measures on a final mill basis.

(ii) *United States*

7.82 The United States submits that the USDOC calculated the duty based on the total value of all sales (first mill and remanufactured) which was the information requested from and provided by Canada in the Questionnaire.<sup>125</sup> The US argues that the Canadian argument is flawed since the USDOC at the time of making its determination did not know and could not know that the information provided by Canada only referred to first mills, since Canada only informed the USDOC of this for the first time after the Preliminary Determination. As this is evidence and information not before the USDOC at the time of the determination, the Panel cannot take it into account when reviewing the USDOC's Preliminary Determination.<sup>126</sup>

(b) Analysis

7.83 In light of our finding above concerning the USDOC's incorrect determination of the amount of benefit which formed the basis for the calculation of the countervailing duty rate, we consider that it is not necessary for us to address this claim in order to resolve the dispute before us and we therefore decide to apply judicial economy in respect of this claim.

**6. Conclusion on Canada's claims relating to the Preliminary Countervailing Duty Determination.**

7.84 In light of our conclusions above that the USDOC Preliminary Countervailing Duty Determination

? was not inconsistent with Article 1.1(a) SCM Agreement when it found that the provision of stumpage constituted a financial contribution, in the form of the provision of a good or service;

? failed to determine the existence and amount of benefit to the producers of the subject merchandise on the basis of the prevailing market conditions in Canada as required by Article 1.1 (b) and Article 14 and 14(d) SCM Agreement; and

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reported StatsCan data, which was limited to NAICS subsection 321111, do not contain any sales or production information for "remanufacturers."

*See also* Letter to the Honourable Donald L. Evans from Weil Gotshal and Manges (27 August 2001) (Exhibit CDA-46) ("As explained in [Canada's August 15, 2001 (Exhibit CDA-45) and 21 August 2001 (Exhibit CDA-96)] submissions, with the exception of insignificant amounts for first-mill further manufactured products, these data do not include shipments made by 'remanufacturers.'")

<sup>125</sup> The US argues that the USDOC asked for information on total value of sales and specifically requested to include information on remanufactured products, and that Canada replied that the information provided included both. US First Written Submission, footnotes 84 -85; Exhibit US-12 and US -13.

<sup>126</sup> The US refers to the Panel report in *US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, which stated that: "When assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination. In respect of the US determination at issue in the present case, we consider, therefore, that this Panel is requested to make an objective assessment as to whether the United States respected the requirements of Article 6.2 and 6.3 of the ATC at the time of the determination". Panel Report, *US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted as modified by Appellate Body Report WT/DS33/AB/R on 23 May 1997, para. 7.21.

- ? failed to establish that a benefit in the sense of Article 1.1 (b) SCM Agreement was conferred to certain producers of the subject merchandise, since the USDOC did not examine whether a benefit was passed through by the unrelated upstream producers of log inputs to the downstream producers of the subject merchandise;

we conclude that the USDOC's imposition of provisional countervailing measures was inconsistent with the US' obligations under Articles 1.1 (b), 14, 14 (d) SCM Agreement as well as Articles 10 and 17.1 (b) of the SCM Agreement, as these provisional measures were imposed on the basis of an inconsistent preliminary determination of the existence of a subsidy.<sup>127</sup> We do not consider it necessary to address Canada's additional claims regarding the consistency of USDOC's actions with Articles 17.2, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994. In light of our conclusions above, we do not find it necessary either to rule on Canada's claim that the USDOC instructions transmitted to the United States Customs Service on 4 September 2001, imposed provisional measures in excess of the subsidy preliminarily found to exist in a manner inconsistent with Articles 10, 17.2, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994.

**B. CLAIMS RELATING TO THE PRELIMINARY CRITICAL CIRCUMSTANCES DETERMINATION AND THE RETROACTIVE APPLICATION OF PROVISIONAL COUNTERVAILING MEASURES**

7.85 The second set of claims of Canada relates to the USDOC Preliminary Critical Circumstances Determination which formed the basis for the retroactive application of provisional measures in this case. Canada argues, first, that the SCM Agreement does not under any circumstances allow for the retroactive application of provisional measures, and thus considers that the USDOC Preliminary Critical Circumstances Determination is inconsistent with the SCM Agreement. In addition, Canada argues that the retroactive application of the provisional measures violated the disciplines of Article 17 SCM Agreement. Finally, Canada submits that, in any event, and even if we were to find that the SCM Agreement would in certain circumstances allow for the retroactive application of provisional measures, the USDOC failed to establish the existence of critical circumstances which would have justified the retroactive application of the provisional measures in question.

**1. Claim 1: retroactive application of provisional measures is inconsistent with Article 20.6 SCM Agreement and violates Article 17.3 and 17.4 SCM Agreement.**

(a) Arguments of the parties

(i) *Canada*

7.86 Canada is challenging the USDOC Preliminary Critical Circumstances Determination on the basis of which the United States retroactively applied the provisional measures to entries occurring 90 days prior to the date of publication of the preliminary determinations, *i.e.* entries occurring in the period of May 19 through August 16, 2001.

7.87 According to Canada, a retroactive application of provisional measures inevitably violates Article 20.6 SCM Agreement as this provision only allows for the retroactive application of

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<sup>127</sup> Article 10 SCM Agreement provides that "Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture".

Article 17.1 (b) SCM Agreement states that "provisional measures may be applied only if:

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports;"

definitive duties. Canada argues that the plain and ordinary meaning of the terms of Article 20.6 SCM Agreement, read in context and in the light of the object and purpose of the provision, make clear that only definitive countervailing duties, if warranted, can be applied retroactively, and that retroactive application of provisional measures is simply not permitted. In addition, Canada argues that Article 17.3 SCM Agreement provides that provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation. Due to the Preliminary Critical Circumstances Determination, provisional measures in this case were applied to entries occurring within 90 days prior to the date of publication of the Preliminary Determination (17 August 2001), i.e. as of 19 May 2001. As a consequence, the date of application of provisional measures in this case was less than a month after the initiation (23 April 2001), thereby violating Article 17.3 SCM Agreement, which provides that provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation. In addition, Canada submits that Article 17.4 SCM Agreement provides that the maximum period of application of provisional measures is 4 months following the Preliminary Determination. According to Canada, as the US applied provisional duties retroactively for 90 days in addition to the 4 month period following the Preliminary Determination, provisional measures were applied for almost 7 months thereby violating Article 17.4 SCM Agreement. Accordingly, Canada argues, not only is the retroactive application of provisional measures not permitted under Article 20.6 SCM Agreement, but any such action by the United States also constitutes a violation of Article 17.3 and 17.4 of the SCM Agreement.

7.88 Canada therefore considers the USDOC's Preliminary Critical Circumstances Determination to be inconsistent with Articles 17.1(b), 17.3, 17.4, 17.5, 19.4 and 20.6 of the SCM Agreement.

(ii) *United States*

7.89 The United States is of the view that the retroactive application of provisional measures, in this case in the form of suspension of liquidation and the posting of a bond or cash deposits, is allowed under Article 20 SCM Agreement. The United States argues that both suspension of liquidation of import entries and the posting of bonds or cash deposits are necessary to ensure that it retains the possibility of exercising the right to retroactive relief provided for in Article 20.6 SCM Agreement. Suspension of liquidation alone would not be sufficient, the United States asserts, since, if no amount is guaranteed by a cash deposit or bond, Article 20.3 SCM Agreement would, on its face, preclude the collection of duties retroactively. The retroactive application of provisional measures is thus necessary, according to the US, to preserve the possibility and the ability to exercise the retroactive definitive remedy.<sup>128</sup> According to the United States, Article 20 SCM Agreement provides an exception to the timing provisions of Article 17.3 and 17.4 SCM Agreement relating to the maximum duration of the provisional measures and the earliest possible date of application of such measures. The US argues that Article 20.1 and 20.6 SCM Agreement establish an exception which, although not altering the date when provisional measures may be imposed, expands the universe of "entries" of the subject merchandise to which those measures apply.<sup>129</sup>

7.90 In sum, according to the United States, where provisional measures are imposed in accordance with the requirements of Article 17 SCM Agreement (i.e. after preliminary determinations of subsidization and injury), Article 20.1 SCM Agreement permits a Member to expand the scope of

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<sup>128</sup> The United States acknowledges that there is no equivalent to the early measures provision of Article 10.7 Anti-Dumping Agreement, but argues that this only implies that a critical circumstances determination in the countervailing duty context may not be made as early as in the anti-dumping context where Article 10.7 Anti-Dumping Agreement allows Members to take precautionary measures "after initiation of the investigation". US Answers to Questions from the Panel after the Second Meeting, para. 57.

<sup>129</sup> US First Written Submission, footnote 103. Thus, according to the US, in a case of retroactive application, the period of 4 months during which the provisional measures are applied remains the same, but the amount of entries covered becomes larger.

these provisional measures to encompass entries during the 90 days prior to the preliminary determination if there is sufficient evidence that the circumstances described in Article 20.6 SCM Agreement exist.

(b) Analysis

(i) *Does Article 20.6 SCM Agreement allow for the retroactive application of provisional measures?*

7.91 The USDOC made a preliminary determination of the existence of critical circumstances on the basis of which it ordered the retroactive application of provisional measures. The USDOC accordingly directed the US Customs Service to suspend liquidation of all entries of the subject merchandise from Canada, entered or withdrawn from warehouse for consumption on or after 90 days prior to the date of publication of the Preliminary Determination, and instructed Customs to require a cash deposit or bond for such entries of the subject merchandise.<sup>130</sup> The US argues that both suspension of liquidation and the posting of bonds or cash deposits are necessary to ensure the possibility of exercising the right to retroactive definitive relief provided for in Article 20.6 SCM Agreement. Thus, for the US, the USDOC Preliminary Critical Circumstances Determination is consistent with Article 20.6 SCM Agreement.

7.92 Article 20 SCM Agreement provides as follows:

*Article 20*

*Retroactivity*

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

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<sup>130</sup> USDOC Preliminary Determination, p. 43215

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures." (emphasis added)

7.93 As its text indicates, Article 20.1 SCM Agreement provides that provisional measures and countervailing duties shall only be applied to products entering the country following the imposition of such measures, "*subject to the exceptions set out in this Article*". While Article 20.2 and Article 20.6 SCM Agreement provide for explicit exceptions in the case of the *definitive* countervailing duties, we find no similar exceptions relating to provisional measures. Article 20.2 SCM Agreement sets forth the circumstances in which definitive countervailing duties may be applied retroactively for the period during which provisional measures were applied.<sup>131</sup> Similarly, in critical circumstances, Article 20.6 SCM Agreement allows for the definitive duties to be assessed on imports which entered the country from 90 days prior to the date of application of the provisional measures.

7.94 Pursuant to the Preliminary Critical Circumstances Determination, the USDOC ordered the retroactive imposition of provisional measures in the form of the suspension of liquidation and a cash deposit or bond requirement. The US acknowledges in this dispute that such measures constitute provisional measures within the meaning of Article 17 SCM Agreement.<sup>132</sup> We are of the view that the only two exceptions to the general rule of non-retroactivity of Article 20.1 SCM Agreement as set forth in Article 20.2 and 20.6 SCM Agreement do not apply to provisional measures, but concern definitive countervailing duties only. On the basis of the clear language in the SCM Agreement, we therefore consider that the general rule of non-retroactivity applies to provisional measures, without exceptions. We therefore find that the retroactive application of the provisional measure imposed by the USDOC is inconsistent with Article 20.6 SCM Agreement.

7.95 We agree with the United States that a Member is allowed to take measures which are necessary to preserve the right to later apply definitive duties retroactively. In our view, an effective interpretation of the right to apply definitive duties retroactively requires that a Member be allowed to take such steps as are necessary to preserve the possibility of exercising that right. What kind of measures may thus be taken by the Member concerned will have to be determined on a case-by-case basis. In this case, the US argues that both suspension of liquidation and the posting of a cash deposit or bond are necessary for the US authorities to be able to collect the duties retroactively. According to the United States, without suspension of liquidation, the products will have definitively entered the country and no duties can be assessed on such entries after liquidation. The United States further argues that the posting of a bond or a cash deposit is equally necessary because Article 20.3 SCM Agreement would not allow the retroactive duty collection beyond the amount guaranteed by the cash

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<sup>131</sup> We note that the use of the term "countervailing duties" in Article 20.2 SCM Agreement reflects the distinction made in Article 20.1 SCM Agreement between "provisional measures" on the one hand and "countervailing duties" on the other. It is clear from the immediate context of the term "countervailing duties" in Article 20.2 SCM Agreement that this term refers to definitive duties, as the text of the provision juxtaposes the terms countervailing duties and provisional measures. "Countervailing duties" in the context of Article 20.2 SCM Agreement thus refers to definitive duties only.

<sup>132</sup> United States Answers to Questions from the Panel after the First Meeting, para. 52.

deposit or bond. In the view of the United States, if no cash deposit or bond is required, Article 20.3 SCM Agreement would imply that no definitive countervailing duty for the period preceding the Preliminary Determination could be levied either.

7.96 We are not convinced by the US argument in respect of the posting of cash deposits or bonds. We consider that Article 20.3 SCM Agreement states that if the amount guaranteed by the cash deposit is lower than the definitive countervailing duty, the difference shall not be collected. If the reverse is true, the excess amount shall be reimbursed and the bond released in an expeditious manner. Article 20.3 SCM Agreement thus concerns the wholly different issue of how to deal with a discrepancy between the provisional and the final rates of the countervailing duty. It does not address the retroactive imposition and collection of definitive duties for the period before the application of provisional measures. Article 20.6 SCM Agreement provides that definitive duties may in certain circumstances be assessed on imports which were entered for consumption from 90 days *prior to the date of application of provisional measures*.

7.97 The text thus clearly indicates that the Agreement allows for the retroactive application of definitive duties at a time when no provisional measures were in place and thus no provisional duties were collected. To accept the US argument that Article 20.3 SCM Agreement would preclude a Member from collecting definitive duties for the period prior to the date of application of provisional measures, would mean that a Member doing what Article 20.6 SCM Agreement expressly allows for, would be violating the Agreement nevertheless. We cannot accept an interpretation which leads to this contradictory result. We consider that the principle of effective treaty interpretation requires the treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."<sup>133</sup>

7.98 We therefore find that the USDOC retroactive application of provisional measures is inconsistent with Article 20.6 SCM Agreement, as this provision allows for the retroactive application of definitive duties only. In our view, and leaving aside the question which sorts of actions of a conservatory nature a Member would be allowed to take in order to preserve the right to apply definitive duties retroactively, provisional measures such as the requirement of a cash deposit or the posting of a bond are not necessary to preserve the right to apply definitive duties retroactively under the SCM Agreement.<sup>134</sup>

(ii) *Does the retroactive application of provisional measures also violate the disciplines of Article 17 SCM Agreement.*

7.99 We next turn to Canada's claim pursuant to Article 17.3 and 17.4 SCM Agreement in respect of the date of application and the duration of the provisional measures in this case. These provisions read as follows:

"17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months".

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<sup>133</sup> Appellate Body Report, *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted on 12 January 2000, para. 81.

<sup>134</sup> We consider that the US argued before us that both the suspension of liquidation and the bond or cash deposit requirement are necessary conservatory measures, and we therefore have treated them jointly. We note on the other hand that Canada recognised that in a retrospective duty assessment system, Members "may keep liquidation open for a long enough period that would allow the retroactive imposition of definitive duties following a critical circumstances determination". Canada's Answers to the Questions from the Panel after the Second Meeting, para. 65.

7.100 In our view, Article 17.3 and 17.4 SCM Agreement are unambiguous, clearly specifying that provisional measures shall not be applied sooner than 60 days after initiation and their application shall be limited to maximum 4 months. Article 20.1 SCM Agreement provides that provisional measures may be applied only to products which entered the country after the time when the decision under paragraph 1 of Article 17 SCM Agreement was taken, subject to the exceptions set out in that Article. In respect of the starting-point for the application of provisional and final measures, Article 20 SCM Agreement thus establishes two exceptions to the general rule of non-retroactivity of final countervailing duties and no exceptions to the general rule of non-retroactivity of provisional measures. Nothing in Article 20 SCM Agreement provides an exception to the rules relating to the minimum period between initiation and application of provisional measures or the maximum period of application of such measures as provided for in Article 17.3 and 17.4 SCM Agreement.

7.101 The USDOC initiated its countervailing duty investigation on 23 April 2001, and applied retroactive provisional measures on imports entering from 19 May 2001, i.e. less than 60 days after initiation. The USDOC applied provisional measures on imports entering from 19 May 2001, until 14 December 2001, which is 4 months after the Preliminary Determination. In total, the provisional measure thus covered imports for a period of almost 7 months. We therefore find that the US application of provisional measures during the period prior to the 60 days after initiation, and for longer than 4 months is inconsistent with Article 17.3 and 17.4 SCM Agreement.

7.102 We consider that the US argument that the period of application in Article 17.4 SCM Agreement refers to the period during which cash deposits or bonds are taken rather than the period during which the affected imports enter for consumption would have the effect of nullifying the provision, particularly in light of Article 20.1 SCM Agreement. We cannot accept such an interpretation which would reduce a provision of the treaty to redundancy or inutility.<sup>135</sup> The US interpretation would allow significantly more than 4 months worth of entries to be covered by a provisional measure. For example, under this interpretation, a decision under Article 17.1 SCM Agreement could be taken after 60 days, following which the importing country would wait say 3 months before "applying" the provisional measures for 4 months, including retroactively to imports entering after the date of the decision. In our view this would render meaningless the disciplines imposed by Article 17 SCM Agreement.

(c) Conclusion

7.103 In sum, we find that the United States' application of provisional measures in the form of cash deposits or bonds under the USDOC Preliminary Critical Circumstances Determination is inconsistent with Article 20.6 SCM Agreement, as this provision does not allow for the retroactive application of provisional measures. In addition, we find that the provisional measures at issue were applied in violation of Article 17.3 and 17.4 SCM Agreement as they were imposed less than 60 days after initiation and covered imports for a period of more than four months.

**2. Claim 2: USDOC failed to establish critical circumstances under Article 20.6 SCM Agreement**

(a) Arguments of the parties

(i) *Canada*

7.104 Canada argues that even if, in theory, retroactive application of provisional measures were permitted under Article 20.6 SCM Agreement, the USDOC Preliminary Critical Circumstances

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<sup>135</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS/2/AB/R, adopted on 20 May 1996, p. 23.

Determination is still inconsistent with Article 20.6 SCM Agreement since the USDOC failed to establish the existence of critical circumstances.

7.105 Canada asserts that the Investissement Quebec Small and Medium Businesses Guarantee programme (the "IQ SMB" programme) upon which the USDOC Preliminary Critical Circumstances Determination was based is not a prohibited export subsidy, as it is contingent upon developing markets outside Quebec, not outside Canada. Therefore the determination that the alleged massive imports have benefitted from subsidies bestowed inconsistently with the provisions of GATT 1994 and of the SCM Agreement is, in Canada's view, flawed. In any case, Canada submits, even if the IQ SMB programme were a prohibited subsidy, the amount of the subsidy found (0.005 per cent) is *de minimis*. Canada argues that Article 11.9 SCM Agreement provides that a *de minimis* rate is an insufficient basis for applying any countervailing measure whether final or provisional, and the determination was thus made in the absence of any critical circumstances in the sense of Article 20.6 SCM Agreement.<sup>136</sup>

7.106 Canada argues that even if the IQ SMB Guarantee programme were a prohibited export subsidy, Articles 17.5 and 19.4 SCM Agreement, as well as Article 20.6 SCM Agreement, require that the rate to be applied retroactively to this programme should have been no more than the rate of subsidization under this programme, i.e. 0.005 per cent rather than the country-wide rate of 19.3 per cent. Canada argues that the text of Article 20.6 SCM Agreement allows for the retroactive application of only the rate that is commensurate with the benefit bestowed by the alleged prohibited subsidy. By applying a duty at this higher rate, the US countervailed to an amount in excess of that required to "preclude the recurrence of the injury" caused by such subsidies in "critical circumstances", which is the object and purpose of Article 20.6 SCM Agreement. The US thus violated Article 20.6 SCM Agreement as well as Articles 17.5 and 19.4 SCM Agreement.

7.107 Canada further asserts that countervailing measures were applied retroactively without a finding by USDOC or USITC of "injury which is difficult to repair" or that the retroactive application of the duties was "necessary to preclude the recurrence of such injury" in violation of the explicit requirements of Article 20.6 SCM Agreement. Canada adds that the USDOC itself admitted as much, as it acknowledged that these findings would have to be made by the USITC at the time of the final critical circumstances determination.<sup>137</sup>

7.108 Canada submits that the USDOC's finding of "massive imports" is flawed as it is based on all imports from Canada while the SMB subsidy programme applies only to shipments from Quebec. Moreover, in Canada's opinion, the increase in imports of 23.34 per cent following the petition was not due to the alleged export subsidy of a *de minimis* level but rather to the anticipated and then actual expiration of the Softwood Lumber Agreement between the US and Canada, which first sharply reduced exports in the first quarter of 2001 and whose actual expiry led to an increase in the second quarter. Canada submits that the retroactive application of provisional measures in the absence of "massive imports of a product benefitting from subsidies paid or bestowed inconsistently with the GATT 1994 and the SCM Agreement" is in violation of Article 20.6 SCM Agreement.

7.109 Canada finally argues that if it is permissible to include for purposes of determining massive imports, shipments that have not benefitted from the prohibited subsidy, an authority should include all such shipments and not just the portion of such shipments that an authority needs in order to find a high rate of subsidization. Canada asserts that the finding of "massive imports" violates Article 20.6 SCM Agreement, as it did not include all shipments from Canada, but rather excluded imports from

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<sup>136</sup> Canada asserts that the USITC recognized as much in a case involving certain steel products from Korea (Exhibit CDA – 36).

<sup>137</sup> USDOC Preliminary Determination, p. 43189.

the Maritime provinces, which would have resulted in a negative "massive imports" finding under the SCM Agreement.

(ii) *United States*

7.110 The United States argues that there existed a sufficient basis for a preliminary critical circumstances determination, especially as in its view the evidentiary standard in the case of a preliminary determination should be lower than in case of a final determination.

7.111 According to the US, one Canadian provincial subsidy programme was an Article 3-inconsistent export subsidy which was meant to promote economic development in Quebec by encouraging growth of exports. The US argues that the existence of a prohibited export subsidy suffices to preserve the possibility of retroactive application later, and the fact that this programme's subsidy rate was *de minimis* is not relevant in this respect.

7.112 The US further submits that, as no methodology is prescribed in the SCM Agreement for determining the existence of "massive imports", it was reasonable for the USDOC to consider an increase of 23 per cent as massive. The US notes that the USDOC's analysis in this respect took the expiration of the Softwood Lumber Agreement between Canada and the US into account and came to the conclusion that it did not have the distorting effect Canada is alleging.

7.113 The US finally notes that the USITC had already made a preliminary finding of injury before the USDOC made its Preliminary Critical Circumstances Determination. According to the US, the remaining conditions for the retroactive application of definitive duties, relating to injury which is difficult to repair, are necessarily determinations that can only be made at the time of the final determination. For the purpose of the Preliminary Critical Circumstances Determination and the retroactive application of provisional measures, the preliminary determination of injury by the USITC was sufficient.

(b) *Analysis*

7.114 Canada argues that "[e]ven if the Panel found that provisional measures could be applied retroactively under Article 20.6, Commerce had not established the existence of any or all of the elements required under that provision".<sup>138</sup> In light of the fact that we uphold Canada's principal claim by finding that the Agreement does not allow for the retroactive application of provisional measures, we do not consider it necessary for the resolution of the dispute before us to address the arguments made by the parties concerning the specific hypothetical conditions that would need to be met for such inconsistent measures to be applied. For this reason we apply judicial economy and do not rule on this claim.

**3. Conclusion on Canada's claim concerning the USDOC Preliminary Critical Circumstances Determination**

7.115 In light of the conclusions above, we find that the United States' retroactive imposition of provisional measures on the basis of the USDOC Preliminary Critical Circumstances Determination is inconsistent with Article 20.6 SCM Agreement, as there does not exist a basis for the retroactive application of provisional measures in the SCM Agreement. Moreover, the retroactive application of provisional measures in the form of a cash deposit or bond in this case violated Article 17.3 and 17.4 SCM Agreement, as the measures covered imports for a period of almost seven months and were applied before sixty days after the initiation of the investigation. In light of this finding, we do not

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<sup>138</sup> Canada's First Written Submission, para. 116.

consider it necessary or appropriate to examine Canada's claims with regard to a violation of Articles 17.1 (b), 17.5 and 19.4 SCM Agreement and Article VI:3 GATT 1994.

C. CLAIM OF INCONSISTENT CVD LAW CONCERNING EXPEDITED AND ADMINISTRATIVE REVIEWS

(a) Arguments of the parties

(i) *Canada*

7.116 Canada claims that US countervailing duty law<sup>139</sup> violates the United States' obligations under the WTO because it fails to provide for company-specific expedited reviews and "administrative reviews"<sup>140</sup> in countervailing duty cases in which the investigation was conducted on an aggregate basis<sup>141</sup>, and because it mandates that a single country-wide duty rate calculated in an administrative review supersedes all individual rates previously determined in the countervailing duty proceeding.<sup>142</sup> Canada considers that these measures are inconsistent with US obligations under Article VI:3 of GATT 1994 and Articles 10, 19.3, 19.4, 21.2 and 32.1 of the SCM Agreement.<sup>143</sup>

7.117 In particular, Canada submits that the US legislation is in violation of Article 19.3 SCM, which according to Canada provides that exporters "not actually investigated" are entitled upon request, with "no exceptions" to an "expedited review" to establish an individual countervailing duty rate for that exporter.<sup>144</sup> Canada further submits that the US legislation is in violation of Article 21.2 SCM Agreement, which in Canada's view entitles exporters and producers to a "company-specific administrative review" upon request, again with "no exceptions".<sup>145</sup>

7.118 Canada submits that by maintaining legislation which is inconsistent with the SCM Agreement, the US also failed to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the SCM Agreement in violation of Article XVI:4 WTO Agreement and Article 32.5 SCM Agreement.

7.119 Canada further submits that, since the USDOC conducted the softwood lumber investigation on a country-wide basis, the cited US legislation denies expedited reviews and company specific

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<sup>139</sup> The relevant US law is found in Section 777 A (e) (2) (A) and (B) Tariff Act of 1930 and USDOC Regulations at 19 C.F.R. Sections 351.214 (k) (1) with regard to expedited reviews and section 351.213 (b) and (k) concerning administrative reviews.

<sup>140</sup> Canada does not define the term "administrative review", which is not a term found in the SCM Agreement. From its arguments before us, we understand Canada uses this term to refer to the reviews conducted to finalize the rate of duty collection under the retrospective duty assessment system used by the United States in applying countervailing duties. This is the meaning that we ascribe to this term in our findings.

<sup>141</sup> We understand Canada to use the term "aggregate" to refer to an investigation where instead of individual rates of subsidization being calculated, an overall average rate or "country-wide" rate is calculated, for the purpose of applying countervailing duties.

<sup>142</sup> Canada asserts that under US law the only exception is for requests for administrative review concerning zero or *de minimis* subsidies, and even there, only where practicable.

<sup>143</sup> In its Request for Establishment of a Panel (WT/DS236/2), Canada also cites Article 21.1 SCM Agreement in connection with its claims concerning US legislation. Canada does not pursue an allegation of a violation of this provision in its submissions in this dispute, however. Rather, it argues in its oral statement at the first meeting that Article 21.2 SCM Agreement should be read in conjunction with Article 21.1 SCM Agreement as meaning that the review obligations in Article 21.2 SCM Agreement relate not only to whether countervailing duties should continue, but also to the level at which duties should continue to be imposed. Canada's First Oral Statement, para. 106. We therefore do not address any allegation of violation of Article 21.1 SCM Agreement in our findings.

<sup>144</sup> First Written Submission of Canada, paras. 163 - 165.

<sup>145</sup> First Written Submission of Canada, paras. 166 - 168.

administrative reviews to the exporters concerned in the investigation, which in turn will necessarily amount to a duty being applied to certain exporters in excess of their individual duty rate. This, Canada argues, is in violation of Articles 19.3, 21.2 and 19.4 SCM Agreement.

7.120 According to Canada, the US statute, Section 777A(e)(2)(B), by failing to explicitly provide for company-specific expedited and administrative reviews where an investigation has been conducted on an aggregate basis, makes such reviews impossible. Canada further submits that Section 351.213(b) of the USDOC Regulations specifically denies exporters and producers an "administrative review" if the investigation was conducted on an aggregate basis. Finally, Canada argues, the requirement of Section 351.213 (k) (2) of the Regulations, that a single country-wide duty rate calculated in an administrative review supersede all individual rates previously established through expedited reviews, undoes the benefit of the expedited review under Article 19.3 SCM Agreement, and prevents exporters from obtaining an individual rate in an administrative review.

(ii) *United States*

7.121 The US argues that the US laws and regulations referred to by Canada do not constitute mandatory legislation, and therefore cannot be challenged as such before a WTO panel.<sup>146</sup>

7.122 In particular, the US argues, US law does not prohibit the conduct of such reviews. The United States maintains that the USDOC Regulations cited in Canada's claim do not apply to cases in which investigations are conducted on an aggregate basis – a very rare situation – and the fact that no regulations concerning expedited or administrative reviews have yet been promulgated for this situation does not mean that such reviews are prohibited. Rather, the US submits, Section 751 of the US Tariff Act provides for a broad authority to conduct reviews, and does not require further regulations to be implemented by the USDOC. The US further notes its view that Article 21.2 SCM Agreement in any case does not imply an unfettered right to a review in all cases upon request as Canada seems to be suggesting. The US asserts that Canada also is mistaken when it claims that a decision by USDOC to conduct an investigation on an aggregate basis necessarily implies the denial of an expedited review or a company-specific "administrative review".

(b) *Analysis*

7.123 Canada argues that the US laws and regulations are inconsistent with Articles 19.3 and 21.2 SCM Agreement relating to expedited and administrative reviews respectively.

7.124 With regard to expedited reviews, Article 19.3 SCM Agreement provides as follows:

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

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<sup>146</sup> The United States further considers that the Panel should decline to address Canada's challenge to these laws and regulations as applied because, in the absence of any final measures at the time of the request for establishment of this case, no reviews have been initiated yet. Canada is thus, in the US view, seeking an advisory opinion from the Panel. US First Written Submission, para. 102.

7.125 Article 21.2 SCM Agreement concerning certain kinds of reviews provides that:

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

7.126 Due to the US laws and regulations' alleged inconsistencies with Articles 19.3 and 21.2 SCM Agreement, Canada also alleges that the US violates Article 32.5 SCM Agreement, which provides as follows:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question."<sup>147</sup>

7.127 Canada further, and finally, alleges that because exporters in the lumber case are denied by US law the possibility of expedited reviews and company-specific administrative reviews, the United States also violates Articles 10, 19.4 and 32.1 SCM Agreement and Article VI:3 of GATT 1994. Article 19.4 SCM Agreement provides that no countervailing duty shall be levied in excess of the amount of the subsidization found to exist, calculated per unit of the subsidized exported product. Canada argues that the legislatively required denial of the reviews at issue will necessarily result in a violation of Article 19.4 SCM Agreement as certain exporters will be subject to countervailing duties in excess of their rates of subsidization. As a consequence, according to Canada, Articles 10 and 32.1 SCM Agreement are violated, as these provisions require Members to ensure conformity with the SCM Agreement and Article VI:3 of GATT 1994 in conducting investigations and applying countervailing duties.

(i) *Mandatory versus discretionary legislation*

7.128 We consider that it is a well established GATT/WTO practice that legislation can only be challenged as such before a WTO panel, when it is mandatory in nature and *requires* the violation of the Agreement. As the Appellate Body in the *United States – 1916 Act* stated:

"88. As indicated above, the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations. The practice of GATT panels was summed up in *United States – Tobacco* as follows:

... panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such;

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<sup>147</sup> Canada also alleges on the same basis a violation of Article XVI:4 of the WTO Agreement.

only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge. (emphasis added)

89. Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the executive branch of government". (footnotes omitted) (emphasis added)<sup>148</sup>

7.129 We thus consider that legislation which merely gives the executive authority the discretion, either through silence or otherwise, to act inconsistently with the Agreement cannot as such be challenged before a Panel, i.e. independent of its actual application in a particular case.

7.130 The question before us is thus whether the US laws and regulations on administrative and expedited reviews are inconsistent with the SCM Agreement by mandating a violation of the relevant provisions of the SCM Agreement. Canada challenges the following US legislative provisions as inconsistent with the obligations of the United States under the SCM Agreement:

? Section 777A(e)(2)(A) and (B) of the Tariff Act of 1930, as interpreted by the Statement of Administrative Action (SAA)(pages 941-942); and

? the Department of Commerce Regulations at 19 C.F.R. Section 351.214(k) and Section 351.213(b) and (k)<sup>149</sup>

(ii) *The US Statute and the Statement of Administrative Action*

7.131 Sections 777A(e)(2)(A) and (B) of the US Tariff Act provide as follows:

" (e) Determination of Countervailable Subsidy Rate.

...

(2) Exception. If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may

(A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to

(i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or

(ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or

(B) determine a single country-wide subsidy rate to be applied to all exporters and producers."

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<sup>148</sup> Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, adopted 26 September 2000, paras. 88 – 89.

<sup>149</sup> 19 C.F.R. §§ 351.213(b) and (k) and 351.214(k). (Exhibit CDA-39)

7.132 The relevant part of the SAA reads as follows:

"Section 265 (1) of the implementing bill repeals section 706 (a)(2). It eliminates the presumption in favor of a single country-wide CVD rate and amends section 777A of the Act to establish a general rule in favor of individual CVD rates for each exporter or producer individually investigated. [...] In addition, instead of examining a limited number of individual exporters and producers, section 777 A (e)(2)(B) would permit Commerce to calculate, on the basis of aggregate data, a single country-wide subsidy rate to be applied to all exporters and producers of the subject merchandise."<sup>150</sup>

7.133 Section 777 of the US Tariff Act of 1930 does not deal with the conduct of administrative or expedited reviews as such, but merely provides for the possibility in investigations and reviews to calculate the rate of subsidization on an aggregate basis and to determine a country-wide subsidy rate. In our view, the SAA<sup>151</sup> only confirms that although no longer the rule, it remains possible to conduct an investigation or a review on an aggregate basis and determine a country-wide duty rate. Nothing in the statute or the SAA indicates that expedited reviews or company-specific administrative reviews are necessarily excluded where an investigation has been conducted on an aggregate basis. In other words, neither the statute nor the SAA on its face appears to prohibit the USDOC from conducting such reviews where the investigation has been conducted on an aggregate basis.

(iii) *USDOC Regulations*

7.134 We now consider whether the US Department of Commerce Regulations cited by Canada prohibit the USDOC from conducting either expedited reviews or company-specific "administrative reviews", and if so, whether any such prohibition would violate Articles 19.3 or 21.2 SCM Agreement, as Canada alleges.

(a) *Expedited reviews*

7.135 With regard to expedited reviews, Canada alleges that USDOC Regulations Section 351.214(k)(l) prohibits the conduct of expedited reviews where an investigation has been conducted on an aggregate basis.

7.136 We recall the relevant part of Article 19.3 SCM Agreement, namely that any exporter whose exports were not actually investigated for reasons other than a refusal to cooperate is "entitled" to an expedited review to establish an individual countervailing duty rate. To us, this text makes clear that an expedited review to establish an individual countervailing duty rate must be conducted, upon request, for any exporter of the type referred to in Article 19.3 SCM Agreement. Thus, the question before us is whether the relevant regulations prohibit the USDOC from conducting such reviews in aggregate cases.

7.137 Section 351.214(k)(1) of the USDOC Regulations provides in relevant part:

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<sup>150</sup> "Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, vol. 1, p. 941 (1994). (Exhibit CDA-38)

<sup>151</sup> We note that as was recognized by the Panel in the *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* case, the SAA is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law". Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted as modified by Appellate Body Report WT/DS184/AB/R on 23 August 2001, para. 7.198.

(k) *Expedited reviews in countervailing duty proceedings for noninvestigated exporters.* (1) *Request for review.* If, in a countervailing duty investigation, the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act, an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent (*see* § 351.204(d)) may request a review under this paragraph (k).

7.138 Canada argues that because this regulation refers only to expedited reviews in the case of investigations conducted on the basis of the exception set forth in Section 777A(e)(2)(A) of the Act (sampling), it is impossible for the USDOC to conduct such reviews in investigations conducted on the basis of the *other* exception in the statute (aggregate cases), which is provided for in Section 777A(e)(2)(B) of the Act. Canada bases this argument on the fact that expedited reviews are expressly provided for in the Regulations, except in respect of aggregate cases. In Canada's view, it is a basic principle of statutory construction that if a right is provided for in certain circumstances, its deliberate exclusion in other circumstances must be given meaning, in particular, that no such right exists in those other cases. Thus, Canada argues, Section 351.214(k)(1), by providing for expedited reviews for cases other than aggregate cases, precludes the possibility of such reviews in aggregate cases.

7.139 The United States responds that Section 351.214(k)(1) does not cover aggregate cases. According to the United States, the fact that the USDOC has not issued regulations to cover such cases, which are rare, does not justify Canada's conclusion that US law prohibits expedited reviews in aggregate cases. The United States further argues that the USDOC has broad discretion under the statute, in particular Section 751 of the US Tariff Act (which is not before us in this dispute), to conduct the kinds of reviews required by the SCM Agreement.<sup>152</sup> According to the US, Section 751 of the Tariff Act provides the USDOC with ample authority to fulfil all of the United States' obligations under the SCM Agreement, with regard to expedited and administrative reviews alike.

7.140 We note that the regulation at issue in respect of Canada's claim concerning expedited reviews, Section 351.214(k)(1) USDOC Regulations, addresses only one of the two situations identified in the US statute as an exception to the general rule of company-specific rates of subsidization. Namely, this regulation addresses the exceptional situation of an investigation conducted on the basis of some sort of a sample. Canada would have us infer, *a contrario*, that the silence of this regulation and the absence of any other in respect of the other exceptional situation – an investigation conducted on an aggregate basis – means that the USDOC is prohibited by law from conducting expedited reviews in such a situation. We find Canada's *a contrario* argument to be unjustified. We consider that the fact that no regulation exists regarding the apparently rare case of aggregate investigations does not imply that the USDOC is required by law to deny any requests for expedited review where an aggregate countervailing duty rate has been applied. In other words, the USDOC Regulations are simply silent on the issue.

7.141 We thus agree with the US that the fact that the USDOC has not elected to codify specific rules for handling what could potentially be an extremely large number of expedited reviews in an

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<sup>152</sup> The US argues that Section 751 of the US Tariff Act authorizes reviews to “determine the amount of any net countervailable subsidy” at least annually, upon request. It also authorizes reviews of “new shippers,” defined as exporters and producers that did not export the subject merchandise to the United States during the period of investigation and were not affiliated with exporters or producers who did. In addition, the United States argues, the statute authorizes the USDOC to conduct a review “whenever [Commerce or the ITC] receives information concerning, or a request from an interested party for a review . . . which shows changed circumstances sufficient to warrant a review of,” *inter alia*, a countervailing duty order. US First Written Submission, para. 110.

aggregate case does not in any way diminish the Department's statutory authority to conduct such reviews.<sup>153</sup> We therefore find that the fact that 19 C.F.R. § 351.214(k)(1) does not specifically address the possibility of expedited reviews in aggregate cases does not prohibit such reviews. In fact, as Canada acknowledged in the course of the second meeting with the Panel, "with respect to expedited reviews, we note that the United States has in fact posted a notice indicating that it will accept requests for such reviews in the *Lumber IV* case."<sup>154</sup> We consider that this is further evidence of the fact that the US laws and regulations challenged by Canada do not require the authority to deny any expedited reviews in case of an aggregate investigation. We consider that the fact that no regulation exists regarding the apparently rare case of aggregate investigations, does not imply that exporters are denied by law the right to an expedited review where an aggregate countervailing duty rate was applied. The US laws and regulations cited by Canada thus do not mandate a violation of the requirement under Article 19.3 SCM Agreement to conduct an expedited review in order that the authority promptly establish an individual countervailing duty rate for any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate. For this reason also, we do not find that the USDOC is required by law to violate Article 19.4 SCM Agreement in the softwood lumber case by inevitably levying countervailing duties in excess of the amount of the subsidy found.

7.142 In sum, we find that the above-cited US laws and regulations concerning expedited reviews do not mandate a violation of Article 19.3 SCM Agreement, or thereby, of Article 19.4 SCM Agreement, and thus reject Canada's claims in this respect.

(b) *Company specific "administrative reviews"*

7.143 Canada submits that Article 21.2 SCM Agreement, read in the light of Article 21.1 SCM Agreement, contains the clear obligation to provide company-specific "administrative reviews" i.e., calculation of duty rate for a given period, upon request, without exceptions. Thus, Canada argues, the United States must provide for, and conduct, administrative reviews *upon request* to determine not only whether countervailing duties are necessary at all, but also to establish company-specific rates. Canada asserts that there are no exceptions to the US obligation to provide for administrative reviews.<sup>155</sup>

7.144 According to Canada, under US law, contrary to the clear obligation in Article 21.2 SCM Agreement, an administrative review is not available to an exporter (nor to a producer, domestic interested party, foreign government, or importer) where the USDOC has conducted its investigation or prior administrative review under Section 777A(e)(2)(B) of the Act (*i.e.* where the USDOC has established a country-wide rate).

7.145 Canada further argues that because US law prohibits such company-specific administrative reviews, it also violates the requirement in Article 19.3 SCM Agreement to conduct expedited reviews upon request. Here, Canada argues, because exporters and producers are denied an administrative review (to finalize the rate of duty collection) if the investigation was conducted on an aggregate basis, this means that an exporter or producer would still be denied the opportunity to obtain a *final*

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<sup>153</sup> The US asserts that it is a long-established principle of US law that administrative agencies have the discretion to promulgate formal procedures or to proceed on a case-by-case basis, especially when the agency has not had sufficient experience with a particular issue to formulate binding regulations. *See Securities & Exchange Commission v. Chenery Corporation*, 332 US 194, 202-203 (1947). US First Written Submission, para. 112.

<sup>154</sup> Canada's Oral Statement at the Second Meeting, para. 71 referring to USDOC, *Countervailing Duty Order on Softwood Lumber Products from Canada: Request for Expedited Review*, available online at <http://www.ia.ita.doc.gov/lumber/expedite/index.html> (posted 24 May 2002). (Exhibit CDA-103).

<sup>155</sup> Canada's Oral Statement at the Second Meeting, para. 78

individual countervailing duty rate, contrary to Article 19.3 SCM Agreement, even if that exporter or producer were given the right to an expedited review to establish an individual *cash deposit* rate. Canada further argues that, as a result, Article 19.4 SCM Agreement is also violated, as the legislatively required denial of the reviews at issue will necessarily result in a violation of 19.4 SCM Agreement since certain exporters will be subject to countervailing duties in excess of their rates of subsidization.

7.146 The United States argues, in the first instance, that Article 21.2 SCM Agreement does not contain the obligation asserted by Canada. The United States notes that what its law refers to as "administrative reviews" are the annual reviews that it conducts to finalize the duty collection rate under its retrospective duty assessment system. In the US view, these sorts of reviews are not covered by Article 21.2 SCM Agreement. Rather, according to the United States, Article 21.2 SCM Agreement provides for, and requires, three completely different types of review: reviews to determine (1) whether the continued imposition of the duty is necessary to offset subsidization; (2) whether the injury would be likely to continue or recur if the duty were removed or varied; or (3) both.<sup>156</sup> Furthermore, the United States argues, even if Canada were correct that Article 21.2 SCM Agreement does require administrative reviews in the US sense of the term, Section 751(a) of the Tariff Act gives the USDOC ample discretion to conduct administrative reviews.

7.147 The legislative provisions cited by Canada as violating US obligations in respect of administrative reviews are Section 351.213(b) subparagraphs (1) and (2), and Section 351.213(k) subparagraph (2) of the USDOC Regulations.

7.148 Section 351.213(b) subparagraphs (1) and (2) of the USDOC Regulations provide as follows:

(b) *Request for administrative review.* (1) Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government) may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers.

(2) During the same month, an exporter or producer covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) may request in writing that the Secretary conduct an administrative review of only that person.

(3) During the same month, an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only an exporter or producer (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) of the subject merchandise imported by that importer. (emphasis added)

7.149 Section 351.213(k) subparagraph (2) on administrative review provides:

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<sup>156</sup> According to the United States, the USDOC has the discretion under US law to conduct the first type of review, while the second type of review, falls under the authority of the US International Trade Commission.

(2) *Application of country-wide subsidy rate.* With the exception of assessment and cash deposit rates of zero determined under paragraph (k)(1) of this section, if, in the final results of an administrative review under this section of a countervailing duty order, the Secretary calculates a single country-wide subsidy rate under section 777A(e)(2)(B) of the Act, that rate will supersede, for cash deposit purposes, all rates previously determined in the countervailing duty proceeding in question. (emphasis added)

7.150 Canada further asserts that the only requests the Secretary of the USDOC will consider for an individual administrative review in cases where administrative reviews are conducted on an aggregate (country-wide) basis, are those for individual assessment and cash deposit rates of zero under subparagraph (1) of Section 351.213(k) and even then, "only to the extent practicable." This regulation provides in relevant part as follows:

"(k) *Administrative reviews of countervailing orders conducted on an aggregate basis – (1) Request for a zero rate.* Where the Secretary conducts an administrative review of a countervailing duty on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and review requests for individual assessment and cash deposits of zero to the extent practicable...."

7.151 In view of the nature of Canada's claim the first question that we must address is the nature of the obligations under Article 21.2 SCM Agreement, and in particular, whether that provision requires "administrative reviews" as that term is used in this dispute, i.e. the yearly review procedure undertaken by the United States in its retrospective duty assessment system. Here, we agree with the United States that Article 21.2 SCM Agreement deals with different kinds of review mechanisms, requiring the authority to provide for the right of interested parties to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Thus, the first type of review addresses the question of whether subsidization is present at all, while the second type of review, by its very terms, has to do primarily with injury questions, that is, the effect on the domestic industry of changing or removing entirely the countervailing duty. This second type of review thus does not have to do with finalizing the rate of countervailing duty during a particular period for which estimated duties have been collected, but rather with the underlying need and rationale, from the standpoint of the affected domestic industry, for maintaining a countervailing duty. In short, Article 21.2 SCM Agreement is silent on the question of "administrative reviews".

7.152 In the USDOC Regulations, Section 351.213 quoted above deals with administrative reviews under Section 751 (a) of the US Tariff Act entitled "periodic review of amount of the duty" and sets forth the yearly duty assessment and review mechanism as part of the US retrospective duty assessment system. Section 751 (b) of the Tariff Act entitled "reviews based on changed circumstances" provides that the US International Trade Commission shall upon receipt of a substantiated request from an interested party review whether revocation of the order is likely to lead to the continuation or recurrence of injury.<sup>157</sup> In our view, Section 751 (b) of the Tariff Act is the

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<sup>157</sup> Section 751 (a) (1) and 751 (b) (1) of the US Tariff Act of 1930, as amended, provide as follows:

#### SEC. 751. ADMINISTRATIVE REVIEW OF DETERMINATIONS

##### (a) PERIODIC REVIEW OF AMOUNT OF DUTY. -

(1) IN GENERAL. - At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this title or under Section 303 of this Act, an anti-dumping duty order under this title or a finding under the Anti-Dumping Act, 1921, or a notice of the suspension of an investigation, the administering

relevant provision of the US legislation implementing the US obligations under Article 21.2 SCM Agreement to review the need for continued imposition of the duty, *inter alia* upon request from an interested party to examine whether injury would be likely to continue or recur if the duty were removed or varied. Leaving aside the question of whether the US legislation provides for detailed regulations to deal with all the rights exporters are entitled to in this context, we find that the US statute allows the investigating authority to provide for and conduct reviews consistently with the SCM Agreement.

7.153 In addition, we consider that although Section 351.213 (b) states that the rules relating to administrative duty assessment reviews are not applicable to cases where the original investigation or the prior administrative review was conducted on an aggregate basis, it does not restrict the USDOC's authority to conduct reviews, nor does it require the authority to deny interested parties the right to request reviews in the sense of Article 21 SCM Agreement. We further note that subparagraph (k) of the same Section 351.213 provides an opportunity for exporters to request reviews where their subsidy rates are zero.<sup>158</sup> We consider that this review possibility tracks Article 21.2 SCM Agreement which provides for reviews to determine *inter alia* whether the continued imposition of the duty is necessary to offset subsidization.<sup>159</sup>

7.154 We conclude that with regard to "administrative reviews", the challenged USDOC Regulations specify the rules that apply to a certain kind of review, and do not on their face alter the general statutory requirement to conduct reviews in the sense of Article 21 SCM Agreement. In our view, and in light of the broad statutory authority for the US authorities to conduct administrative

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authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall

(A) review and determine the amount of any net countervailable subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any anti-dumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement, and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

[...]

(b) REVIEWS BASED ON CHANGED CIRCUMSTANCES. -

(1) IN GENERAL. - Whenever the administering authority or the Commission receives information concerning, or a request from an interested party for a review of -

(A) a final affirmative determination that resulted in an anti-dumping duty order under this title or a finding under the Anti-Dumping Act, 1921, or in a countervailing duty order under this title or Section 303,

(B) a suspension agreement accepted under Section 704 or 734, or

(C) a final affirmative determination resulting from an investigation continued pursuant to Section 704(g) or 734(g), which shows changed circumstances sufficient to warrant a review of such determination or agreement, the administering authority or the Commission (as the case may be) shall conduct a review of the determination or agreement after publishing notice of the review in the Federal Register.

We note that the relevant section in the USDOC Regulations dealing with changed circumstances reviews is Section 351.216 which has not been challenged by Canada.

<sup>158</sup> US Answers to Questions from the Panel after the First Meeting, para. 63.

<sup>159</sup> We note that the second leg of the review under Article 21.2 SCM Agreement relates to the injury analysis which in the US is not performed by the USDOC, but by the US International Trade Commission (USITC). We note that Canada is not challenging the USITC Regulations.

reviews under Section 751 of the Tariff Act, and the specific provision in the Regulations which allows for review requests in case of a zero duty rate, we do not consider that the US laws and regulations mandate the executive authority to deny interested parties the opportunity to request a review of the need for the continued imposition of the duty under Article 21.2 SCM Agreement. In the absence of provisions in the legislation which require the executive authority to act in violation of the SCM Agreement, we reject Canada's claim in this respect.

7.155 We next consider Canada's claim that the alleged prohibition under US law of company-specific administrative reviews in aggregate cases also violates Article 19.3 SCM Agreement, by foreclosing the possibility in such cases that the results of expedited reviews would ever give rise to company-specific final countervailing duty rates, and Article 19.4 SCM Agreement, as certain exporters will be subject to countervailing duties in excess of their rates of subsidization. As we have found that the legislation challenged by Canada does not mandate a violation of Article 21.2 SCM Agreement, and that the USDOC has broad discretion to conduct reviews under Article 21 SCM Agreement, we also reject this claim. In addition, and more specifically, we note that Section 351.213(k) subparagraph (2), cited by Canada in connection with this claim, does not directly address the situation alluded to by Canada, and thus does not mandate the violation alleged by Canada. In particular, this regulation provides that where an administrative review is conducted on an aggregate basis, the final results of that review will supersede the previously-established countervailing duty rates. This regulation therefore does not address, or contain any requirements regarding, the circumstances under which an administrative review will be conducted on an aggregate basis.

7.156 Finally, Canada challenges what it views as the inevitable denial of expedited reviews and company-specific "administrative reviews" in the current softwood lumber investigation as a necessary result of the USDOC's decision to conduct this countervailing duty investigation on an aggregate basis. In light of the fact that at the time of the Preliminary Determination which is under review by the panel, no final determination had yet been made, no reviews of such a determination could have actually been requested, let alone denied, nor has Canada argued that this has happened.

7.157 Therefore, given our finding that the laws and regulations cited by Canada do not preclude the USDOC acting consistently with the US' obligations under Articles 19.3 and 21 SCM Agreement with respect to expedited and administrative reviews, we consider that it is not appropriate to rule on a potential denial of a request for review if no such request has even been made. The WTO dispute settlement system allows a Member to challenge a law as such or its actual application in a particular case, but not its possible future application.

7.158 In sum, we find that the US laws and regulations challenged by Canada do not require the executive authority to violate Articles 19.3 and 21.2 SCM Agreement in respect of the reviews required thereby, and are therefore not inconsistent with the SCM Agreement.

(c) Conclusion

7.159 For the reasons set forth above, we find that the US laws and regulations on Expedited and Administrative Reviews as challenged by Canada do not constitute a violation of the provisions of Articles 19 and 21 SCM Agreement in respect of the reviews required thereby, and we therefore reject all of Canada's claims in this respect.

## **VIII. CONCLUSIONS AND RECOMMENDATIONS**

8.1 In light of the findings above that the USDOC Preliminary Countervailing Duty Determination

- (a) was not inconsistent with Article 1.1 (a) SCM Agreement when the USDOC found that the provision of stumpage constituted a financial contribution, in the form of the provision of a good or service;
- (b) failed to determine the existence and amount of benefit to the producers of the subject merchandise on the basis of the prevailing market conditions in Canada as required by Article 1.1 (b) and Article 14 and 14 (d) SCM Agreement; and
- (c) failed to establish that a benefit was conferred to certain producers of the subject merchandise as the USDOC did not examine whether a benefit was passed through by the unrelated upstream producers of log inputs to the downstream producers of the subject merchandise;

we conclude that the USDOC's imposition of provisional measures based on the preliminary countervailing duty determination was inconsistent with the US obligations under Articles 1.1 (b), 10, 14, 14 (d), and 17.1(b) SCM Agreement. In light of our conclusion, we apply judicial economy, and therefore do not rule on Canada's claim that the USDOC instructions transmitted to the United States Customs Service on 4 September 2001, imposed provisional measures in excess of the subsidy preliminarily found to exist in a manner inconsistent with Articles 10, 17.2, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994.

8.2 In light of the findings above concerning the USDOC Preliminary Critical Circumstances Determination, we conclude that the retroactive imposition of a provisional measure on the basis of the USDOC Preliminary Critical Circumstances Determination is inconsistent with Articles 20.6, 17.3, and 17.4 SCM Agreement. In light of this conclusion, we decide to apply judicial economy and therefore do not rule on Canada's claim that the USDOC failed to establish the existence of critical circumstances under Article 20.6 SCM Agreement in its Preliminary Critical Circumstances Determination.

8.3 Finally, in light of the findings above concerning the US countervailing duty laws and regulations, we conclude that the US laws and regulations challenged by Canada on expedited and administrative reviews are not inconsistent with the SCM Agreement as they do not require the executive authority to act in a manner inconsistent with the US obligations under Articles 19 and 21 of the SCM Agreement concerning expedited and administrative reviews. As a result we also reject Canada's claims that the United States has failed to ensure that its laws and regulations are in conformity with its WTO obligations as required by Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

8.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the SCM Agreement, it has nullified or impaired benefits accruing to Canada under that Agreement. We recommend that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the SCM Agreement.

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