ANNEX B

Parties' Responses to Questions – Second Meeting of the Panel

ANNEX B-1

RESPONSES OF CANADA TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(24 June 2002)

To Both Parties:

1. The evidence on the record related to softwood log harvest going to sawmills for processing into softwood lumber during the period of investigation is found in the following exhibits: CDA-104 (British Columbia); CDA-105 and CDA-106 (Alberta); CDA-107 and CDA-108 (Québec); and CDA-109 (Ontario). In addition, the percentage of Crown logs entering sawmills (as opposed to veneer mills, pulpmills, etc.) was as follows for each of the provinces: B.C. – 61.6 per cent on the Coast and 83.8 per cent in the Interior; Alberta – 59 per cent; Québec – 80 per cent; Ontario – 57 per cent. The record evidence does not always respond directly to the Panel's question. For example, British Columbia does not distinguish between logs from private lands and logs from Crown land entering sawmills, but did provide information to Commerce on the total percentages of logs entering sawmills. In addition, Alberta's figures are for all wood categories that could possibly have been made into softwood lumber products as Alberta does not track whether the softwood entering sawmills is used to make softwood lumber or other products such as pulp, chips, etc.

2. If by "tenure contract" the Panel means any form of tenure agreement including short-term licenses and permits, the answer to the question is yes. For trees to be cut on Crown land, a tenure contract is always required.

3. Canada elaborates on the processing requirements in existence in Canada, and the reasons for those requirements, in its response to Question 5, below. This answer describes the different types of tenure arrangements that exist in each province, the domestic processing requirements – if any – that attach to each arrangement, and the evidence on the record as to the percentage of total logs harvested that were subject to such requirements.

British Columbia - There are basically two types of tenures that have some form of processing requirement: Tree Farm Licenses and Forest Licenses. The vast majority of these types of tenures do *not* require the licensee to process harvested logs in a specific sawmill. Rather, the standard processing requirement requires only that the licensee process the timber harvested or an equivalent volume in a processing mill of any kind (sawmill, pulpmill, etc.) owned by the licensee. Harvesters frequently sell logs they harvest to third parties, and purchase logs they need from third parties to supplement their log supply for particular grades, species, etc. Only 11.5 per cent of the total harvest is subject to an appurtenancy clause, under which logs harvested by the licensee must be processed in a specific mill. Evidence on the record at the time of the CVD PD also indicates that 34 per cent of the total provincial Crown harvest (all tenure types) was harvested under tenures that were not subject to processing or appurtenancy requirements.

In addition, while part 10 of the *Forest Act* requires logs harvested from Crown land to be used or manufactured in the province, unless exempted, the record evidence indicates that more than

97 per cent of all applications to export logs from Crown land during the period of investigation were granted.

Alberta - There are three main tenure types: Forest Management Agreements (FMAs), Timber Quota Certificates and Commercial Timber Permits. With few exceptions, FMA holders in Alberta can use all the wood they harvest or sell all or a portion of the wood to third parties. Timber Quota Certificates and Commercial Timber Permits have no processing requirements. Harvesters in Alberta are also free to export their logs after obtaining export permits from the Alberta and Federal Governments. All export permits applied for by Alberta harvesters during the period of investigation were approved.

Ontario - There are two main types of tenure: Sustainable Forest Licenses and Forest Resource Licenses. License holders are not required to own or operate milling facilities. They are, however, required to indicate to the province that they have a market for the timber they intend to harvest. That market may be a facility in which they have an ownership interest or one in which they have no interest. In certain instances tenure holders and mills reach agreements that provide the opportunity for some forest resources to be committed to a specific facility or facilities. Actual supply of a facility pursuant to such an agreement is subject to the parties involved agreeing on the terms of the transaction. Approximately 30 per cent of Ontario's Crown timber is acquired by sawmills through arm's-length transactions with third parties who have their own licenses. While Ontario does have a requirement that its Crown timber be processed in the province unless an exemption is granted by the Minister, all permits to export logs from the province applied for were granted during the period of investigation.

Québec - There are two types of tenure arrangements: Timber Supply and Forest Management Agreements (TSFMAs) and Forest Management Contracts (FMCs). The timber harvested under TSFMAs (which represents 99.4 per cent of the softwood harvest in 2000-2001) must be processed in the mill holding the TSFMA. While Québec has a requirement that timber harvested be processed in the province, TSFMA holders may apply for authorization to export logs harvested under their tenure agreements rather than process them. All such applications were granted.

4. **Timber** refers to standing trees in the forest. In their natural state, trees are not capable of being traded because they are firmly rooted in the ground.

Logs are produced when standing timber is harvested and prepared for transportation.

Lumber is produced when logs are processed by sawmills. Logs are, therefore *input goods* into the production of lumber, which is the subject merchandise.

Sawlog refers to widely different things in Canada and the United States. Most Canadian provinces do not use the term "sawlog" other than to generally refer to logs of any size that enter a sawmill; therefore, in Canada the term refers to a particular *use* for logs. In the United States, however, "sawlog" refers to a *grade* of logs, rather than their intended *use*. There, "sawlogs" are defined as logs exceeding a minimum size requirement, while smaller logs are classified as "pulpwood".

"Pulpwood" prices are often less than half of "sawlog" prices in many US jurisdictions. Sawmills in the US can and do process both "sawlogs" and "pulpwood". In Canada, mills in several provinces use a significant amount of logs that would be classified as "pulpwood" in the United States. As well, in Canada, softwood stumpage charges are usually levied for the stand as a whole, rather than separately for the different log grades that can be produced from the stand. In contrast, US stumpage prices are specified for different log grades.

For the above reasons, which log classes are used in any calculation has an enormous impact on the resulting pricing benchmarks.

One of the several ways in which Commerce biased its preliminary determination calculations was by using United States price data that was explicitly based on "sawlog" and "pulpwood" grades, but then excluding all smaller "pulpwood" price data from its US calculations. In short, Commerce compared only the highest US prices to the stumpage charges it chose from Canada.

Stumpage is the right to harvest *timber*, or standing trees. It is a property interest in land. This right is normally accorded in return for a series of obligations related to the management of the resource, including management of the land and reforestation, and payment of a charge on the exercise of that right.

Stumpage programme or **practice** refers to provincial forestry management policies under which provinces enter into tenure agreements with or issue harvesting licenses to timber harvesters in return for the assumption of obligations, including forestry management and payment of charges, by the harvester.

Stumpage rate refers to the charge imposed on the volume of harvest.

There is a distinction between a standing tree in the forest that cannot be traded, and a log that results from the harvest of that tree. For the purposes of the WTO Agreement, standing trees, which cannot be traded, are not "goods". Also "timber" is simply not "goods" within the meaning of the *Black's Law Dictionary* definition, which is based on nearly two centuries of common law making a distinction between interests in land and "goods".

5. Canada adds the following to its discussion in answer to Question 3 above.

Domestic processing requirements are intended to ensure that tenure holders carry out their short and long term obligations under tenure agreements consistently with sound forestry and environmental objectives and that standing timber that is harvested is utilized fully and is not wasted.

Neither Alberta nor Ontario has appurtenancy requirements. In Québec, under the main type of tenure arrangement, agreement holders must process the timber they harvest in the facility that holds the TSFMA.

Tenure holders are free to apply to export the logs that they harvest from Canada. As noted above, permits to export are issued routinely by the Federal government and provincial governments in Alberta, Ontario and Québec for export from those provinces. In British Columbia permits to export are issued when various criteria are met. 97 per cent of all applications to export from the province during the POI were approved.

6. Commerce used public lands as benchmarks for British Columbia (Washington), Alberta (Montana) and Saskatchewan (Montana), that are subject to log export restrictions. Exports of softwood lumber from British Columbia, Alberta and Saskatchewan represented almost 61 per cent of Canadian exports subject to countervailing duties. The United States, therefore, used as benchmarks for 61 per cent of Canadian exports subject to the determination, stumpage from US public lands that have export restrictions. This means that even if a Canadian could obtain the ability to harvest on these lands, he or she could <u>not</u> export the logs to Canada.

7. Import data relating to the imports of logs from the United States into Canada, by province, during the period of investigation was on the record at the time of the preliminary determination. No information on the re-export to the United States of lumber processed from those logs was asked for by Commerce nor provided to it. The import statistics consisted only of a basket category "wood in

the rough" and so included imports of products other than rough logs such as poles, roughly squared timber and house logs. With the exception of imports of logs into Québec, the import of logs into Canada represent less than 1 per cent of the total annual harvest. With respect to log imports into Québec, these imports, from Maine into southern Québec, are not large in volume and relate to particular factors that are unique to this area. Imports of logs by volume by province are as follows: British Columbia - 593,760m^3; Alberta - 2,212m^3; Ontario - 272,385m^3; Québec - 2,910,929m^3.

8. Tenure agreements in British Columbia, Alberta, Ontario and Québec contain maximum cut limits. Ontario and Québec have no minimum cut requirements. Some of Alberta's tenures contain minimum cut requirements, but they are not enforced, as Alberta confirmed during the hearings before the US International Trade Commission in the *Lumber IV* injury proceeding. The Annual Allowable Cut (AAC) for each of these provinces and the volume of timber harvested for 1998, 1999 and 2000 was provided to Commerce and are set out in Exhibits CDA-125 (Alberta), CDA-126 (Ontario), CDA-127 (Québec) and CDA-128(British Columbia).

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. Information on the record reveals that in years 1998, 1999, and 2000/2001, the total timber harvest was less than the applicable total AAC allocation for those years. The record does not contain information on whether the 5-year limits were met or exceeded. Thus, it is not possible to determine from record evidence whether the cut requirements were satisfied. The *Forest Act* (Section 66) provides the Minister with discretion not to enforce those cut requirements in particular cases if the circumstances so warrant.

In B.C., the record evidence demonstrates that a significant portion of logs is purchased from third parties. Even if a tenure holder has an unused AAC, it will still supplement its input by purchasing logs of specific species, grade, etc., from third parties that are not available from its Crown holdings.

To Canada:

28. The main interest of tenure holders is the end product of the harvest. From the perspective of the tenure holder, however, the distinction between the *right to harvest* and that end product has significant legal and economic consequences . A long-term tenure represents current and future harvests, and also obligations. A simple sale of stumpage as is done in the United States, however, concerns a set harvest volume available today – only in this sense can it be argued that there is no real distinction between the right to harvest and the end result of the harvest. While the end result of each activity is the production of logs, the nature of economic interests timber harvesters acquire when entering into different types of arrangements is significantly different.

29. Whether stumpage is a price or tax was immaterial to the question at issue in *British Columbia* v. *Canadian Forest Products*. Instead, this case only considered whether a statutory appeal board had exceeded its jurisdiction.

Furthermore, other higher courts in Canada have described stumpage as a tax. In *Royal Bank of Canada* v. *The King*, the Supreme Court of Canada referred to stumpage as "being by definition 'a tax charged for the privilege of cutting timber on State lands'." Accordingly, to the extent that this US argument is at all relevant, the precedent of *this* court is controlling.

In any event, Canada's position in this respect is a matter of sound economics and WTO law. Stumpage is the right to harvest timber. This right is accorded by a province in exchange for obligations assumed by the tenure holder, one of which is the payment of a stumpage fee or charge on the timber cut and processed into logs. The nature of the volumetric stumpage charge as part of a

broader bundle of rights and obligations underscores the inappropriateness of the comparison made by the United States of stumpage charges in Canada to lump-sum auction prices for short-term harvesting rights on public lands in the US to determine and measure a benefit.

30. Canada initially used the term "arm's-length" to make the point that Article 1 of the SCM Agreement does not permit an investigating authority to presume that a purchaser of a good from an allegedly subsidised entity is also subsidised. There are two elements in a subsidy determination, financial contribution by government that confers a benefit.

With respect to financial contribution, an alleged provision of goods by the government to a seller may not be *presumed* to be the provision of goods by the government to someone who purchases from that seller *at arm's-length*. Thus, for the United States to demonstrate, under Article 1, that a sawmill received "goods" from the *government* when it entered into an *arm's-length* transaction with a timber harvester, it must establish "entrustment" or "direction" under subparagraph (iv).

A similar analysis is applicable to the second element. Where two unrelated parties acting in their own self-interest enter into a transaction, an investigating authority may not *presume* that the allegedly subsidised seller has passed on a benefit to the purchaser. A "benefit" analysis looks at the terms of a sale available *to a recipient* and not those obtained in a previous transaction by the seller. Parties at arm's-length act in their own self-interest, and a seller will not "pass on" a benefit willingly. An investigating authority must, accordingly, *demonstrate* that an arm's-length transaction is not at "fair market value", and may not presume that it is not.

(a) Canada has been consistent in defining what constitutes an "arms-length" transaction: it is the sale between unrelated parties where each is acting in its own self interest. An arm's-length transaction forms the basis to determine fair market value. Canada agrees with Black's definition of fair market value. However, the US conclusion from that definition that an arm's length transaction is one where neither party is under "any outside control or influence" from any person has no basis in anything other than its own assertion, and should be rejected. Contrary to what the US appears to argue, fair market value is not a required element of an arm's-length transaction. Where timber harvesters and sawmills are at arm's-length, an investigating authority must demonstrate government entrustment or direction in the sense of subparagraph (iv) and may not presume that a subsidised seller in an arm's-length transaction passes on the benefit to the purchaser.

(b) A government-directed sale may or may not constitute a subsidy *depending on the terms of the sale agreed by the parties.* Where the parties are at arm's-length, even where the goods are *provided* under instruction from the government, it may not be presumed that the goods are provided at *less than the market rate*. There are two elements in a subsidy determination and each must be demonstrated.

In the *Lumber IV* investigation there was no allegation or demonstration of a financial contribution within Article 1.1(a)(1)(iv). Commerce conducted no analysis and simply presumed a pass-through of alleged subsidies to timber harvesters to producers of softwood lumber despite the fact that Canada raised "pass-through" as a significant issue in the investigation even before the investigation was initiated. Indeed, the questionnaire responses of the provinces provided data demonstrating that a portion of logs entering sawmills were acquired in arm's-length transactions with timber harvesters.

(c) Canada's statement in paragraph 49 of its responses to the Panel's questions related to the market *prices* that are normally the product of an arm's-length transaction rather than to the hallmarks of an arm's-length transaction *per se.*

A transaction is considered to be at arm's-length where neither party controls the other in respect of its acceptance of the terms of the transaction. In this respect, both parties must be "willing" to enter into that transaction with the other. In such a case, an investigating authority may not simply *presume* that because the seller was allegedly subsidised, then the buyer is also subsidised. Indeed, since each party is acting "in his or her own self interest" and seeking to maximize profits, any presumption may *only* be that the transaction price is a market price.

31. To maximize efficiency, mills are designed to process a given species (or species group) and timber of a given size. Each mill owner, whether with or without tenure, will seek to ensure that the log supply for each mill best meets its species and dimension requirements. For example, an owner of a cedar mill may not have sufficient supply of cedar and will seek to purchase cedar logs from other sources of log supply. The same need to enter the log market occurs to ensure that the log dimension requirements of mill owners are met.

In many cases the log sales by tenure holders are on a cash basis, but in other cases they entail log trades or "swaps". That is, logs of a given species and/or size are traded to another mill in return for logs of a different species and/or size. There is no legal requirement for tenure holders to trade or "swap" logs. Log purchases, sales and trades result from the profit maximizing behaviour of tenure holders, and in any log transaction, both parties want to receive fair value. Indeed, the practice of partial cash settlements in log trades confirms the nature of the transaction: they would only occur if the value of the logs being traded were not equal and the cash settlement was required to equalize the value.

32. Where a government has given a harvester no choice but to harvest standing timber and enter into a contract with a sawmill to process the logs that result from the harvest, this could constitute a government-directed provision of goods. The investigating authority would, of course, have to gather and analyse facts regarding whether the situation described in the question existed, and whether the other requirements of subparagraph (iv) were present.

There was no allegation in *Lumber IV* of government-directed provision of goods, and Commerce did not undertake any such analysis. It simply asserted that provinces directly provide goods to lumber producers under Article 1.1(a)(1)(iii) of the SCM Agreement. This, the provinces do not do.

33. With the exception of certain commitment letters in Ontario, tenured log harvesters in Canada who do not own sawmills are not required to contract with sawmills in the province for processing of the logs they harvest.

34. It is up to a WTO Member to structure its laws in such a way as to permit it to avail itself of rights it might have under the WTO Agreement. A WTO Member may not apply a measure in direct contravention of its obligations to "preserve" the rights the Agreement affords.

With respect to critical circumstances, a WTO Member has the *right* to impose *definitive* duties retroactively, subject to the requirements of Article 20.6. In the case of Members with retrospective systems, they may keep liquidation open for a long enough period that would allow the retroactive imposition of definitive duties following a critical circumstances determination or otherwise provide themselves with the legal authority to impose definitive countervailing duties retrospectively when the requirements of Article 20.6 have been met.

35. Yes. Opening an investigation would have commercial consequences for traders. However, opening an investigation that alleges the existence of critical circumstances merely implies the *possibility* of a retroactive imposition of duties *in the future* once there have been positive determinations both on the underlying action and with respect to critical circumstances. Suspension

of liquidation specifically targets the traded goods at issue and results in an immediate chilling effect in the market.

36. Yes. Canada is not pursuing its claims in respect of "specificity" in this dispute. Canada has decided instead to pursue this claim in its WTO challenge to the US final countervailing duty determination (WT/DS257).

37. Yes. Canada is no longer pursuing its claims in respect of the "Maritimes" question in this proceeding.

To the United States:

12. Article 19.3 does not contain any exceptions, and the United States has *not*, in any of its submissions throughout this case, claimed the benefit of an exception to the obligation to grant expedited reviews and to establish an individual countervailing duty rate for requesting exporters.

14. While the United States has stated that it has discretion under US law to grant expedited reviews, it has not unequivocally stated, as Canada requested, that such "discretion" does *not* include discretion to *refuse* to grant an expedited review or to establish individual countervailing duty rates. Accordingly, the findings requested by Canada are necessary to resolve the other questions that are at the heart of the obligation in Article 19.3, and that remain in dispute.

16. Regarding the use of import log prices, neither the data nor the methodology necessary to estimate "adequate remuneration" based on log import data exists.

Further, logs are not a homogeneous good. The price of logs varies by species and quality. Comparing import log prices to domestic log prices is confounded by a number of practical matters including:

- The "wood in the rough" category in StatsCan's import data (Tariff Item 44.03) is a catch-all category that includes other, and frequently more valuable, products in addition to logs, and it is not possible to derive from the official customs data an import price for softwood logs only, the necessary first step in developing a log import benchmark.

- Export (import) prices may not be representative of domestic prices because exports are often higher in quality, and export price data are rarely collected with enough care to assure that there are not important quality differences between them.

Estimating "adequate remuneration" for vast reaches of any Canadian province based on prices of imported logs is an intractable problem. For example, the cost of harvesting different species may be different because of differences in the terrain on which those species are found or differences in the distance to mill or market for different species, and species-specific prices must be used because the species mix of imported and domestic logs may differ. There is therefore no valid means to estimate the harvesting and transportation costs that should be deducted from imported log prices as a measure of stumpage charges, even (incorrectly) assuming that in this case the necessary information about log imports were available by species, grade, and other relevant criteria.

17. For reasons that include the following, cross-border log price comparisons do not provide a valid in-market price benchmark:

- **Differences in economic conditions**: economic conditions such as wages, capital costs, taxes, and various governmental regulatory policies differ between countries and as such affect prices in each country.

- **Trade distortions**: Commerce's period of investigation coincided with the final year of the Canada/United States Softwood Lumber Agreement (SLA). The SLA restricted Canadian exports of lumber to the US and, as such, caused Canadian domestic lumber prices to fall relative to US lumber prices. As prices are set at the margin and as the demand for logs is a derived demand, derived from the demand for lumber, any fall in Canadian lumber prices relative to US lumber prices would cause Canadian log prices to fall relative to US log prices.

- **Locational differences**: A log price is the price of the log delivered to a specific location, typically a mill. For US log prices that location is not within Canada. At a minimum adjustments will be needed for both differences in log haul and lumber transportation costs. In addition, comparison of prices in one regional market to prices in another regional market, where the supply and demand conditions are different, would be invalid. This applies for comparisons made within US jurisdictions let alone across international borders. This is illustrated by the table at paragraph 75 of Canada's responses to questions from the Second Substantive Meeting which reveals significant domestic Douglas fir log price variations among sub regions in western Oregon and Washington during the year 2000.

- **Timber differences**: Logs are not a homogenous product. They differ in species and quality. There are significant differences in timber species and quality (*i.e.*, diameter, length, taper, ring-width, defects, etc.) between Canada and the United States. Thus, any comparison of aggregate average log prices would need to account for the differences in species mix and quality which requires some standard set of log grading rules along with grade specific prices. No such standard grading system exists in the US, and the Canadian grading rules differ from those in the US

- **Differences in Measurements:** Log prices in the United States are measured in $/MBF while Canadian stumpage charges are measured in $/m³. The near impossibility of finding appropriate conversion factors for converting US stumpage prices measured by antiquated US log scales to Canadian charges in cubic metres equally plagues comparisons of log prices.

18. The use of any benchmark that is not a benchmark in Canada (i.e. within the country of provision in this case) is inconsistent with the SCM Agreement and Article 14(d) in particular.

21. The fundamental US position at issue in this case is that the word "in" in Article 14(d) can be understood as meaning "out". The word "in" cannot be read as "out" and thus Article 14(d) cannot be found to permit using cross-border benchmarks in determining the adequacy of remuneration, i.e. in determining whether a benefit has been conferred. It is this fundamental point that Canada requests that the Panel confirm.

The "new" US position that "out" means "in" is also predicated on an erroneous reading of Article 14(d) – that "availability" means the "availability of commercial prices". It is clear from the separate inclusion of "price" and "availability" in the list of factors set out in Article 14(d) that it is a "good" and not a "price" that has to be available in Canada. Thus this US interpretation of Article 14(d) must also fail. Canada requests that the Panel confirm this.

The basic factual problems regarding Commerce's determination that have been discussed with the Panel underline why these US approaches to the "appropriate methodology" under Article 14(d) must fail and why Canada's interpretation is correct. Alberta, Ontario and Québec all provided evidence on private sales of timber harvesting rights and Alberta and B.C. provided information on competitive tenures. Québec also provided a comprehensive economic analysis showing Québec's private forest to be an open and competitive market free of government distortion. Ontario provided Commerce with a study that concluded that the market for private timber in Ontario

was both competitive and efficient. Further, these provinces provided Commerce with evidence that provincial stumpage systems earned substantial profits and are operated consistently with market principles. Finally, evidence was presented 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.

Commerce's own regulations provide for analysing consistency with market principles as a way to evaluate adequacy of remuneration. "Consistency with market principles" is the benchmark used by Commerce to determine adequacy of remuneration in cases where it has found that the government played a dominant role in the market. In a number of recent cases Commerce has clarified that government prices are consistent with market principles when the government earns a profit.

27. There were two *measures* applied pursuant to two *determinations*: the preliminary countervailing duties determination, and the preliminary critical circumstances determination. Absent a "critical circumstances" determination, provisional measures would have applied *only* to entries within the period in which provisional measures existed. The CC PD purported to permit the retroactive application of provisional measures to imports entered in the 90 days before the date of the determination. This is not permitted by Article 20.6 which allows only for the retroactive application of *definitive duties*.

Even if the Panel agrees that there was only one measure, it was applied to entries over approximately a seven-month period, i.e. four months under the CVD PD and 90 days under the CC PD. For this reason alone, that measure would be inconsistent with Article 17.4.

ANNEX B-2

RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(24 June 2002)

Questions to Both Parties

1. **Q1:** The record at the time of the Preliminary Determination clearly demonstrates that the vast majority of logs used to make softwood lumber in Canada during the period of investigation were harvested from Crown lands. British Columbia reported that exact figures regarding the volume of softwood logs sent to sawmills were unavailable. However, it stated that *89.5 per cent* of the softwood sawlog-grade logs that were harvested during the period of investigation were harvested from Crown land. Quebec reported that *84.7 per cent* of the softwood logs that were harvested and sent to sawmills during the period of investigation were harvested from Crown land. Ontario reported that *93.2 per cent* of softwood logs that were harvested and sent to sawmills during the period of investigation were harvested from Crown land. Alberta reported that *98.5 per cent* of softwood logs that were harvested and sent to sawmills during the period of investigation were harvested from Crown land. Saskatchewan reported that *88.5 per cent* of softwood logs that were harvested and sent to sawmills during the period of investigation were harvested from Crown land. Finally, Manitoba reported that 546,667.52 cubic meters of softwood logs were harvested and sent to sawmills from Crown land during the period of investigation. Manitoba indicated that it did not have data regarding the size of the harvest on private or federal land, but stated that Crown land accounted for *95 per cent* of the forested land in the province. In calculating the amount of the subsidy benefit, the Commerce Department only included those logs harvested from Crown land.

2. **Q2:** The record evidence at the time of the Preliminary Determination unequivocally demonstrates that the harvesting of Crown timber without a tenure contract or license is prohibited by law in each of the Canadian provinces producing lumber subject to the investigation. The British Columbia Forest Act provides that rights to harvest Crown timber may only be granted in accordance with the Forest Act and specifies the types of tenure contracts under which harvesting rights may be granted. The Quebec Forest Act forbids any person to "carry on a forest management activity" without a forest management permit, and defines these activities to include "timber felling and harvesting." The Ontario Crown Forest Sustainability Act provides that no person may conduct any forest operations except in accordance with a forest management plan approved by the Minister. The Alberta Forest Act provides that no person may cut "any forest growth on forest land" without the permission of the Minister, and that the Minister may dispose of Crown timber only under one of the three forms of tenure in Alberta. The Saskatchewan Forest Resources Management Act provides that no person may "harvest forest products except in accordance" with the Act and its regulations governing licenses required to harvest or operate a wood processing facility. Finally, the Manitoba Forest Act states that timber cutting rights may only be granted under the authority of the Minister, and that no person may cut or remove timber without a license.

3. **Q3:** The record at the time of the Preliminary Determination demonstrated the following with regard to processing requirements imposed on tenure holders in British Columbia: (1) by law, all

logs harvested from Crown land must be used in British Columbia or manufactured into lumber or another approved wood product in British Columbia; (2) by law, four tenure types are limited to licensees who own wood processing facilities. More than 83 per cent of the British Columbia softwood log harvest that was sent to sawmills was harvested under these four tenure types. Eight per cent of the Crown softwood timber harvest was provided to entities for which the evidence was not conclusive as to whether the tenure holders were required to own mills. Only 9 per cent of the British Columbia Crown softwood timber harvest was provided to licensees under tenures normally reserved for entities not owning wood processing facilities; and (3) the sample licenses provided by British Columbia indicate that all timber harvested under the license, or an equivalent volume, must be processed in the wood processing facility named in the license.

4. The record at the time of the Preliminary Determination demonstrated the following with regard to Quebec: (1) the Quebec Forest Act states that "[a]ll timber harvested in the public domain, whatever the nature or object of the management permit authorizing the harvesting, must be completely processed in Quebec;" (2) the same Act limits eligibility for Timber Supply and Forest Management Agreements ("TSFMAs") to entities authorized to construct or operate wood processing facilities, and timber harvested under TSFMAs accounts for 99 per cent of the Crown softwood timber harvest in Quebec; and (3) the sample TSFMA provided by Quebec states that the license holder is granted authority to harvest "for the purpose of supplying its plant," and that the tenure holder is required to "[p]rocess all wood harvested under its forest management permit with a view to using it at the plant identified in the preamble to this Agreement."

5. The record at the time of the Preliminary Determination demonstrated the following with regard to Ontario: (1) by law, all timber licenses are "subject to the condition that all trees harvested shall be manufactured in Canada into lumber, pulp, or other products;" (2) Ontario's questionnaire response stated that "[g]enerally, in order to obtain any type of license, an applicant must either own a forest resource processing facility or must have a market to supply wood to some type of forest resource processing facility;" and (3) Ontario's questionnaire response stated that the typical license "directs that the forest resources harvested pursuant to that license should be used to supply the forest resource processing facility owned by the license holder identified in the license, as well as other mills with commitments to receive wood from that license area." The Ministry of Natural Resources requires tenure holders to sign agreements (i.e., wood supply agreements) with the mills to supply the mills with timber.

6. The record at the time of the Preliminary Determination demonstrated the following with regard to Alberta: (1) by law, logs from public land may not be transported outside the province of Alberta without the permission of the Minister; (2) the sample tenure contract provided by Alberta requires the tenure holder to construct "a veneer plant within the vicinity of Rocky Mountain House, Alberta" within two years, to upgrade the plant within five years, to complete "the current expansion to its sawmill/planer mill at Sundre, Alberta" within 18 months and to expend a specified, minimum sum on the veneer mill construction and upgrade and on the sawmill expansion; and (3) while there are no generally applicable legal requirements that tenure holders process the timber obtained under the tenure in their own facilities, provisions in individual tenure contracts are designed to achieve that objective.

7. The record at the time of the Preliminary Determination demonstrated that Saskatchewan limits harvesting rights and the right to operate wood processing facilities to holders of approved licenses for each, and Saskatchewan has entered into four forest management agreements with entities, all of which own sawmills. These four agreements account for 86 per cent of the Crown softwood sawlog harvest in Saskatchewan. Furthermore, 9 per cent of the Crown softwood sawlog harvest was provided to other tenure holders who own sawmills. Thus, as much as 95 per cent of Saskatchewan Crown softwood sawtimber was provided to entities that also hold provincial licenses to operate sawmills. While by law the agreements must include a requirement to "utilize the licensed volume or area," Saskatchewan did not provide any sample agreements.

8. The record at the time of the Preliminary Determination demonstrated that in Manitoba the Minister is authorized by law to grant Forest Management Licenses ("FMLs") "[w]here the investment in a wood-using industry established or to be established in Manitoba is sufficient to require the security of a continuous timber supply." In fact, all FMLs own sawmills, and FMLs account for 49 per cent of the softwood logs harvested in Manitoba. Furthermore, as much as an additional 46 per cent of the harvest was provided under other tenures to entities that do, in fact, own wood processing facilities.

9. **Q4:** The *New Shorter Oxford English Dictionary* defines "timber" as "[t]he wood of large growing trees able to be used for structural purposes" and "the trees themselves." The United States has used the term in both of these ways. "Logs" are felled trees or sections of felled trees that may have been delimbed or debarked, but have not been further processed into another end product. "Sawlogs " are logs that are suitable for sawing into lumber or logs that in fact are sawn into lumber. "Lumber" refers to sawn wood products (usually with at least two parallel sides) such as structural or framing lumber, flooring, or siding. The United States has used the term "softwood lumber" more precisely to refer to any lumber product within the scope of the subject merchandise in this investigation. "Stumpage" can mean: (1) "standing timber"; (2) "the value of standing timber"; (3) "a license to cut timber"; or (4) "the fee paid for the right to cut timber." The United States has used this term to refer to standing timber. "Stumpage rates" refers specifically to the fee paid for timber. The United States has used this term to refer to the rates charged by the provincial governments for Crown timber. "Stumpage programmes" are the legal regimes through which the provinces provide provincially owned timber. "Stumpage practices" is not a term used by the United States. As used by Canada, the term appears to be synonymous with stumpage programmes.

10. **Q5:** Ontario stated in its questionnaire response that "[g]enerally, in order to obtain any type of license, an applicant must either own a forest resource processing facility or must have a market to supply wood to some type of forest resource processing facility." Ontario also stated that the typical license "directs that the forest resources harvested pursuant to that license should be used to supply the forest resource processing facility owned by the license holder identified in the license, as well as other mills with commitments to receive wood from that license area." In Ontario, in order to build a wood processing facility such as a sawmill, a mill must identify available timber on Crown lands and sign a wood supply commitment letter with the Ministry of Natural Resources to receive the timber. In turn, the Ministry requires tenure holders to sign agreements with the mills to supply the mills with timber. Since all tenure holders appear to be required by their licenses to use the harvested timber either in their own wood processing facility or in a defined wood processing facility within the license area for which a pre-existing contract exists, the evidence indicates that any "third party" purchases of logs are largely, if not entirely, mandated transfers of logs from tenure holders to the mills named in their license.

11. **Q6:** In the Preliminary Determination, benchmarks for three of the six provinces investigated by the Commerce Department were based entirely on stumpage rates from public lands where export restrictions apply. The Commerce Department found that (1) stumpage rates from public lands were based on open, competitive sales; (2) sales from public lands accurately reflected the market price available to US and Canadian purchasers because they constituted a minority of sales in the United States and were driven by the majority of sales in the United States, which consist of open, competitive sales from private lands; and (3) the Department would continue to seek private sales data as the investigation proceeded towards the final determination.

12. **Q7:** There is no record evidence on the volume of log imports from the United States that are processed in Canada and re-exported as lumber to the United States. US government statistics, however, demonstrate that US exports of softwood logs to Canada during 2000 totaled 2,476,000 cubic meters. The US statistics by port of exit indicate that a large majority of those exports (approximately 75 per cent) are from the Eastern United States. Data from Quebec companies that

requested exclusion indicate that most of those exports likely went to mills in Quebec. With respect to lumber exports, approximately 50 per cent of Canada's lumber production is exported to the United States. No aspect of the Commerce Department's analysis was dependent on the level of Canadian imports of logs from the United States that was re-exported to the United States as lumber.

13. **Q8:** British Columbia reported that the total Crown harvest in fiscal year 2000-01 was 94 per cent of the annual allowable cut ("AAC "). By law, major licensees must ensure that between 50 per cent and 150 per cent of their allocated cut is harvested in any given year, and that between 90 per cent and 110 per cent of their allocated cut is harvested over a five-year period. Quebec reported that the total Crown harvest in fiscal year 2000-01 was 89.3 per cent of the AAC. By law, the Minister may reduce a tenure holder's AAC after a five-year interval if the tenure holder has not made full use of its prior allotment. Ontario reported that the total Crown harvest was 79.2 per cent of the AAC. By law, the Minister may amend the license based upon the "business requirement" of the licensee. The sample license provided by Ontario states that the amount of timber actually harvested shall be considered a "business requirement" for purposes of that statutory provision and explicitly states that the Minister may reduce a tenure holder's AAC after a five-year interval if the tenure holder has not made full use of its prior allotment. Alberta reported that the total Crown harvest in calendar year 2000 was 104.5 per cent of the AAC. According to Alberta, salvage operations following severe fires in 1998 and 1999 account for the temporary authority to harvest more in each of the years from 1998 to 2000 than would normally be allowed. By law, the Minister may suspend or cancel a timber license or quota if the tenure holder harvests more or less timber than authorized during a five-year period. Saskatchewan reported that the total Crown harvest in fiscal year 2000-01 was 68.8 per cent of the AAC. Tenure holders are required by law to prepare plans describing the amount of timber to be harvested and to follow those plans as a condition of remaining in compliance with their licenses. Finally, Manitoba reported that the total Crown harvest in fiscal year 1999-2000 was 34.6 per cent of the AAC. The record evidence did not indicate what, if any, provincial cut requirements exist.

Questions to the United States

14. **Q9:** The Commerce Department rejected the use of stumpage prices for timber on private land in Canada because the evidence demonstrates that the provincial tenures drive the prices for those private timber sales. The impact of the provincial tenures on private prices was the only government action considered in this analysis.

15. **Q10(i):** The United States position is precisely as it was stated in the quoted US response, i.e., "if the government made the financial contribution to an entity that does *not* produce the subject merchandise, it would be necessary to analyze whether that financial contribution benefitted another entity that *does* produce the subject merchandise."

16. **Q10(ii):** The ordinary meaning of an "arm's-length" transaction is one in which the parties are unrelated and neither party is under any outside control or influence, either from the party with whom they are bargaining, or other parties.

17. **Q10(iii):** In an aggregate case, if there is a financial contribution to an entity that does not produce the subject merchandise, it would be necessary to analyze whether that financial contribution benefitted another entity that does produce the subject merchandise. Canada's allegation of a financial contribution to an entity that does not produce the subject merchandise is based on its unsubstantiated assertion 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. Canada's assertion concerning independent loggers is not, however, supported by the record at the time of the Preliminary Determination. Moreover, Canada did not assert this claim until one day before the Preliminary Determination.

18. **Q10(iv):** The United States agrees that countervailing duties may not be imposed in excess of the subsidy found to exist. The Commerce Department calculated the benefit on an aggregate basis and the record at the time of the Preliminary Determination did not indicate that any significant amount of Crown timber was provided to independent entities that did not produce subject merchandise. Canada did not argue to the contrary until one day prior to the Preliminary Determination. The Commerce Department did not, therefore, examine the issue of pass-through in the Preliminary Determination.

19. **Q11:** The US position is that, consistent with Article 19.3, "[a]ny exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter." The provision speaks for itself. The United States has established that Section 751 of the Tariff Act of 1930, as amended, provides the United States with ample discretion to implement its obligations under Article 19.3. Moreover, *even if* Canada's characterization of the Article 19.3 obligations were correct, Section 751 of the Act provides the United States with ample discretion to implement such obligations.

20. **Q12:** Article 19.3 speaks for itself. In addition, it is uncontested that *no expedited reviews have been requested or refused in any prior case*. Moreover, Canada has acknowledged that the Commerce Department has offered exporters an opportunity to request expedited reviews in this case; none of those requests has been denied. If a Member's law provides discretion to authorities to act in a WTO-consistent manner, established WTO jurisprudence dictates that the law, as such, does not breach the Member's WTO obligations. Refraining from further review in such cases avoids unnecessary adjudication and respects the presumption that Members will implement their obligations in good faith. This is Canada's third attempt to reverse that presumption in connection with the lumber dispute. US law, however, unquestionably provides the United States with ample discretion to implement its obligations under Article 19.3 of the SCM Agreement, even as those obligations are characterized by Canada. There is therefore no basis for Canada's claim that US law is inconsistent with the SCM Agreement, and the United States is entitled to the presumption that it will implement its obligations in good faith. In seeking to answer the question of whether the United States *would* breach Article 19.3 *if*, at some point in the future, it were to exercise its discretion in a specified manner, Canada is merely requesting an advisory opinion on a non-existent measure not before the Panel. The United States notes that this issue was central to the *Section 129* panel report, which was issued to the parties on June 12, 2002 but remains confidential. The United States urges the Panel to review the report when it becomes available.

21. **Q13:** What the United States refers to as an "administrative review" is an annual assessment proceeding. Section 751(a) of the Act states that the Commerce Department shall, upon request, conduct an annual administrative review to determine the rate of duty to be assessed on entries during the preceding year. US law requires such proceedings, upon request, in all cases, including aggregate cases. Article 21.2 of the SCM Agreement does not address assessment proceedings. It instead requires reviews to determine "whether the continued imposition of the duty is necessary to offset subsidization." The Commerce Department has the discretion to conduct reviews to determine whether continued imposition of the duty is necessary to offset subsidization and, if not, to revoke the countervailing duty order. While those provisions of the statute and regulations are not before the Panel, we note that they are applicable in all cases, including aggregate cases. Moreover, even if Canada were correct that Article 21.2 does require administrative reviews, Section 751(a) of the Act gives the Commerce Department ample discretion to conduct such reviews.

22. **Q14:** Canada's request that the Panel make the "findings" listed in paragraph 95 of its second submission amounts to no more than a request that the Panel issue an advisory opinion regarding hypothetical future requests for expedited reviews. The United States has demonstrated that the first requested finding is wrong as a matter of fact and Canada has failed to establish this alleged finding in

this proceeding. The second finding the United States has already addressed and shown that it does have sufficient discretion under US law. The last two requested "findings" are prospective in nature and outside the terms of reference of this Panel.

23. **Q15:** The Commerce Department has the discretion to conduct administrative reviews or changed circumstances reviews on a company-specific basis and to establish duty rates on a company-specific basis. Any exploration of how the Commerce Department will exercise its discretion in a hypothetical future administrative or changed circumstances review would improperly go beyond the boundaries of the existing dispute. The United States respectfully requests that the Panel not address legal issues not implicated by measures in this dispute, and it again commends to the Panel the approach taken in the forthcoming *Section 129* panel report.

24. **Q16:** The Commerce Department's initial questionnaire asked each province to provide the "average prices paid for US-origin softwood logs . . . by species . . . and quality." The provincial governments, however, provide timber at the stump (i.e., standing trees), not "roadside" (i.e., as logs). A stumpage price is analogous to an ex-factory price. The benchmark must, therefore, also be an ex-factory (i.e., stumpage) price. One could derive a stumpage price from import prices for logs, but it would be far more complex and, in all likelihood, less accurate, than using an actual stumpage price. US timber is commercially available to Canadian lumber producers, and Canadian lumber producers may, and do, purchase US timber at the stump as well as in the form of logs. Furthermore, the United States is the only country from which Canada purchases a significant amount of timber, either standing timber or logs.

25. **Q17:** Provincial timber is provided at the stump. The most appropriate benchmark for provincial stumpage prices, therefore, is a market stumpage price. Log prices themselves could not be compared to stumpage prices, but log prices could possibly be used to derive a stumpage price. In this case, that is not necessary, because actual stumpage prices commercially available to Canadian lumber producers are available. The cost to the government of providing the timber is not an appropriate measure of the adequacy of the remuneration. WTO panels and the Appellate Body have repeatedly and properly rejected a cost to government benchmark. Canada also cited to three unique cases in which, because there were no commercially available market benchmark prices, the Commerce Department measured the adequacy of remuneration through an analysis of whether the government prices were consistent with market principles. Canada fails to note, however, that the Commerce Department conducted such an analysis in those cases only because there were *no* market benchmark prices available, from either domestic sources or commercially available imports.

26. **Q18:** The United States erroneously included a reference to subparagraph "(d)" in the first line of paragraph 15 of its second written submission. The United States was pointing out that Article 14 in its entirety (not Article 14(d) specifically) "does not purport to address every conceivable scenario in which benefit must be determined." The guideline in Article 14(d) establishes a criterion that any methodology for determining the adequacy of remuneration must meet. Any reasonable measure consistent with the stated guidelines is permissible. The United States agrees that the relevant "prevailing market conditions" are those in the country of provision, not some other country. Where the United States and Canada differ is over what type of evidence constitutes evidence of prevailing market conditions in the country of provision, which Article 14(d) does not address. In Canada's view, evidence of prevailing market conditions in Canada consists solely of transactions for domestic goods. The United States disagrees. "Prevailing market conditions" are the commercial conditions under which goods are bought and sold in the country of provision. A plain reading of the text would indicate that "prevailing market conditions" include the existence of all sources for the good in question that are commercially available to purchasers in the country of provision, including imports. Since US stumpage is commercially available to lumber producers in Canada, it constitutes part of the prevailing market conditions in Canada.

27. **Q19:** The United States confirms the statement it made. A market may be small but nevertheless robust and driven by market forces. Such a market would produce prices that could serve as a benchmark for determining the adequacy of remuneration. The issue is not the size of the "market" *per se*, but rather what the "market conditions" encompass. In particular, "market conditions" encompass the total commercially available supply, including imports. In the Commerce Department's preliminary analysis, while the overall size of the market was not a consideration, the relative size of the government-controlled segment of the market for Canadian stumpage relative to the private segment of the market was a consideration. The provincial governments control approximately 90 per cent of the Canadian softwood timber supply. The relative size of the government's segment of the market is particularly significant because provincial tenure holders consistently harvest less than their AAC and, if necessary, a tenure holder may harvest in excess of its AAC. Canadian lumber producers, therefore, have little or no incentive to purchase private stumpage, unless the private seller is willing to meet, or better, the government's administratively set stumpage price. Thus, the government's overwhelmingly dominant share of the market for stumpage drives private stumpage prices toward an equilibrium with government prices. This was confirmed by other record evidence.

28. **Q20:** There does not appear to be any record evidence to support Canada's claim that swaps must be equivalent in value as well as volume. Tenure holders are generally not permitted to sell the timber they harvest. "Swaps" generally involve two mills that are required under their tenures to process all the timber they harvest or an "equivalent quantity" in their mill. Thus, the provincial laws themselves place a premium on the *quantity* exchanged, not the value. The existence of the "equivalent quantity" language in the provincial statutes is tacit recognition of the occasional need for swaps to meet specific input requirements. The primary factors in swaps are volume and the physical characteristics of the logs, not value. Moreover, swaps are between sawmills. In an aggregate benefit calculation, where both parties are producers of the subject merchandise, the value of the logs swapped and the nature of the transaction are irrelevant because the benefit is calculated based on the total volume of Crown timber going into lumber production, allocated over all sales of softwood lumber.

29. **Q21:** Adequate remuneration must be determined in relation to prevailing market conditions in the country of provision, consistent with Article 14(d). No amount of evidence could overcome this express requirement. If the Panel is asking what amount of evidence is needed in order for an investigating authority to reject prices for domestically produced goods in favor of prices available in the domestic market for foreign-produced goods, it is the view of the United States that Article 14(d) is not concerned with whether the benchmark is based on domestically produced goods versus commercially available imported goods, but rather with whether the benchmark reflects the prevailing market conditions facing the purchaser in the country of provision. It is purely an evidentiary matter whether domestically produced goods versus commercially available imported goods represent the appropriate benchmark.

30. There may be instances where a government has a monopoly on a particular good. In this instance, the logical alternative would be to test the government price against a commercially available import price. Even Canada concedes that import prices could be utilized in the case of a government monopoly. Where a government does not maintain a monopoly, but exercises overwhelming dominance in the market, the same considerations would apply. Across all of Canada, a *single* government supplier controls on average 90 per cent of the supply of timber. The remaining 10 per cent of supply is provided by *thousands* of small, private landowners. It is impossible to conclude that the private landowners have any market power whatsoever.

31. A benchmark based on foreign-produced goods must be *commercially available* to the domestic purchasers in the country of provision. Thus, it would be inappropriate to choose a world market price from Latvia, Russia, Japan, Europe or Chile as a benchmark for stumpage in Canada. Canadian lumber producers do not import timber from these countries, and only actual or potential

import prices could conceivably satisfy the commercially available requirement. The only country that Canada does import timber from is the United States. Proof of actual imports is the strongest possible evidence that a price is commercially available to domestic purchasers in the country of provision.

32. Finally, the benchmark for measuring adequate remuneration must itself be a *market* price, whether the benchmark stems from domestically produced goods or from commercially available imported goods. Thus, the Commerce Department did not seek to demonstrate that the US market was "more competitive" than the Canadian market for stumpage. Rather, the Commerce Department found that the US stumpage market is open and competitive and the prices, therefore, are "market" prices.

33. **Q22:** Article 20.l establishes a general rule of prospective application for both provisional measures and definitive duties, subject to the exceptions in Article 20. Article 20.6 defines a set of circumstances under which retroactive assessment is permitted. The reference to exceptions in Article 20.1, including the Article 20.6 exception, should, logically, be interpreted to include within the exception the provisional measures essential to preserving the possibility of such a remedy where there is evidence that the requisite circumstances exist. Nothing in Article 20.6 precludes such a reading of Article 20.1. The reference to "provisional measures" in Article 20.6 is used solely to fix a point in time from which to calculate the 90-day retroactivity period and thereby define a universe of entries that may be subject to retroactive assessment. The fact that the date on which provisional measures are applied is used to calculate the 90-day period does not preclude subjecting the universe of entries during that period to provisional measures.

34. **Q23:** The timing provisions of Article 17 address the point in a proceeding at which provisional measures can be imposed. That point occurs after affirmative preliminary determinations of subsidization and injury have been made, *and* no earlier than 60 days after initiation. Article 20 addresses the universe of entities to which those measures may be applied.

35. **Q24:** Provisional measures were imposed for 4 months, i.e., they were ordered on 17 August 2001 and terminated on 15 December 2001.

36. **Q25:** The US International Trade Commission ("ITC") does not conduct an analysis of "injury which is difficult to repair" until it makes the final injury determination. As the panel concluded in *Hot-Rolled Steel from Japan*, conducting such an analysis at the preliminary stage would be speculative. In contrast, the existence of massive imports and a subsidy inconsistent with the Agreement are comparatively straightforward analyses of facts. The ITC's preliminary injury determination, together with the evidence concerning prohibited subsidies and massive imports, constitutes sufficient evidence to take the limited step of imposing provisional measures retroactively, pending the outcome of the full investigation.

37. **Q26:** Article 20.3 states that "[i]f the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected." If there is no cash deposit or bond, the amount guaranteed is zero. It follows that, absent provisional measures in the form of a deposit or bond for entries during the 90-day retroactivity period, no definitive duties may be collected on those entries. The conflict between Articles 20.3 and 20.6 does not exist if Article 20.1 is interpreted to permit provisional measures where there is sufficient evidence that critical circumstances exist.

38. **Q27:** In the Preliminary Determination, the Commerce Department issued a single order imposing provisional measures. The universe of entries subject to that order included all entries made or on after 90 days prior to the Preliminary Determination. Moreover, under US law, entries during the 90-day retroactivity period are subject to the provisional measures cap. If the Panel should find that there are two such periods, the rules governing provisional measures cannot apply to the 90-day

retroactive assessment period. If Article 20.6 only addresses assessment, not provisional measures, then the 4-month limitation on provisional measures and the provisional measure cap do not apply to such assessments.

Questions to Canada

39. **Q36:** Canada has *de facto* abandoned its specificity claim in this proceeding. Any attempt by Canada to pursue its specificity claim at this late stage would deny the United States its right to defend its interest and the rights of third parties to be heard.

40. **Q37:** If Canada is still pursuing this claim, it would not be appropriate at this late stage for Canada to supplement its prior submissions with additional information or argument. The US right to defend its interest would be severely prejudiced in such a case.