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 in Connection with the Second Substantive Meeting

April 4, 2003

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

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1. Could the parties please comment on the relevance, if any, of footnote 36 to Article 10 in the context of Canada's pass-through claim, in particular Canada's assertion that the Agreement requires that the calculation of the subsidization rate of the investigated product must be accurate.

1. As the United States has previously noted,[1] Article 10 of the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") provides a general obligation to impose countervailing duties in conformity with the obligations in the SCM Agreement. The general definition of a countervailing duty in footnote 36 to Article 10 does not alter that general obligation. By defining the term "countervailing duty" as "a special duty levied for the purpose of offsetting any subsidy," footnote 36 to Article 10 complements Article 19.4 of the SCM Agreement, which, as the United States has previously noted,[2] establishes the subsidy found to exist as an upper limit on the amount of the countervailing duty that may be levied.

2. The definition of a countervailing duty in footnote 36 does not, however, impose any obligations regarding how the existence of a subsidy is to be determined. Furthermore, the general definition of "countervailing duty" cannot override the more specific provision of Article 19.3 of the SCM Agreement, which permits the imposition of countervailing duties on non-investigated exporters of the subject merchandise. As the United States has explained throughout this proceeding,[3] subjecting uninvestigated companies to countervailing duties does not constitute an impermissible presumption that those companies received a subsidy benefit. Article 19.3 permits Members to apply countervailing duties to exports from companies that were not individually investigated, and Members routinely do so. Moreover, Article 19.3 clearly contemplates that Members may apply countervailing duties to such companies even though they may not have received any subsidy benefit or may have received a subsidy benefit significantly lower than the rate applied.[4]

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[1] *See* First Written Submission of the United States, fn. 213 (January 22, 2003) ("U.S. First Written Submission").

[2] *Id.* at para. 96, fn. 213; Answers of the United States of America to the Panel's Questions, para. 30 (February, 24, 2003) ("U.S. First Response to Panel Questions"); Second Written Submission of the United States, para. 56 (March 6, 2003) ("U.S. Second Written Submission"); Oral Statement of the United States of America at the Second Meeting of the Panel, para. 34 (March 25, 2003).

[3] *See* U.S. First Written Submission, at para. 109; Oral Statement of the United States of America at the First Meeting of the Panel, para. 33 (February 11, 2003) ("U.S. First Oral Statement").

[4] As discussed in our previous submissions, Article 19.3 simply obligates Members to provide expedited reviews for such companies to calculate individual subsidy rates, and these reviews are currently underway in this case. *See, e.g.,* U.S. First Oral Statement, at para. 34.

3. In its preliminary response to this question at the second substantive meeting of the Panel, Canada referenced the panel and Appellate Body reports in *United States – Lead and Bismuth*.[5] The underlying measures at issue in those reports, however, were the final results of administrative reviews conducted with respect to particular companies, and the issue under consideration was whether those particular companies had received subsidies. The focus on whether the particular companies involved received subsidies is inapposite here because the measure at issue in this case is the final determination in an investigation and, as discussed above, Article 19.3 of the SCM Agreement clearly contemplates the imposition of countervailing duties on non-investigated exporters. Thus, the reports that Canada cited are not relevant to this dispute.

2. Is it relevant to the interpretation of Article 14(d), in particular its reference to "… in the country of provision", that Articles 14(b) and 14(c) contain no similar reference?

4. All of the guidelines in Article 14 of the SCM Agreement address the determination of whether a benefit has been conferred, i.e., whether the recipient is better off with the government's financial contribution than it would otherwise have been absent the financial contribution. The guidance in each subparagraph is tailored to the type of financial contribution at issue.

5. Articles 14(b) and (c) provide that the benefit from a government loan or loan guaranty must be determined by comparison to a "comparable commercial" loan that "the firm could actually obtain on the market" or the amount that the firm would pay on a "comparable commercial" loan absent the government guarantee. In conducting the analysis, neither Article 14(b) or (c) requires any examination of financial markets in the country under investigation, or any adjustments, before using lending rates from sources outside the country under investigation.

6. Article 14(d), like the other provisions of Article 14, must answer the basic inquiry of whether the recipient is better off than it would otherwise have been absent the government's financial contribution. In accordance with the findings of the Appellate Body,[6] the point of comparison under Article 14(d) is, as always, the "market." Thus, the point of comparison must be a market-determined price undistorted by the government's financial contribution. Article 14(d) requires that adequate remuneration be determined "in relation to prevailing market conditions . . . in the country of provision." In light of that language, the most probative evidence of adequate remuneration is actual market-determined prices in the country of

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[5] *See* Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted June 7, 2000; Report of the Panel, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, adopted June 7, 2000.

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

provision. That language is not, however, a directive to use price data solely from sources in the country of provision in all cases. Where there are no reliable "market" prices in the country of provision, price data from sources outside the country of provision may form the basis for the adequate remuneration analysis. In such cases, however, adjustments must be made, as necessary, to relate the analysis to conditions of sale "in the country of provision."

3. Why, in the US view, are US stumpage prices broadly representative of market conditions in Canada? What is the motivation or incentive for Canadian harvesters to cut timber in the US, at much higher cost than in Canada, especially in the light of the abundant (in the US view, unlimited) supply of Crown timber? Would such purchases be typical, or instead essentially exceptional?

7. As the United States has noted previously,[7] when the market, rather than the government, sets timber prices, it does so based on the value of the downstream product, lumber. The North American lumber market is highly integrated. Thus, timber values in both Canada and the United States are driven by the same demand for lumber, and, in fact, 60 percent of all Canadian lumber is exported to the United States. Canada does not enjoy a comparative advantage. As discussed in our prior submissions,[8] the timber supply in the United States is comparable to Canadian timber, and the United States used species-specific benchmarks to account for any differences in species mix. The U.S. timber prices are therefore broadly representative of the fair market value of timber in Canada. While there are some differences in conditions of sale, those differences were accounted for in the benchmark calculation.[9]

8. Furthermore, it is undisputed that Canadian mills can and do purchase U.S. timber.[10] Given the wide availability in Canada of Crown timber at below-market rates, these purchases are relatively infrequent, especially outside of Quebec, but they do occur for a number of reasons, such as local availability or related-party transactions.[11] While the supply of Crown timber in Canada is not "unlimited," the availability of additional supply in each province affects the marginal price that Canadian mills will pay for timber from other sources, and thus the volume of Canadian purchases of U.S. timber is doubtless much less than it would be, but for the Canadian subsidies. At the same time, the fact that some transactions occur demonstrates that U.S. timber prices are in fact commercially available to Canadian mills.

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[7] *See* U.S. First Written Submission, at para. 79.

[8] *Id.* at paras. 77-84 and fn. 106.

[9] *Id.* at paras. 77-84 and fn. 59; U.S. Second Written Submission, at paras. 46-50; U.S. First Response to Panel Questions, at paras. 11-13.

[10] *See* U.S. First Written Submission, at para. 80, fn. 104.

[11] Quebec's forestry consultants report that much of the Maine timber harvested by Quebec lumber producers is taken from Maine timberlands owned directly by Canadian companies. *See* Del Degan, Massé et Associés Inc., *The Private Forest Standing Timber Market in Québec*, 91 (July 2001), appended to Response of the Government of Quebec to the Department's June 25, 2001 Questionnaire, volume 3, Exhibit QC-S-100 (August 3, 2001) (Exhibit CDA-29).

4. In paragraph 40 of its second oral statement, Canada argues that "the fundamental basis for Commerce's rejection of in-country evidence was its reliance on the Preamble to its Regulations to presume price suppression". According to the parties, does the Preamble provide for such a presumption in case of dominant position by the government? According to the parties, did the USDOC interpret the Preamble to imply a presumption against the use of market data where the government holds a dominant position in the market? (See for example p. 37 CDA-1 or p. 58: "The preamble to section 351.511 of the Regulations provides that, where a government has a dominant position in a market, the Department will avoid the use of private prices in determining the adequacy of remuneration. Where the market for a particular good is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price").

9. Under the U.S. regulations, the preferred benchmark for determining adequate remuneration is actual market-determined prices in the country under investigation. The Preamble states that, where such prices exist, the U.S. Department of Commerce normally will not account for government distortion of the market. Thus, the presumption is that government involvement in the market does *not* affect the use of in-country prices. The Preamble does recognize, however, that government distortion of the market may be significant where the government has a majority share of the market. Rejection of actual in-country prices is limited, however, to cases "where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market . . ."[12] Thus, the Preamble does not "presume" price suppression on the basis of the government's market share. The United States' application of its regulations in this case was consistent with that policy.

10. The specific statements from the *Final Determination* referenced in the Panel's question should not be viewed out of context. First, the statements were intended to paraphrase the Preamble itself, which, as noted above, does not establish a presumption that in-country prices are distorted whenever the government has a majority share of the market. Second, it is evident from the *Final Determination* that the United States did not, in fact, simply presume that private prices in Canada were distorted as a result of the provincial governments' 90 percent market share. The provinces' dominant market share was sufficient to raise the potential for significant distortion of private prices. Consistent with the Preamble, however, the United States relied on record evidence that established that the private prices in Canada were distorted by the government's dominant role in the market. That evidence was discussed in the *Final Determination*, in the general benefit section and in the province-specific sections.[13] Had the United States employed a presumption of distortion, such evidence would have been irrelevant.

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[12] *Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada,* 59 (March 21, 2002) ("*Issues and Decision Memorandum*") (Exhibit CDA-1), quoting *Countervailing Duties, Final Rule,* 63 Fed. Reg. 65348, 65377 (November 25, 1998) ("Preamble").

[13] *Id.* at 36-38, 58-59, 95-98. *See also* U.S. First Written Submission, at paras. 68-72; U.S. Second Written Submission, at paras. 33-45.

5. The US argues that any overstatement of the subsidy amount due to arms' length transactions for logs between timber harvesters and lumber producers is now being addressed through individual expedited reviews being conducted by the USDOC. Could the US please explain how, if at all, such individual reviews affect the overall aggregate subsidization calculation. That is, does the aggregate subsidization rate remain the same, or is it recalculated to exclude the relevant amounts from the numerator, the denominator, or both, of subsidy amounts attributed to, and sales by, the individual firms subject to expedited review?

11. This is an issue actively under consideration by the United States in the ongoing expedited reviews. The reviews are being conducted, and this issue will be addressed, consistent with the United States' obligations under the SCM Agreement.

6. Could the US respond to the statistics referred to in paragraph 57 of Canada's oral statement, i.e., that the US recognizes that in British Colombia, 24 per cent of Crown timber was harvested by entities that do not own sawmills, and that scores of producers purchased their log and lumber inputs in arms'-length transactions from independent harvesters and other entities.

12. First, Canada's statistical reference to the percentage of British Columbia ("B.C.") Crown timber "harvested by entities that do not own sawmills" is misleading. Obviously, entities in B.C. that do not own sawmills (e.g., pulp mills) harvest Crown timber. The subsidy was calculated, however, based solely on the volume of softwood timber that actually entered sawmills. Thus, the portion of the harvest that did *not* enter sawmills is irrelevant. The vast majority of the timber entering sawmills came from the mill's own tenure.

13. Moreover, the statistics referred to in paragraph 57 of Canada's oral statement at the second substantive meeting of the Panel are inconsistent with the record evidence provided by B.C. itself. As the United States explained in its second written submission, more than 83 percent of the B.C. Crown softwood timber harvest is provided to holders of four types of B.C. tenures. Each of these tenures requires the tenure holder to own a processing facility (for these purposes, a sawmill) and process the harvested timber (or an equivalent volume) in its own mill.[14] In addition, another 4.6 percent of the harvest is allocated under section 21 of the Small Business Forest Enterprise Program ("SBFEP"), which imposes requirements that have effects similar to explicit mill ownership requirements.

[14] *See* U.S. Second Written Submission, at fn 48, citing Response of the Government of British Columbia to the Department of Commerce's May 1, 2001 Questionnaire, vol. 9, Exhibits BC-S-59 at section 1.02, BC-S-62 at section 15.01, BC-S-63 at section 14.01 (June 28, 2001) ("B.C. June 28 Questionnaire Response") (Exhibit U.S.-76). *See also* U.S. First Written Submission, at fn. 137, citing *United States – Lumber Preliminary Determination with Respect to Certain Softwood Lumber from Canada,* Answers of the United States of America to the Panel's 26 April 2002 Questions, paras. 2-3 (May 8, 2002) ("U.S. Response to *U.S. – Lumber Preliminary Determination* Panel's Questions") (Exhibit U.S.-37).

14. The remaining B.C. Crown timber is provided under licenses that are normally reserved (with some case-by-case exceptions) to entities not owning timber processing facilities. These include SBFEP Section 20 licenses (7 percent of the softwood timber harvest) and woodlot licenses (2 percent of the softwood timber harvest). However, there are a number of legal restrictions (e.g., local processing requirements) that call into question whether any transactions for the timber covered by these tenures could be considered to be at "arm's-length." Moreover, as B.C. stated: "For the most part, loggers operate as employees or contractors for holders of private lands or Crown tenures."[15]

15. Finally, as noted above, tenure holders are required to process the timber they harvest, or an equivalent volume, in their own mills. Thus, many of the alleged arm's-length sales are, in fact, simply log trades or swaps among tenure holders. Thus, Canada's claims referenced in the Panel's question are not supported by the record.

7. Could the US respond to the argument in paragraph 61 of Canada's statement that the US positions in respect of pass-through and specificity are internally inconsistent.

16. Canada prefaces its erroneous assertion of an inconsistency on the flawed premise that what is at issue is a "subsidy on standing timber."[16] The subsidy at issue, however, is a subsidy to lumber producers, including remanufacturers. Specifically, the subsidy is the provision of provincial timber for less than adequate remuneration.

17. Remanufacturers use provincial tenures and were included in the United States' specificity determination. As stated in the *Final Determination*:

> Benefits under these Provincial stumpage [programs] are limited to those companies and individuals specifically authorized to cut timber on Crown lands. These companies are pulp and paper mills and the saw mills and *remanufacturers* which are producing the subject merchandise. This limited group of wood product industries is specific under section 771(5A)(D)(iii)(I) of the Act.[17]

Article 2.1(c) of the SCM Agreement provides that a subsidy is specific if it is used by a limited number of enterprises, industries, or group of industries. The subsidy at issue is the provision of Crown timber for less than adequate remuneration. Thus, the analysis of whether the subsidy is specific properly focused on the holders of provincial tenures.

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[15] *See* U.S. Response to *U.S. – Lumber Preliminary Determination* Panel's Questions, at para. 3 (Exhibit U.S.-37), quoting B.C. June 28 Questionnaire Response, at vol. 15, BC-LER-45.

[16] Oral Statement of Canada at the Second Substantive Meeting of the Panel, para. 60 (March 25, 2003).

[17] *Issues and Decision Memorandum*, at 52 (emphasis added) (Exhibit CDA-1).

18. The benefit calculation was not in any way inconsistent with the specificity determination. As the United States has explained previously, it conducted this investigation on an aggregate basis. The aggregate methodology is consistent with the SCM Agreement and Canada has not argued to the contrary. In an aggregate investigation, the United States determines the total amount of the subsidy provided during the period of investigation to producers of the subject merchandise (the numerator), then allocates the total subsidy across all of those producers (the denominator).

19. The subject merchandise, lumber, is produced both by primary mills ("sawmills") and secondary mills ("remanufacturers"). The numerator was therefore based on the total volume of Crown logs entering sawmills.[18] Likewise, both remanufacturers and sawmills were included in the denominator of the ad valorem subsidy rate calculation, i.e., a portion of the subsidy benefit was allocated to remanufacturers. Allocation of the total subsidy to producers of the subject merchandise (sawmills and remanufacturers) does not constitute an impermissible presumption that any individual producer received a portion of the subsidy. In fact, Article 19.3 of the SCM Agreement specifically provides for the imposition of duties without determining company-specific rates in an investigation.

20. There is, therefore, no inconsistency in the United States' positions with respect to specificity and the allocation of the subsidy.

8. At para. 32 of the US second submission, the US states that the data on private stumpage prices in Ontario and Quebec highlight that "prices that are distorted by the government's financial contribution do not reflect 'market' conditions". Could the US please explain in what way this price information demonstrates this.

21. In paragraph 32 of its second written submission, the United States was not suggesting that the price data from Ontario and Quebec proves the distortion. Rather, the United States was noting that, in light of other evidence demonstrating that those prices are distorted by the government's financial contribution, they cannot serve to measure the subsidy benefit. The evidence that the provincial tenure systems distort the small private sector timber sales is discussed in the *Final Determination* and in the United States' prior submissions to the Panel.[19]

[18] As noted previously, the United States did not include the volume of Crown logs from tenures held by remanufacturers in the numerator due to a lack of available data. *See* U.S. First Written Submission, at para. 104, fn. 134; U.S. First Response to Panel Questions, at para. 36, fn. 47.

[19] *See, e.g.,* U.S. First Written Submission, at paras. 68-76*;* U.S. Second Written Submission, at paras. 33-44. *See also Issues and Decision Memorandum*, at 36-38, 57-59, 75-77, 95-98, 109-111, 128-129, 137 (Exhibit CDA-1).

9. Could the US respond to the argument at paragraph 40 of Canada's statement that the US took a selective approach to the record evidence in reaching its determination that Canadian private stumpage prices were distorted by the provincial stumpage programmes.

22. The United States considered all of the evidence presented. As we have noted previously, evidence that Canada claims the United States ignored was, in fact, considered, but found unpersuasive.[20] Where the parties submit evidence in support of opposing views, it is the role of the investigating authority to weigh that evidence and draw a conclusion. In that respect, an investigating authority must, in the end, select the evidence it finds persuasive and on which it will rely. Article 22.5 of the SCM Agreement requires that a final determination include "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," including the reasons for the acceptance or rejection of relevant arguments or claims made. The United States did so in the 164 page *Final Determination*, and Canada has not claimed that the United States' determination is inconsistent with Article 22.5 of the SCM Agreement.

10. Could the US please elaborate on its reference to Article 14 as containing "guidelines", and not "detailed rules". Is the US suggesting that the reference to "guidelines" in the chapeau of Article 14 means that where the word "shall" appears in subparagraphs (a) through (d) of Article 14, it is less than fully binding?

23. Article 14 of the SCM Agreement expressly states that it contains "guidelines" that Members must follow in calculating a subsidy benefit. While the guidelines are binding, they are, nonetheless, guidelines rather than detailed rules. A "guideline" is a general principle to guide the development of policies and procedures.[21] The guidelines in Article 14 are quite distinct from the types of detailed rules found elsewhere, such as in Article 2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement"). Article 2 of the Antidumping Agreement specifies how to perform dumping calculations and the particular data that must be used for specific purposes. As discussed in our prior submissions,[22] Article 14(d) of the SCM Agreement provides that the adequate remuneration analysis must relate to prevailing market conditions in the country of provision, but does not specify the methods for doing so or the types of data that may be used. Thus, where there are no market-determined benchmark prices in the country of provision, a Member may, consistent with the guideline set out in Article 14(d), rely on prices from sources outside the country of provision, provided that adjustments are made, as necessary, to relate the adequate remuneration determination to conditions of sale in the country of provision.

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[20] *See* Closing Statement of the United States of America at the First Meeting of the Panel, para. 6 (February 12, 2003); U.S. Second Written Submission, at paras. 40-43.

[21] *See The New Shorter Oxford English Dictionary*, 1159 (1993) (defining "guideline" as "a directing or standardizing principle laid down as a guide to procedure, policy, etc.") (Exhibit U.S.-12).

[22] *See, e.g.*, U.S. First Written Submission, at para. 46.

24. Moreover, Canada concedes that a price that is available to purchasers in the country of provision is part of the prevailing market conditions in the country of provision.[23] As discussed below in response to question 11, U.S. timber prices are available to lumber producers in Canada.

> **11. Could the US comment on Canada's argument at para. 28 of its second submission concerning the third benchmark in Section 351.511 of the USDOC Regulations. In particular, could the US comment, first, on Canada's argument that there are no world market prices for stumpage, and second, on Canada's position that the evidence shows that provincial stumpage programmes are operated in a manner consistent with market principles, as foreseen by the USDOC Regulations.**

25. Under the U.S. regulations, the second tier in the benchmark hierarchy states:

> If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) . . . the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price *would be available to purchasers in the country in question*. Where there is more than one *commercially available* world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.[24]

As used in the U.S. regulation and in prior determinations, the term "world market price" simply means a price for the good or service from a source outside the country under investigation.[25] However, only world market prices that are commercially available to purchasers in the country under investigation fall within the ambit of the second tier of the regulation.[26]

26. Availability is a case-by-case factual determination. As the United States has discussed in its prior submissions,[27] the record demonstrates that prices for U.S. timber are commercially available to lumber producers in Canada. Canada argues that U.S. timber prices are not available to purchasers in Canada because the trees must be harvested in the United States. Under Canada's reasoning, FOB U.S. factory prices are not available to purchasers in Canada because the purchaser must take delivery in the United States. The reality is, however, that when

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[23] *See* Second Written Submission of Canada, para. 41 (March 6, 2003).

[24] 19 C.F.R. § 351.511(a)(2)(ii) (emphasis added) (Exhibit U.S.-14).

[25] The provision for averaging multiple world market prices reflects the fact that the term "world market price" is not being used narrowly, i.e., it is not restricted to commodities with a single worldwide price.

[26] The Preamble to the U.S. regulations illustrates the importance of commercial availability by noting that prices for electricity in Europe are not likely to be an appropriate basis for determining the value of electricity in Latin America because the electricity "in all likelihood would not be available to consumers in Latin America." *Issues and Decision Memorandum,* at 35 (Exhibit CDA-1), citing Preamble, 63 Fed. Reg. at 65377.

[27] *See, e.g.*, U.S. First Written Submission, at para. 80.

Canadian lumber producers need wood fiber, they can (and occasionally do) purchase U.S. trees. They take delivery in the United States, but they transport the harvested timber to Canada and process it in Canadian mills. The prices for U.S. timber are therefore available to purchasers in Canada.

27. Canada also argued that the U.S. prices are not available to purchasers in Canada because of log export restrictions. However, the vast majority of timber in the United States is privately held, and none of the privately held timber is subject to export restrictions. These private timber sales are the primary driver of U.S. stumpage fees in the timber market overall. The export restrictions that Canada refers to are limited to public timber in Western states. As the United States explained in the *Final Determination*, however, that public timber is sold through open and competitive public auctions in which most purchasers have the choice of buying public or private stumpage. The auction prices for public timber therefore reflect market prices generally, including private timber prices commercially available to purchasers in Canada.[28]

28. The U.S. regulations provide that "[i]f there is no world market price available to purchasers in the country in question," the adequacy of remuneration will normally be determined by assessing whether the government price is consistent with market principles.[29] Where commercially available world market prices exist, as in this case, analysis under the third tier of the U.S. regulations is unnecessary. If the government price is less than the market benchmark price, it is, by definition, less than adequate remuneration.

29. The fact that the provincial stumpage prices are below the market benchmark price contradicts Canada's claim that the provincial stumpage programs are operated in a manner consistent with market principles. That benchmark comparison is all that is necessary to establish the existence of a benefit, consistent with Article 14(d). Nevertheless, as discussed in our prior submissions,[30] other evidence demonstrates that the provincial tenure systems are based on public policy objectives, not market principles. Moreover, the United States disagrees with Canada's argument that evidence that British Columbia makes a profit on its timber sales is sufficient to find that government prices are based on market principles. A government price below fair market value – even a profitable one – is not based on market principles.[31]

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[28] *See Issues and Decision Memorandum,* at 44 (Exhibit CDA-1).

[29] The Preamble to the regulations states that "[i]n our experience, these types of analyses may be necessary for such goods or services as electricity, land leases or water." *Id.* at 35 (Exhibit CDA-1), citing Preamble, 63 Fed. Reg. at 65377-78. All of the cases that Canada cited with respect to U.S. practice concerning the third tier in the regulatory hierarchy involved the provision of electricity or other types of goods or services (port facilities; railway "hopper car" services) for which there was no evidence of world market prices commercially available to purchasers in the country under investigation.

[30] *See* U.S. First Written Submission, at paras. 69-70; U.S. Second Written Submission, at paras. 35-38.

[31] *See also* U.S. response to Question 12, below.

12. What is the basis for the US statement in footnote 40 that the reports on the profits earned by provinces on their timber sales implicitly account for the cost to the government of trees as $0?

30. Footnote 14 of the United States' oral statement provides the relevant citation to B.C.'s questionnaire response, which can be found at Exhibit CDA-48. With respect to Alberta, Ontario, and Quebec, the United States directs the Panel's attention to pages 10, 11, and 12 of Exhibit CDA-47. The "profit" calculation in Exhibit CDA-48 is the basis for Canada's claim that B.C. prices timber in accordance with market principles. The only costs incurred by B.C. included in this calculation, however, are current administrative expenses.[32] Nowhere in the calculation is there a figure for the value of the trees themselves. Thus, the calculation effectively values the trees at zero. The information set forth in Exhibit CDA-47 suffers from the same infirmity.

13. The US, at paras. 83-85 of its second submission, in the context of Canada's Article 12.8 claim, emphasizes the words "essential facts under consideration". The complete phrase from Article 12.8, however, is "essential facts under consideration *which form the basis for the decision* whether to apply definitive measures". The US implies in its arguments that Canada's interpretation of Article 12.8 would require, essentially, disclosure of the entire final results before the final determination was actually made. Under the facts of this case, could the USDOC simply have informed the parties, before issuing its final determination, that it was considering changing the comparison state to Minnesota, and allowing the parties a brief period to comment? Does the US consider that such a disclosure would be equivalent to issuing the entire final determination in advance? Please comment, and explain any reasons why such an approach would not have been possible, if this is the US view.

31. The parties challenged the decision to use Montana in their case briefs, which were submitted one month before the *Final Determination* was issued. We have no basis on which to determine when, in response to those comments, the United States first considered changing to Minnesota. Thus, we cannot speculate on whether there would have been sufficient time to request, receive, and analyze additional comments.[33]

32. Moreover, it is the view of the United States that Article 12.8 did not require additional opportunity for comment. The very purpose of notice and comment is to afford parties the opportunity, as they had in this case, to persuade the investigating authority to take specific

[32] The calculation includes current expenses for "silviculture," "roads and bridges," "protection," "timber sales costs," and "sustainable forest management." *See* B.C. June 28 Questionnaire Response, at Exhibit BC-S-111 (Exhibit CDA-48). *See also* PricewaterhouseCoopers, *Report on Revenues and Expenditures of Certain Canadian Provinces Relating to Stumpage Operations*, 10-12 (June 25, 2001) (Exhibit CDA-47).

[33] This was a very complex investigation and the *Final Determination* required the United States to weigh the evidence and make decisions on a substantial range of issues. Thus, if the United States initially focused on other issues or other provinces, it is possible that specifically identifying Minnesota as being under consideration, in time for parties to submit additional comments on the benchmark determination, would have been precluded as a practical matter.

positions. There may be many issues on which an investigating authority considers changing its mind in response to comments from the parties, but ultimately does not do so; in other instances the investigating authority may change its mind. Nothing in Article 12.8 of the SCM Agreement requires an ongoing notification of that deliberative process. Furthermore, Article 12.8 does not preclude an investigating authority from altering a final decision in response to parties' comments without affording further opportunity to comment. Reading such an obligation into Article 12.8 would undermine the very purpose of notice and comment. The investigating authority could effectively be precluded from altering a decision in response to comments in many instances because of the obligation to complete what is often a very complex investigation within a specified period.

33. Article 12.8 simply requires that a certain result be achieved, i.e., that interested parties be informed of the essential facts under consideration which form the basis of the decision whether to apply definitive measures in time to defend their interests. Article 12.8 does not require any specific procedure for achieving the required result. To determine whether that result has been achieved in a particular case, it is necessary to view the process as a whole.

34. Because Article 12.8 addresses events "before a final determination is made," it cannot be read as requiring pre-notification of the final determination. In this case, where the parties had ample opportunity to defend their interests, Canada's position is equivalent to a requirement to issue a pre-notification of the final decision with respect to the benchmark state (and, by logical extension, pre-notification of the final decision with respect to all issues for which the final decision differed in any respect from the preliminary determination).

35. It is evident from the record of the investigation that the parties had ample notice and opportunity to defend their interests. First, the record establishes that the parties knew that the United States was considering a U.S. state as the basis for the market benchmark and knew the United States' preliminary choice of benchmark state. The parties also knew that the benchmark state would be selected from evidence on the record and that the record only contained evidence on Washington, Idaho, Montana, North Dakota, Minnesota, Michigan, New York, Vermont, New Hampshire, Maine, and Alaska.[34]

36. Second, the parties knew the criteria that the United States would use to select the benchmark state, which included species mix, climate, and topography.[35] Saskatchewan obviously did not believe that the potential pool of states was limited by contiguousness, given that Saskatchewan itself proposed Alaska, a non-contiguous state, as an alternative.

37. Third, the parties were aware of all of the data on each state under consideration, including those not selected in the preliminary determination. And finally, the parties were

[34] *See* U.S. First Response to Panel Questions, at para. 52; U.S. Second Written Submission, at para. 88.

[35] *See* U.S. First Response to Panel Questions, at para. 52; U.S. Second Written Submission, at para. 88.

aware of the arguments presented by all other parties concerning the appropriate comparison state.

38. The parties received all of this information in sufficient time to defend their interests, as evidenced by their case and rebuttal briefs. It is therefore evident that the only thing the interested parties did not know in this case was the United States' final decision *after* considering the essential facts and the comments of the parties.

14. Could the US respond to the argument at paragraph 82 of Canada's oral statement, that new evidence from the petitioners' 4 March 2002 submission was in fact used by the USDOC in its subsidy calculations for Quebec.

39. Canada's argument at paragraph 82 of its oral statement relates to footnote 151 of the United States' second written submission. That footnote states, in its entirety:

> Moreover, the March 4, 2002 letter primarily commented on the MFPC Letter and provided an analysis of information that Quebec had placed on the record on January 4, 2002. Although the United States *considered petitioners' March 4 rebuttal comments, it did not rely on the information provided*. The United States instead relied on a publication by the U.S. Department of Agriculture, which was already on the record. *See Issues and Decision Memorandum*, at 62 (Exhibit CDA-1).[36]

As demonstrated below, this statement is accurate with respect to the issue of the use of studwood in Maine for lumber production.

40. In its December 20, 2001 letter, the Maine Forest Products Council ("MFPC") contended that it was inappropriate for the United States to use only sawlog prices to calculate stumpage prices from Maine.[37] The MFPC proposed a weighted average stumpage price, including prices for pulpwood and studwood in the calculation.[38] The MFPC proposed that studwood account for approximately 74 percent of the weighted-average stumpage price.[39] The petitioners responded to this proposal on March 4, 2002, submitting a report by Lloyd C. Irland, which contended that the proportion of studwood in the Maine harvest is substantially lower than that alleged by the MFPC.[40]

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[36] U.S. Second Written Submission, at para. 91, fn. 151 (emphasis added).

[37] *See* Letter from MFPC to Deputy Assistant Secretary Bernard Carreau, 1 (December 20, 2001) ("MFPC Letter") (Exhibit CDA-100).

[38] *Id*. at 2.

[39] *Id*. at 5.

[40] *See* Lloyd C. Irland, *Estimates of Maine Spruce-Fir Log Production by Grade, 2000* (March 2002), Attachment 2 to Letter from Dewey Ballantine to Secretary of Commerce Donald Evans (March 4, 2002) (Exhibit CDA-112).

41. Thus, the main issue addressed by the MPFC Letter and the petitioners' March 4, 2002 submission was the percentage of the timber used in lumber production in Maine that was studwood. As explained in its *Issues and Decision Memorandum*, the United States made independent inquiries of the Maine Forest Service ("MFS") to identify the names of the four softwood studmills operating in Maine and analyzed their production from a U.S. Department of Agriculture report previously placed on the record to arrive at studwood ratio of 25.36 percent.[41]

42. As the United States acknowledged in its responses to the Panel's first set of questions,[42] the petitioners' March 4, 2002 submission also included species-specific studwood stumpage prices that had not been placed on the record previously. The petitioners obtained these prices, however, from a public source, the MFS Stumpage Reports, which is the same source that the United States used in its preliminary determination in this case. Indeed, Quebec had access to this source and submitted aggregate studwood stumpage prices from the MFS in its January 4, 2002 submission.[43] The March 4, 2002 submission represented the only record source for species-specific studwood stumpage prices for Maine, and, in order to make the calculation as accurate as possible, the United States used these prices from the March 4, 2002 submission in its calculations of the market-based benchmarks for Quebec. The United States also used species-specific information from the March 4, 2002 submission pertaining to the total volume of sawlogs harvested in each county of Maine.

15. Could the US please respond to the argument in para. 67 of Canada's second submission, in which Canada seems to imply that the US argues that the SCM Agreement contains no obligation to *correctly* calculate the rate of subsidization. Is this the US argument? Alternatively, is the US arguing that there is such an obligation, but that it simply is not found in SCM Article 19.4? If the latter is the US position, in which specific provision(s) of the SCM Agreement does the US consider that this obligation is found?

43. It is the position of the United States that, although there are obligations in the SCM Agreement concerning the calculation of the subsidy, there are no such obligations in Article 19.4 of the SCM Agreement. Article 19.4 simply provides that the duty may not exceed the subsidy found to exist. This was confirmed by the Appellate Body, which recently stated that Article 19.4 "set[s] out the obligation of Members to limit countervailing duties to the amount . . . of the subsidy found to exist by the investigating authority."[44]

44. Article 19.4 does not establish the methodological obligations that Canada alleges. For example, there is no obligation in Article 19.4 to allocate the subsidy on a volume, as opposed to

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[41] *See Issues and Decision Memorandum*, at 61 (Exhibit CDA-1).

[42] *See* U.S. First Response to Panel Questions, at para. 56, fn. 72.

[43] *Id.* at para. 56, fn. 71.

[44] Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, para. 139, adopted January 8, 2003.

value, basis, and there is no basis in Article 19.4 to read into the SCM Agreement a host of undefined obligations with respect to the calculation of the rate of subsidization. What constitutes a "correct" calculation can only be determined by reference to the explicit obligations in the Agreement.

45. Various provisions of the SCM Agreement are relevant to Members' obligations to calculate the ad valorem subsidy rate. Article 14, for example, establishes obligations concerning the calculation of the amount of the benefit. Annexes II and III provide guidelines on when indirect tax rebate, duty deferral, and duty drawback programs can provide a benefit and thereby constitute an export subsidy. Annex IV provided specific rules for the calculation of the ad valorem subsidy rate with respect to the determination of whether serious prejudice existed as defined by the now lapsed Article 6.1(a) of the SCM Agreement.

46. In addition to these obligations, the calculation of the ad valorem subsidy rate must have evidentiary support and a reasoned basis. Article 22.5 obligates Members to provide public notice of all relevant information of matters of fact and law and the reasons that led to the imposition of final measures.

47. Moreover, many of the alleged "obligations" that Canada contends are established by Article 19.4 are in reality questions of fact. For example, Canada's claims regarding the conversion factor and the exclusion of residual products from the denominator are in fact challenges to the United States' findings of fact. The Panel, however, is not charged with *de novo* review. As demonstrated in the *Final Determination*, the United States considered all of the relevant facts and provided a reasoned explanation for its conclusions.

16. Could the US please respond to the argument in para. 81 of Canada's second submission that the US excluded from the denominator "other softwood products that were also produced in the sawmill establishments from logs entering those sawmills"?

48. The United States has acknowledged that some of the products in the "residual products" category would have been included in the denominator had Canada provided the information necessary to determine the value of those products.[45] Canada, however, failed to do so. Canada merely provided a single number representing all shipments of products in the residual products category and a list of those products.[46] Canada did not provide any break-out of the residual product category that would have allowed the United States to include those products that resulted from the lumber manufacturing process. The residual products category clearly included products not produced by sawmills, such as spruce logs and other wood in the rough.

[45] *See* U.S. Second Written Submission, at para. 63.

[46] *See* U.S. First Response to Panel Questions, at para. 38.

20. Canada argues, at para. 74 of its second submission, that the numerator in a subsidization calculation must reflect the proportional amount of the subsidy that can be attributed to the subject merchandise. In other words, Canada's argument seems to be that there must be a volume-based allocation of subsidy amounts among a firm's different products, before the rate of subsidization of the subject merchandise can be calculated.

(a) Is this a correct characterization of Canada's argument on this point? If not, please clarify.

(b) If this is a correct characterization of Canada's argument, how does Canada reconcile this with the fact that the *de minimis* rule for countervailing duties is expressed on an *ad valorem* basis in the SCM Agreement (e.g., Article 11.9)?

(c) Similarly, how does Canada reconcile this position with the fact that the Annex IV guidelines for calculation of *ad valorem* subsidization of a product, in the context of (now expired) Article 6.1(a) specifically require that this rate of subsidization be calculated using the total value of the firm's sales as the denominator of the subsidization equation, except in the case of a tied subsidy, in which case the denominator is the value of the firm's sales to which that subsidy is tied? (In other words, the general approach was that the total subsidy amount would be divided by the firm's total sales to arrive at the *ad valorem* subsidization of the product.) In what way, analytically, is this different from what the USDOC did in the Lumber investigation?

49. At the Panel's second substantive meeting, Canada preliminarily agreed that the chapeau to these questions was a correct characterization of its argument. Thus, Canada's claim is that to calculate the subsidy to lumber, the United States was required to allocate the total subsidy benefit based on volume rather than value. Article 19.4 of the SCM Agreement, however, does not contain an obligation to allocate a subsidy on the basis of volume rather than value. "The most logical conclusion to be drawn from this silence is that the choice . . . is up to the investigating authority."[47]

50. Whatever additional calculation steps Canada may propose to convert the subsidy amount to an ad valorem rate are irrelevant. Canada's methodology still presumes an obligation in the first instance to allocate the subsidy benefit based on volume, and no such obligation exists in the SCM Agreement.

[47] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/RW, circulated November 29, 2002, para. 6.87 (finding that because nothing in the text of Article 2.2.2(ii) of the Antidumping Agreement specified whether averages should be weighted by volume or value, the choice is up to the investigating authority); *see also id.* at para. 6.82, quoting Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted January 16, 1998, para. 45.