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

WT/DS257

Answers of the United States of America to the Panel's Questions

February 24, 2003

UNITED STATES – FINAL COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO CERTAIN SOFTWOOD LUMBER FROM CANADA

QUESTIONS FROM THE PANEL

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

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

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

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

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

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

[2] *Issues and Decision Memorandum,* at 29.

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

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

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

5. The record evidence in the underlying investigation demonstrates that stumpage is payment for the actual timber. The tenure holder pays the stumpage fee after the timber is harvested and pays, on a volumetric basis, only for the timber it harvests.[6] As noted in the amicus submission by the Natural Resources Defense Council, the British Columbia ("B.C.") Supreme Court held that "[t]he Crown exerts its financial interest in the forests of the province through stumpage appraisal, a process which places value on timber harvested. Stumpage is the price a licensee must pay to the Crown for its timber."[7] This was confirmed by B.C. in its

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

[4] Joint Case Brief Submitted to the Commerce Department on Behalf of the Government of Canada, Government of Alberta, Government of British Columbia, Government of Manitoba, Government of Ontario, Gouvernement du Quebec, Government of Saskatchewan, Government of the Northwest Territories, Government of the Yukon Territory, and British Columbia Lumber Trade Council, vol. 2, B6 (February 22, 2002) ("Canada Case Brief") (Exhibit U.S.-3).

[5] Response of the Government of Ontario to the Department of Commerce's May 1, 2001 Questionnaire, vol. 4, Exhibit ON-GEN-18, sec. 36 (June 28, 2001) (Exhibit U.S.-56).

[6] *Issues and Decision Memorandum*, at 29-30 (Exhibit CDA-1).

[7] *British Columbia v. Canadian Forest Products* (8 February 1999), Victoria 972176, (1999) BCJ 335 (B.C.S.C.), affirmed 2000 BCCA 456 (Exhibit U.S.-57).

questionnaire response when it described its timber pricing system as "a means of charging specific stumpage according to the relative value of *each stand of timber being sold*."[8]

6. Moreover, tenure holders do not acquire ownership of the trees unless and until they harvest the trees, and payment for the cut timber has been made to the government. For example, the Government of Quebec acknowledged that it "sells standing timber" and that "stumpage is charged on the volume harvested, i.e., . . . after trees have been felled. Stumpage charges are not based on inventories of standing timber."[9] Thus, the facts demonstrate that the tenure holder is paying for the tree, not merely the right to cut the tree.

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

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

8. As is typical in a contract for the sale of goods, the record evidence demonstrates that the actual tenure holder or licensee obtains ownership rights to the timber it harvests, provided it pays the stumpage fee. For example, section 8 of the Quebec Forest Act provides that "[f]ull ownership of the timber authorized for harvesting under a forest management permit remains in the domain of the State until the timber is felled and delivered to the destination indicated in the permit [i.e., the sawmill owning the tenure], unless the prescribed dues are paid in full."[10] Likewise, section 33(1) of the Ontario Crown Forest Sustainability Act provides that "[p]roperty in forest resources that may be harvested under a forest resource license remains in the Crown until all Crown charges have been paid in respect of the resources."[11] Section 28(4) of the

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[8] Response of the Government of British Columbia to the Department of Commerce's May 1, 2001 Questionnaire, vol. 1, at IV-16 (June 28, 2001) (emphasis added) (Exhibit U.S.-58).

[9] Response of the Government of Quebec to the Department of Commerce's November 21, 2001 Questionnaire, at 5 (December 17, 2001) (Exhibit U.S.-59).

[10] Response of the Government of Quebec to the Department's May 1, 2001 Questionnaire, vol. 3, Exhibit QC-S-16 (June 28, 2001) (Exhibit U.S.-24).

[11] Response of the Government of Ontario to the Department of Commerce's May 1, 2001 Questionnaire, vol. 4, Exhibit ON-GEN-18, sec. 31(1) (June 28, 2001) (Exhibit U.S.-60).

Alberta Forests Act also provides that "[t]he holder of a timber license or permit becomes the owner of timber authorized to be cut pursuant to the license or permit when the timber is actually cut by him or on his behalf."[12] The United States also understands that, under B.C. law, ownership of the objects covered by a profit à prendre (B.C.'s description of its tenure licenses) is acquired when the objects are "captured."[13]

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

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

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

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

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

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

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[12] Response of the Government of Alberta to the Department of Commerce's May 1, 2001 Questionnaire, vol. 2, Exhibit AB-S-9 (June 28, 2001) (Exhibit U.S.-61).

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

[14] Response of the Government of British Colombia to the Department of Commerce's May 1, 2001 Questionnaire, at vol. 7, Exhibit BC-S-36 (June 28, 2001) ("B.C. June 28 Response") (Exhibit U.S.-63).

[15] Response of the Government of Quebec to the Department of Commerce's May 1, 2001 Questionnaire, vol. 1, at 49 (June 28, 2001) (Exhibit U.S.-64).

[16] Response of the Government of Ontario to the Department of Commerce's May 1, 2001 Questionnaire, vol. 4, Exhibit ON-GEN-18, sec. 35 (June 28, 2001) (Exhibit U.S.-65).

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

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

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

> **8. Concerning the subsidy calculation, the US argues that the USDOC used US price data as the "starting point" for an assessment of the fair market value of Canadian timber, and then made adjustments to the US price data for obligations such as road building and silviculture (as "conditions of sale" in Canada) to arrive at an assessment of fair market value of timber in Canada (US first submission, para. 79-82). The implication of this argument seems to be that the USDOC did not simply make an unadjusted "cross-border" comparison, but rather, that it adjusted the US prices to arrive at some sort of a proxy price, based on the US price, to use as the "market value" benchmark in Canada. However, Attachment 1 to the US First Written Submission seems to show that in fact the unadjusted US price was used as the benchmark for "market value" in Canada. While Attachment 1 makes clear that, on the "government price" side of the equation, the stumpage fees were increased to account for the in-kind costs borne by Canadian harvesters under stumpage contracts, it seems to the Panel that such costs would have had to be included on that side of the equation, no matter what market benchmark was used (whether from inside Canada, from another market, etc.), simply to arrive at the total cost to the stumpage holder of the trees that it harvests on Crown land. As such, therefore, these adjustments seem to have nothing to do with adjusting the benchmark to which that government price is compared to determine the amount of subsidy benefit. Could the United States please comment.**

11. Article 14(d) requires the investigating authority to determine the adequacy of remuneration "in relation to prevailing market conditions for the good or service in question in the country of provision . . . (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)." Thus, in establishing a market benchmark price, the investigating authority must make adjustments to account for differences in prevailing market

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[17] Response of the Government of Alberta to the Department of Commerce's May 1, 2001 Questionnaire, vol. 2, Exhibit AB-S-9 (June 28, 2001) (Exhibit U.S.-61).

[18] Response of the Government of Saskatchewan to the Department of Commerce's May 1, 2001 Questionnaire, Exhibit SK-S-13 (June 28, 2001) (Exhibit U.S.-66).

[19] Response of the Government of Manitoba to the Department of Commerce's May 1, 2001 Questionnaire, vol. 1, MB-S-13 (June 28, 2001) (Exhibit U.S.-67).

conditions to ensure a proper comparison between the government price and the market benchmark price. The United States made such adjustments in this case.

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

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

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

> **"…StatsCan data show that approximately 2.5 million cubic meters of softwood logs were imported into Canada during the POI, and each of the investigated Provinces imported U.S. logs during the POI. …**
>
> **"This extensive record evidence that Canadian lumber producers had actual imports of U.S. logs and purchased U.S. stumpage during the POI would support basing our benchmark on tier one of the regulatory hierarchy [market prices from actual transactions within the country under investigation]. However, we do not have sufficiently detailed import prices on the record to use as the benchmark for all Provincial stumpage programs. Therefore, we are using stumpage prices in the United States under tier two of the regulatory hierarchy [world market prices that would be available to purchasers in the country under investigation]."**

Could the US please indicate in detail the reasons why the record did not contain "sufficiently detailed" import price data to use as the benchmark ? What did the

USDOC do to obtain such data? Did it request such detailed data from Canada? Please indicate where in the record the relevant information on this point can be found (i.e., both any requests for, or other efforts to obtain, such information, as well as the data of record on import prices, and any memoranda or other documents discussing the problems with those data). If neither party has yet provided this part of the record to the Panel, could the US please submit it.

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

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

15. *Manitoba and Saskatchewan*: Manitoba and Saskatchewan did not provide any private stumpage price data.[20]

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

> beginning in 1993, Alberta has had a consultant collect information on an annual basis on the value of *arms length log purchases in the province. This information, which does not differentiate between private and crown wood, has been used by*

[20] *See* Response of the Government of Manitoba to the Department of Commerce's May 1, 2001 Questionnaire, vol. 1, MB-55-MB-56 (June 28, 2001) (Exhibit U.S.-20); *see also* Response of the Government of Saskatchewan to the Department of Commerce's May 1, 2001 Questionnaire, SK-81-SK-82 (June 28, 2001) (Exhibit U.S.-21).

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

> *the province to develop a means for mediating disputes* between timber operators and other industrial operators concerning the value of standing timber adversely affected by industrial operations.[22]

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

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

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

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[22] Response of the Government of Alberta to the Department of Commerce's May 1, 2001 Questionnaire, vol. 1, page AB I-8 (Exhibit U.S.-69) (emphasis added).

[23] Rebuttal Brief of the Government of Alberta, vol. 2, at 65, fn. 94 (March 1, 2002) (Exhibit U.S.-55).

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

[25] *Id.* at 8.

[26] *Id.*

States' conclusion that the Norcon study did not provide a sufficient basis for establishing market benchmark prices.[27]

19. *Ontario*: On July 30, 2001, Ontario submitted a study conducted by Resource Information Systems, Inc. ("RISI").[28] The RISI survey, which was conducted for purposes of the investigation, collected data for both hardwood and softwood timber for all types of destination mills. Recognizing the limitations in this data, on December 18, 2001, Ontario submitted a study by Charles River Associates ("CRA"),[29] which analyzed the RISI survey data relating solely to softwood timber going to sawmills. The only data on private softwood timber that CRA was able to extract from the RISI study related to 111,000 cubic meters of timber and this data was not species specific.

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

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

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

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

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[27] *Issues and Decision Memorandum*, at 76-77 (Exhibit CDA-1).

[28] Response of the Government of Ontario to U.S. Department of Commerce July 25, 2002 First Supplemental Questionnaire (Aug. 3, 2001), at ON-SUP-2 - ON-SUPP-8 (Exhibit CDA-39).

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

[30] *Issues and Decision Memorandum*, at 98 (Exhibit CDA-1) (citations omitted).

[31] *See* First Written Submission of the United States, para. 66 (January 22, 2003) ("U.S. First Written Submission").

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

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

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

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

Benefit: $1 million

Sawmill ☞ Lumber sales of $1 million ☞ Remanufacturer
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Lumber exports $9 million
(Total sales $10 million)

Lumber exports $2 million
(Total sales $2 million)

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

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

Sawmill ☞ Lumber sales of $1 million ☞ Remanufacturer

Benefit: $1 million
|
Lumber exports $9 million
(Total sales $10 million)

|
Lumber exports $2 million

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

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

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

27. The United States also notes that, in the hypothetical investigation of specific companies, as in the aggregate investigation, exporters of the subject merchandise that were not individually investigated could be subject to duties, consistent with Article 19 of the SCM Agreement, even though those exporters may not have received any benefit. As the United States explained in its first written submission and oral statement,[33] subjecting uninvestigated companies to countervailing duties does not constitute an impermissible presumption that those companies received a subsidy benefit. Members routinely apply countervailing duties to exports from companies that were not individually investigated, as envisioned in Article 19.3, even though the

[32] *See*, U.S. First Written Submission, at paras. 108-114; Oral Statement of the United States at the First Meeting of the Panel, para. 32 (February 11, 2003) ("U.S. First Opening Statement").

[33] *See* U.S. First Written Submission, at para. 109; U.S. First Opening Statement, at para. 33.

producers may not have received any subsidy benefit or may have a subsidy rate significantly lower than the rate applied. Thus, if allocating some portion of the subsidy to remanufacturers that were not individually investigated and subjecting their exports to duties is inconsistent with the SCM Agreement, then Members are routinely violating the Agreement when they apply any subsidy rate to an exporter that was not individually investigated.

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

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

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

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

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

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

[36] Thus, for example, if a Member determines a subsidy of $12 per unit has been granted, the Member may not impose a countervailing duty of $20 per unit.

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

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

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

33. The EC concedes that "as a third party [it] is obviously not in a position to comment on the availability of *independent market-driven prices for non-governmental stumpage* (be it from private Canadian land or imported)."[41] The EC, however, does precisely that when it supports its

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

[38] Third Party Submission by the European Communities, para. 31("EC Third Party Submission") (emphasis in original).

[39] *See* Notification of Laws and Regulations Under Article 32.6 of the Agreement, European Communities, G/SCM/N/1/EEC/2/Suppl.3 (November 18, 2002) (Exhibit U.S.-15).

[40] *Id*. at para. 27.

[41] *Id*. at para. 32 (emphasis added).

argument with erroneous factual assertions such as "the USDOC rejected the use of *actual market prices*,"[42] and that the reason for such rejection was "the *mere assertion* that such prices are driven by the stumpage prices on Crown land."[43]

34. As discussed in our first written submission and oral statement,[44] and in our responses to other questions from the Panel contained herein, the facts on the record of the investigation demonstrate that there were no "independent market-driven prices for non-governmental stumpage" available in Canada. Most of the provinces failed to provide any price data on private stumpage sales or provided inadequate data. Moreover, the evidence established that the limited price data that was provided did not represent independent market-driven prices.

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

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

36. Tenure holders pay for the volume of trees they harvest. The subsidy benefit is the extent to which they pay less than adequate remuneration for the trees they harvest. Thus, the proper basis for calculating the total benefit is to multiply the total volume of harvested Crown timber entering the sawmills[47] by the difference between the market benchmark stumpage price and the

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[42] *Id*. at para. 20 (emphasis added).

[43] *Id*. at para. 32 (emphasis added).

[44] *See* U.S. First Written Submission, at paras. 64-76; U.S. First Opening Statement, at paras. 23-26.

[45] *See* EC Third Party Submission, at para. 32.

[46] *See* U.S. First Written Submission, at para. 72; U.S. First Opening Statement, at para. 14.

[47] Crown timber harvested by remanufacturers from their own tenures should also be included in the numerator. However, as the United States explained in its first written submission and at the first panel meeting, the United States did not have this data, which would have increased the total benefit calculation. U.S. First Written

government stumpage price. For example, if the sawmill paid $2/cubic meter for 500,000 cubic meters of harvested timber, and the market benchmark is $4/cubic meter, the total benefit to the sawmill is $1 million ($4 - $2 = $2 x 500,000).

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

38. At the first substantive meeting of the Panel, Canada asserted that certain other products, such as posts and ties, should also have been included in the denominator. The United States would have included such products in the denominator had Canada provided data from which the value of these sales could have been derived. Canada, however, failed to do so. Rather, Canada argued that a category of products labeled "residual products" should have been included in the denominator. The StatsCan information provided by Canada consisted of a single number representing the total shipments that fell within the residual products category and a list of products contained in the residual products category.[49] The list included products, such as particle board and spruce logs, that did not result from the processing of timber.[50] Canada did not, however, provide any information concerning the break out of the residual products category.[51] The United States therefore could not determine which specific products from the list provided made up what percentage of the total number provided for in the residual products category. Accordingly, because Canada did not provide enough information concerning the make-up of the residual products category, the United States could not include that category in the denominator.[52]

19. According to Canada, the USDOC used "manifestly incorrect data" (para. 132 Canada's oral statement) in its selection of a conversion factor which led to the inflation of the subsidy and amounts to a legal error. In Canada's view, was it manifestly incorrect of the USDOC not to accept the conversion factor suggested by Minnesota in its Public Stumpage Price Review and Price Index (CDA-113), when it is clearly noted in this Minnesota document that "the reader should use caution when comparing the prices shown in this report with actual prices received or

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Submission, at para. 104, fn. 134.

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

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

[50] *Id.* at Exhibit 13 (Exhibit U.S.-71).

[51] *See Issues and Decision Memorandum*, at 22 (Exhibit CDA-1).

[52] *Id.* at 22-23 (Exhibit CDA-1).

> **expected on any specific timber sale. Individual sale prices will vary significantly from the averages shown in this report because of variability in both economic and physical conditions"? (CDA-113, p. IV.A)**

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

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

> **20. Could each party clarify how it sees the role of the Panel in respect of the calculation-related claims, in light of the Panel's standard of review?**

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

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

42. In making an objective assessment of the matter before it, this Panel is to address only those provisions of the covered agreements cited by Canada in its request for the formation of a panel.[55] Canada has claimed that Articles 10, 19.1, 19.4, and 32.1 of the SCM Agreement and

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

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

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

Article VI:3 of GATT 1994 essentially imposes on Members obligations with respect to the calculation of the subsidy rate. In light of the Panel's standard of review, therefore, the role of the Panel is *inter alia* to determine the "applicability" of these cited provisions in assessing the calculation methodologies used by the United States.

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

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

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

45. Article 12.1 of the SCM Agreement provides:

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

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

46. Article 12.3 of the SCM Agreement provides:

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

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[56] Closing Statement of the United States at the First Meeting of the Panel, paras. 7-8.

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

47. Article 12.8 of the SCM Agreement states:

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

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

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

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

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[57] *See* 19 C.F.R. § 351.303(f)(1) (Exhibit U.S.-45).

50. Moreover, it is the view of the United States that when the investigating authority provides a detailed preliminary determination, access to the administrative record, detailed verification reports identifying the items examined during verification and any discrepancies found, exchange of case briefs and rebuttal briefs in which parties identify both legal and factual issues and advocate approaches to those issues, these processes reasonably inform the parties of all essential facts under consideration, consistent with Article 12.8 of the SCM Agreement.[64]

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

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

52. In this case, the United States announced in the *Preliminary Determination* its preliminary decision to use northern U.S. border states as the basis for calculating the benchmarks for each province.[65] The United States also announced which criteria it considered in selecting the benchmark sources, including species-mix, climate, and topography. Moreover, the record contained information from a limited number of potential benchmarks for all Canadian provinces being examined: Washington, Idaho, Montana, North Dakota, Minnesota, Michigan, New York, Vermont, New Hampshire, Maine, and Alaska. Therefore, based on the evidence contained in the record, and on the criteria announced in the *Preliminary Determination*, all parties were informed that a limited pool of potential benchmark sources was under consideration as the basis for the benefit calculations.

53. Minnesota is a U.S. northern border state, and the record contained all of the information necessary to use Minnesota as the basis for a benchmark prior to the parties' submission of

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

[65] *See Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 43186, 43197 (August 17, 2001) (Exhibit CDA-20) ("*Preliminary Determination*").

briefs.[66] Canada, Alberta, and Saskatchewan all were active parties to the investigation and received copies of all information concerning Minnesota. These facts, combined with the recognition that the United States had indicated that it was considering a limited pool of potential market benchmarks which included Minnesota, leave no doubt that the United States complied with Article 12.8 by giving Canada notice that the use of Minnesota stumpage prices was among the "essential facts under consideration."[67]

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

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

> The authorities shall whenever practicable provide timely opportunities for *all interested Members and interested parties* to see all information that is relevant to the presentation of *their cases*, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare *presentations* on the basis of this information.[68]

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

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

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[66] *See* Memorandum from the Team to File, Calculations for the Preliminary Affirmative Countervailing Duty Determinations: Stumpage Programs in the Investigation of Certain Softwood Lumber Products from Canada (August 9, 2001) ("*Preliminary Determination Calculations Memorandum*") (Exhibit U.S.-50).

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

[68] Emphasis added.

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

56. Canada argues that it was denied the opportunity to rebut information contained in two reports submitted by the petitioners on March 4, 2002 in response to the Maine Forest Products Council ("MFPC") letter. The March 4, 2002 letter[69] contained commentary on the MFPC letter, and tables containing information that Quebec itself submitted on January 4, 2002. Specifically, a report authored by the James W. Sewall Company ("Sewall Report") attached to the March 4, 2002 letter contains tables with information derived from the Maine Forest Service 2000 Stumpage Price Report and 2000 Wood Processor Report.[70] Quebec submitted those reports as an attachment to its January 4, 2002 submission.[71] Therefore, much of what Canada complains about is commentary on factual information Quebec had placed on the record.[72]

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

58. On October 30, 2001, Deputy Assistant Secretary Bernard Carreau ("DAS Carreau") and other Commerce Department officials met with representatives of the MFPC. During this meeting, the MFPC gave the officials a survey of U.S. private landowners and Quebec border mill owners. On October 31, 2002, the Commerce Department placed a memorandum in the administrative record stating that this meeting took place, which contained a copy of the survey that the MFPC had presented to the Commerce Department.[73]

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[69] Letter from John J. Ragosta to Secretary of Commerce (March 4, 2002) (Exhibit CDA-112) ("March 4, 2002 letter").

[70] *See* James W. Sewall Company, Review of Letter from Jonathan Ford to Department of Commerce, attached to March 4, 2002 letter (Exhibit CDA-112).

[71] *See* Letter from Arent Fox to Secretary of Commerce (January 4, 2002), Attachment 1 – Quebec/Maine Analysis of Comparative Factors Between the Public Forests of Quebec and the Private Forests of Main ("Quebec/Maine Analysis"), Appendix 7 to the Quebec/Maine Analysis – Maine Forest Service, 2000 Stumpage Reports, and Appendix 8 to the Quebec/Maine Analysis – Maine Forest Service, 2000 Wood Processor Report (Exhibit U.S.-73).

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

[73] Memorandum from Melissa G. Skinner, Re: *Ex Parte* Meeting with the Maine Forest Products Council Concerning the Countervailing Duty Investigation on Softwood Lumber from Canada (October 31, 2001) (Exhibit U.S.-72).

59. During this meeting, the MFPC asserted that the Commerce Department should not have used only sawlogs when it calculated the weighted-average stumpage price for Maine. According to the MFPC, DAS Carreau "invited" the MFPC to provide the Commerce Department with more information concerning standing timber prices in Maine.[74]

60. On December 20, 2001, the MFPC sent a letter addressed to DAS Carreau,[75] in which the MFPC stated that studwood was used in the production of lumber in Maine. This letter included tables based on information from a survey conducted by the Maine Forestry Service containing prices for studwood in Maine.[76] The MFPC did not submit this letter in accordance with the Commerce Department's regulations.

61. Section 351.303(b) of the regulations[77] require the submission of all documents to "the Secretary of Commerce, Attention: Import Administration, Central Records Unit." Properly addressed submissions are processed through the Administrative Protective Order Office ("APO office"). The APO office controls access to business proprietary information, ensures that all documents have a certificate of service, and distributes the documents to appropriate Commerce Department officials. Commerce Department officials, such as DAS Carreau, normally receive submissions through this process.

62. Section 351.303(f)(1)(i) of the Commerce Department's regulations also requires that "a person filing a document with the Department simultaneously must serve a copy of the document on all other persons on the service list by personal service or first class mail." Section 351.303(f)(2) requires that all documents be accompanied by a certificate attesting to such service.[78]

63. Because the Commerce Department relies on these regulations to ensure that information is placed on the record and provided to interested parties, it was not immediately apparent that the MFPC letter had not been formally placed on the record. On February 8, 2002, Quebec filed

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

[75] Pursuant to Commerce Department regulations, parties filing documents with the Commerce Department must address those documents to the Secretary of Commerce. *See* 19 C.F.R. § 351.303(b) (Exhibit U.S.-45).

[76] Letter from MFPC to Bernard Carreau (December 20, 2001) (Exhibit CDA-100).

[77] The United States provided a copy of these regulations to the Panel as Exhibit U.S.-45.

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

a letter with the Commerce Department informing it that the MFPC letter had not been placed on the record.[79] The Commerce Department then took immediate steps to rectify this situation.

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

65. On March 1, 2002, Quebec submitted its rebuttal brief, which commented on the information contained in the MFPC letter.[80] On March 4, 2002, the petitioners submitted comments on the MFPC letter, and rebuttal information, including the Sewall Report.[81]

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

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[79] Letter from Arent Fox to U.S. Department of Commerce Regarding Request that Department Place Information Received from Maine Landowners on the Record (Feb. 8, 2002) (Exhibit CDA-101).

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

[81] *See* James W. Sewall Company, Review of Letter from Jonathan Ford to Department of Commerce, attached to March 4, 2002 letter (Exhibit CDA-112).