

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

Report of the Panel

The report of the Panel on United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 27 September 2002 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

I. INTRODUCTION

A. COMPLAINT OF CANADA

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

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

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

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

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

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

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

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

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

¹ WT/DS/236/1.

² WT/DS/236/2.

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

Chairman: Mr. Dariusz Rosati

Members: Mr. Robert Arnott
Mr. Gonzalo Biggs

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

C. PANEL PROCEEDINGS

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

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

II. FACTUAL ASPECTS

2.1 This dispute concerns the preliminary countervailing duty determination and the preliminary critical circumstances determination made by the USDOC on 9 August 2001 in respect of certain softwood lumber imports from Canada, classified under headings 4407.1000, 4409.1010, 4409.1020, and 4409.1090.³ This dispute also concerns US law on expedited and administrative reviews in the context of countervailing measures.

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

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

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

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

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

⁴ US Department of Commerce, *Notice of preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, and alignment of final countervailing duty determination with final antidumping duty determination: Certain softwood lumber products from Canada*, Exhibit CDA-1, p. 43,188.

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

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CANADA

3.1 Canada requests the Panel to:

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

B. UNITED STATES

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

[Parties' arguments in Sections IV and V deleted from this version.]

VI. INTERIM REVIEW

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

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

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

6.4 The United States further took issue with the Panel's statement in the first sentence of paragraph 7.74. According to the US, it had not conceded, as the Panel suggested, that in a certain number of cases the lumber producers were independent from the tenure harvesters and may have had to pay an arm's-length price to obtain the allegedly subsidized logs from the harvesters. The US also commented that the last sentence of the preceding paragraph 7.73 referred to arm's-length purchases of timber from private lands or from US suppliers, not purchases of Crown timber. The US therefore requested the Panel to revise the first sentence of paragraph 7.74. Canada commented that in its view the Panel's factual conclusion in paragraph 7.74 was correct and that the US was simply disagreeing with the Panel's appreciation of the evidence on the record. Moreover, Canada argued that the passage quoted by the Panel in the last sentence of paragraph 7.73 also referred to lumber producers purchasing logs at arm's-length in addition to lumber producers purchasing logs from private lands and US suppliers. We considered that the facts set out in paragraph 7.73, which had been confirmed by the US in its answers to questions from the Panel, were not contested. According to these uncontested facts, a certain percentage of Crown timber harvest is done by independent harvesters (i.e. harvesters that are not related to lumber producers). As the evidence on the record showed, this percentage differed from province to province. In the first sentence of paragraph 7.74, we only summarized that the factual information provided to us by the US in the course of the proceedings showed that in a certain number of cases, the lumber producers were independent from the tenure harvesters and may have had to pay an arm's-length price to obtain the logs from the harvesters. We acknowledge that the US has on various occasions during the proceedings argued that the evidence does not support Canada's claim that there is a significant volume of Crown timber that the provincial governments provide to truly independent loggers who then sell the timber at arm's-length to the lumber mills. However, as paragraph 7.74 did not state that the US conceded that there was a significant number of such transactions nor that the US conceded that these transactions were "actual"

arm's-length transactions between "truly" independent harvesters, we saw no reason to amend the text of paragraph 7.74 as suggested by the US.

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

VII. FINDINGS

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

7.2 As a preliminary matter, we note that in the course of these proceedings, we decided to accept for consideration one unsolicited *amicus curiae* brief from a Canadian non-governmental organization, the *Interior Alliance*. This brief was submitted to us prior to the first substantive meeting of the Panel with the parties and the parties and third parties were given an opportunity to comment on this *amicus curiae* brief. After this meeting, we received three additional unsolicited *amicus curiae* briefs. For reasons relating to the timing of these submissions, we decided not to accept any of these later briefs.

A. CLAIMS RELATING TO THE PRELIMINARY COUNTERVAILING DUTY DETERMINATION

1. Introduction

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

- (a) the Canadian "stumpage"²⁶ practices in question are not "subsidies" as defined in Article 1 of the SCM Agreement. Specifically:
 - "stumpage" is not a "financial contribution" within the meaning of Article 1.1(a) of the SCM Agreement,

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

- even if stumpage were a financial contribution, the USDOC's determination and measurement of a "benefit" is based on a "cross-border" methodology that is not permitted by the SCM Agreement, and
- even if a cross-border methodology were permitted, the USDOC's determination assumes holders of harvesting rights pass through an alleged benefit to softwood lumber producers, without any basis for the assumption;
 - (b) the USDOC impermissibly inflated the alleged subsidy rate by calculating a country-wide rate based on only a portion of Canadian production and exports of softwood lumber²⁷, and
 - (c) the USDOC impermissibly inflated the provisional measures imposed by applying them on an entered value basis after having calculated the subsidy rate using first mill value.

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

7.5 The United States asserts that the USDOC correctly determined the existence of a subsidy to Canadian softwood lumber producers in accordance with the SCM Agreement as it found that the Canadian provincial stumpage programmes conferred a benefit on Canadian softwood lumber producers. The US therefore requests the Panel to reject all of Canada's claims relating to the Preliminary Countervailing Duty Determination.

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

- (a) Arguments of the parties
 - (i) *Canada*

7.6 Canada considers that the USDOC erred in determining that "stumpage" is a financial contribution in the form of the provision of a good by the government.²⁸ Canada argues that the practice of stumpage, which it views as a right to exploit an in situ natural resource, or more specifically, the right to harvest standing timber, is not a financial contribution. According to Canada, it is a form of a property right which cannot be equated to the provision of a good or a service by the

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

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

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

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

7.7 In addition, Canada submits, to "provide goods" implies a positive action on the part of the government in respect of the goods themselves, and not any other action that merely allows someone to obtain goods or which has the same economic effect as the government action which consists of providing goods.³² Canada asserts that the United States' broad interpretation of the word "provide" as "to make available" is untenable, for it offers an interpretation of the term "provide" that makes little sense in context and that is not consistent with the way that term is used throughout the WTO Agreement. Throughout the WTO Agreement, the word "provide" is used to indicate the giving of something, rather than more generally enabling someone to obtain or produce something. According to Canada, the more common meaning of "provide" is "supply".³³ Canada argues that, given the use of the word "purchase" as an opposite of "provide" in subparagraph (iii), this sense of provide, implying to give or to sell, is far more contextually logical than the general term "make available". Canada further asserts that the proposed United States interpretation encompasses a range of government actions that go far beyond those contemplated under Article 1.1(a)(1)(iii) SCM Agreement. According to Canada, to "*make available* services", for example, would include in the US interpretation any circumstance in which a government action makes possible the receipt of

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

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

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

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

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

services. Canada submits that the financial contribution test is not concerned with the *consequences* of a government action, however, but with those actions themselves.³⁴

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

(ii) *United States*

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

7.10 The US argues that there is no "natural resources" exception in the SCM Agreement, and that the provision of a good, like timber, thus constitutes a financial contribution in the sense of Article 1.1(a)(1)(iii) SCM Agreement. The only exception provided for in the Article is for general infrastructure. The United States asserts that the context, object and purpose of Article 1 SCM Agreement confirm that if the government provides a good in the form of a natural resource which constitutes the major input for a product, this practice is covered by Article 1 SCM Agreement as it is a practice through which the government has the ability to provide an advantage that would not be available on the market. According to the US, the "negotiating history" to which Canada refers in support of its argument that harvesting rights are excluded from the scope of Article 1 SCM Agreement is an informal discussion paper which does not shed light on the consensus view. The United States therefore requests the Panel to reject Canada's claim concerning the USDOC's Preliminary Determination of the existence of a financial contribution.

(b) *Analysis*

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

Article 1

Definition of a Subsidy

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

³⁴ Canada's Second Written Submission, para. 13.

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

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

- (a)(1) there is a **financial contribution by a government** or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
 - (iii) a government provides goods or services other than general infrastructure, or purchases goods;**
 - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
- or
- (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
- and
- (b) a **benefit** is thereby conferred." (emphasis added)

7.12 Article 1.1 SCM Agreement defines a subsidy as a financial contribution by the government which confers a benefit. An investigating authority, in a countervailing duty (CVD) investigation will thus as a first step need to establish the existence of a financial contribution by the government. Subparagraph (iii) of Article 1.1(a)(1) SCM Agreement states that a financial contribution exists if the government provides "goods or services other than general infrastructure". In its Preliminary Determination, the USDOC stated that :

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

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

³⁷ USDOC Preliminary Determination, p. 43,192.

Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

(i) How do the stumpage programmes operate?

7.14 On the basis of the information and documents on the record of the investigation concerning the operation of stumpage programmes, including the forest legislation and various timber sales agreements submitted by Canada³⁸, and as clarified by the parties before us, we understand that most forest land in the covered provinces³⁹ of Canada is Crown land⁴⁰ and that interested persons who want to harvest on such Crown land have to enter into tenure or licensing agreements with the provincial governments.⁴¹ In general, such tenure and licensing agreements, the terms of which may vary slightly from province to province, allow the licensee or tenure holder (hereafter referred to as the "tenure holder") to harvest the standing timber on a particular parcel of Crown land. In return, the tenure holders commit themselves to a number of obligations, including at a minimum (i) service and maintenance obligations, such as road-building and maintenance, and protection against fire, disease, and insects; (ii) implementation of forestry management and conservation measures, including silviculture and reforestation; and (iii) payment of a volumetric "stumpage charge" that is levied upon the exercise of the harvesting right.

7.15 The Canadian provinces as the owners of the land and the trees standing thereon typically employ these tenure arrangements or licenses to confer rights to harvest standing timber. Canada agrees that if any company wants to log trees standing on Crown land for *inter alia* further processing or sale, it will have to enter into tenure or license stumpage agreements with the provincial government. Canada further acknowledges that the tenure agreements contain various processing requirements as well as certain minimum and maximum cut requirements. For example, tenure agreements in Alberta, Ontario and Québec contain maximum cut limits. According to Canada, Ontario and Québec have no minimum cut requirements. Canada further asserts that some of Alberta's tenures also contain minimum cut requirements, but that they are not enforced. In British Columbia, licensees under certain designated types of tenures are subject to minimum cut requirements, which require the harvester to harvest plus or minus 50 per cent of the annual allowable cut for that licensee in any given year, and plus or minus 10 per cent over a five year period.⁴²

(ii) Do stumpage programmes provide standing timber?

7.16 Canada seems to suggest that a distinction should be made between a government extending a right to take the trees from its land, and that government selling the trees as such. In our view, however, and according to the record, the trees which grow on the publicly owned Crown land are government owned.⁴³ We consider that there are a number of ways in which the government may be

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

³⁹ We recall that the USDOC Preliminary Determination excluded softwood lumber from the Maritime provinces.

⁴⁰ The term Crown land refers to land that is not privately owned.

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

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

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

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

7.17 Canada argues that even if one were to accept that the issuance of harvesting rights by the provincial governments is equal to the provinces making standing timber available to the loggers, this still does not qualify as the "provision" of a good. According to Canada, "to provide" means "to give" or "to sell" and not just "to make available". We note that both parties agree that the ordinary meaning of the verb "to provide" is "to supply".⁴⁷ Canada is right that the provinces do not provide logs to lumber producers when they make it possible for timber harvesters to harvest trees.⁴⁸ In our view, however, the issue is whether the provinces supply standing timber, not logs, to the tenure holders who harvest the trees and turn the timber into logs. In our view the only way to supply *standing* timber to harvesting companies is by allowing them to harvest the timber. We consider that this is precisely what the stumpage agreements do. We therefore find that standing timber is provided to the tenure holders through the provincial stumpage programmes.

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

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

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

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

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

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

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

(iii) Is standing timber a "good"?

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

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

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

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

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

7.21 The term "goods" has been defined in many ways in various dictionaries. Black's Law Dictionary, for example, defines "goods" as "tangible or movable personal property other than money; especially articles of trade or items of merchandise <goods and services>".⁵¹ Black's Law Dictionary adds that "[g]oods means all things, including specially manufactured goods, that are movable at the time of identification to a contract for sale and future goods. The term includes the unborn young of animals, growing crops, and other identified things to be severed from real property ...".⁵²

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

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

7.24 The object and purpose of Article 1.1 SCM Agreement is to provide a definition of a subsidy for the purposes of the SCM Agreement. Article 1.1(a)(1) SCM Agreement provides that the first

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

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

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

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

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

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

7.26 We note that the text of the SCM Agreement does not in any way provide an exception for the right to exploit natural resources.⁵⁵ The only exception from the term "goods or services" provided for in Article 1.1(a)(1)(iii) SCM Agreement is general infrastructure, not natural resources. Moreover, the paper referred to by Canada in support of its argument that harvesting rights are not covered by Article 1.1(a)(1)(iii) SCM Agreement, called Discussion Paper No. 6, is an "informal discussion paper" from the Chairman of the Negotiating Group on Subsidies and Countervailing Measures dated 4 September 1990, which together with six other "informal discussion papers" was circulated in preparation for the issuance of a revised version of the Chairman's draft text of the SCM Agreement.⁵⁶ Canada argues that this Discussion Paper reflects an understanding at the time of the SCM Agreement negotiations of the fundamental difference between tangible commercial inputs and intangible real property rights.⁵⁷ We note however that, as stated in the Chairman's Note accompanying the discussion paper, this paper was circulated solely to "facilitate" discussions and that it did not reflect the Chairman's view of "what may be included in the subsequent revision", nor

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

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

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

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

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

did it "have any status relating [it] to the Chairman's paper."⁵⁸ The Note further states that some of the views expressed in the discussion papers "are purposefully provocative in order to make evident technical complexities and/or workability (or its lack) of certain approaches."⁵⁹ In our view, this Discussion Paper thus has little if any probative value, especially in light of the fact that the reference to "harvesting rights" as separate from "goods" was not included in the final text of the Agreement.⁶⁰

7.27 Canada further argues that the reference in Article 1.1(a)(1)(iii) SCM Agreement to the provision of "goods" is to be interpreted as referring to tradable products for which there is a tariff line. Canada's argument in favour of such a very narrow interpretation of the word *goods* is basically that, in Canada's view, it is used throughout the GATT and WTO Agreements as an equivalent of *products* on which tariff concessions may be given under Article II GATT 1994.⁶¹ Canada thus submits that standing timber which is not capable of being traded across borders is not a "good".

7.28 In our view however, although in many cases the general word "good" may indeed be used as an equivalent of the term "products", this does not imply that this necessarily is always so, precisely because "goods" is a term with a broad and general meaning. Canada refers to certain provisions which contain the term "imported goods", and concludes on that basis that wherever the term "goods" is used in the Agreement, it refers to products which are capable of being imported and traded across borders. We find no basis for such a conclusion in the text of the SCM Agreement. Although "goods" in Article 1.1(a)(1)(iii) SCM Agreement certainly includes tradable products, there is no reason to limit its meaning to only such products, particularly where the immediate context in which the term is used does not suggest such a limitation. In particular, this provision states that when the government provides "goods or services", this constitutes a financial contribution. The "goods" in question are not imported or exported, simply provided by the government, and nothing suggests therefore that the goods in question need to be tradeable products with a potential or actual tariff line. Goods in this context are distinguished from services, and in our view the two cover the full spectrum of in-kind transfers the government may undertake by providing resources to an enterprise. Our view is reinforced by the fact that there is only one exception among all possible goods and services that could be provided by the government - general infrastructure - which is explicitly defined as not constituting a financial contribution. We thus find that there is no basis in the text of the SCM Agreement to conclude that "goods" in Article 1.1 is limited to products with an actual or potential tariff line.

7.29 In sum, we find that through the Canadian provincial government stumpage programmes, Crown timber is being supplied to the tenure holders. Standing timber is the valuable input for logs which may be processed by sawmills into softwood lumber.⁶² In light of our finding that there is no basis in the text of the SCM Agreement to limit the term "goods" to tradeable products with a

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

⁵⁹ *Id*

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

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

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

potential or actual tariff line, we consider that standing timber, trees, are goods in the sense of Article 1.1(a)(1)(iii) SCM Agreement.⁶³

(c) Conclusion

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

3. Claim 2: inconsistent determination of benefit

(a) arguments of the parties

(i) *Canada*

7.31 Canada argues that, even if one were to accept that the provision of stumpage constitutes a financial contribution in the form of the provision of a good under Article 1.1(a)(1)(iii) SCM Agreement, the USDOC erred in finding that the Canadian provincial stumpage programmes *conferred a benefit*. The USDOC compared the Canadian stumpage prices to those charged in the United States, which, in the USDOC's view, correspond with "commercially available world market prices". Canada is of the view that the USDOC's use of a benchmark for determining benefit based on conditions outside the country of the alleged provision of goods, was inconsistent with Article 14(d) SCM Agreement. Canada asserts that whether a "benefit" is conferred by the alleged provision of goods by the government (stumpage) depends on whether the Canadian producers were better off than other purchasers who buy the same good from other sellers *in the country subject to the investigation*.⁶⁴ Canada argues that a cross-border analysis using transactions in another country to determine the existence of a benefit, and to measure it, is inconsistent with Article 1 and Article 14 (d) SCM Agreement.⁶⁵

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

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

⁶⁴ Canada's First Written Submission, para. 43.

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

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

⁶⁷ Canada's Second Written Submission, para. 35. Canada notes that the USDOC did not have any evidence of alleged price suppression, but simply relied on an erroneous translation of a letter of the Quebec Minister of Natural Resources which formed part of the petition, which in fact merely stated that public land

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

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

(ii) *United States*

7.35 The United States observes that, in accordance with Article 14 (d) SCM Agreement, the adequacy of the remuneration and the existence of a benefit must be determined "*in relation to* the prevailing market conditions in the country under investigation" and not necessarily "*in the country under investigation*".⁶⁹ The US argues that this "market" benchmark may refer to the entire market available to the subsidized producers.⁷⁰ According to the US, the concept of "prevailing market conditions in the country of provision" is sufficiently broad to permit consideration of prices for competitive goods commercially available on the world markets to purchasers in the country of provision.⁷¹ The US argues that commercially available goods, both imported and domestic, compete in the domestic market and together constitute the supply available to purchasers in the country of provision, that is, goods that the purchaser could obtain in the market absent the government's financial contribution.⁷²

7.36 According to the US, in this particular case, the provincial governments completely dominate the market in those provincial markets and are virtually the sole providers of timber. In the US' view, the evidence indicates that Canadian provincial governments so dominate the Canadian market for timber⁷³ that below-market government prices suppress prices in the small private market for timber in Canada. Therefore, the US submits, in the absence of market prices in Canada, the use of other prices commercially available to Canadian lumber producers on world markets is the only reasonable

stumpage charges could have an indirect influence on the private market. Canada argues that a doctoral thesis further relied on in this respect by the United States before the Panel is outdated and the information on which it is based has earlier been rejected by the USDOC in the earlier investigation of imports of lumber from Canada (*Lumber II*) as evidence of alleged price suppression.

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

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

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

⁷¹ US Oral Statement at the Second Meeting of the Panel with the Parties ("*US Second Oral Statement*"), para. 7.

⁷² US Second Oral Statement, para. 8.

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

alternative. In light of the object and purpose of Article 14 SCM Agreement it would not make sense to use prices determined or influenced by the government to measure the adequacy of the remuneration for the goods. According to the US, the comparison in Article 14 (d) SCM Agreement is intended to identify the potentially trade-distorting artificial advantage resulting from the government's provision of a good, and the market conditions referred to in Article 14 (d) SCM Agreement thus relate to what the market price would have been absent the financial contribution. The US asserts that the USDOC used stumpage prices in various US states with comparable forests and adjusted such prices to reflect prevailing market conditions in Canada.⁷⁴ According to the US, the USDOC's use of US prices is supported by ample record evidence indicating that many Canadian companies do, in fact, import US logs and bid on US stumpage.⁷⁵ The US submits that US timber is therefore "commercially available" to Canadian lumber mills, and in light of the specific facts of this case, the USDOC's use of US prices for stumpage that is commercially available to lumber producers in Canada was appropriate and consistent with Article 14(d) SCM Agreement.

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

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

(b) Analysis

7.39 Article 1.1 SCM Agreement provides that a subsidy in the sense of the SCM Agreement shall be deemed to exist when a financial contribution confers a benefit. In light of our findings above concerning the USDOC Preliminary Determination that the provision of stumpage by the Canadian provincial governments constitutes a financial contribution by the government under Article 1.1(a)(1)(iii) SCM Agreement, we will therefore need to examine whether the USDOC determination that this financial contribution conferred a benefit was made in a manner consistent with the US obligations under the Agreement. The issue before us is whether the USDOC determined the existence and amount of benefit to the Canadian softwood lumber producers in a manner consistent with Articles 1.1 and 14 of the SCM Agreement. We recall that Canada raises two claims relating to the USDOC's benefit determination. First, Canada challenges the use of US stumpage prices as the benchmark to assess the adequacy of the remuneration and thus the existence and amount of the benefit. We will discuss this claim in this section. Second, Canada claims that the USDOC failed to properly examine and properly determine that the benefit was conferred on the producers of the subject merchandise, softwood lumber. This claim will be discussed in the following section.

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

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

⁷⁵ US Second Written Submission, para. 27; US Second Oral Statement, para. 18.

⁷⁶ USDOC Preliminary Determination, p. 43193.

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

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

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

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

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

Article 14

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

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

⁷⁷ USDOC Preliminary Determination, p. 43195.

⁷⁸ US Answers to Questions from the Panel after the Second Meeting, para. 85

⁷⁹ US Answers to Questions from the Panel after the Second Meeting, para. 92.

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

7.44 Article 14 (d) SCM Agreement thus provides that the provision of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than *adequate remuneration*. The adequacy of the remuneration charged by the government shall be determined "**in relation to the prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)**". We find that the text of Article 14 (d) SCM Agreement is very clear: the adequacy of remuneration is to be determined in relation to *prevailing market conditions* for the good or service in question *in the country of provision or purchase*. It further specifies market conditions that have to be taken into account: price, quality, availability, marketability, transportation and other conditions of purchase or sale. The text of the Agreement thus clearly requires that the prevailing market conditions to be used as a benchmark are those in the country of provision of the goods, in this case Canada. The words "in relation to" in our view, mean "on the basis of" or "in comparison with" and indicate in this context that the adequacy of the remuneration charged by the government is to be compared with the prevailing market conditions in the country of provision. We therefore disagree with the US that "the prevailing market conditions in the country of provision are a reference point, not necessarily an end-point for the market benchmark".⁸⁰ The prevailing market conditions in the country of provision *are* the benchmark and operate as the reference point or the point of comparison for the adequacy of the remuneration. We therefore find, on the basis of a plain reading of Article 14 (d) SCM Agreement, that the ordinary meaning of this provision excludes an analysis based on market conditions other than those in the country of provision of the goods, i.e. Canada.

7.45 We note that, in its arguments before us, the US "agree[d] with Canada that, as the text of Article 14 (d) states, the relevant 'prevailing market conditions' are those in the country of provision,

⁸⁰ US First Written Submission, para. 43.

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

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

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

7.47 We consider that a proper interpretation is one which gives meaning to all the terms in the treaty and does not reduce certain parts of the treaty to redundancy or inutility.⁸³ We consider that the US is reading Article 14 (d) SCM Agreement to mean that the benchmark to be used should be "market conditions" in general. In our view, to adopt the US approach that the market refers to the entire market available to the allegedly subsidized producers, would effectively read out of the SCM Agreement the explicit reference to the country of provision, as the country the prevailing market conditions of which have to be used as a benchmark.

7.48 In support of its argument that the "market", as generally referred to in the SCM Agreement, is not restricted to the exporting country, but rather "encompasses the entire market available to the subsidized producer or exporter", the US refers to item (d) of the Illustrative List of Export Subsidies of Annex I of the SCM Agreement. We note that item (d) of the Illustrative List establishes

⁸¹ US Answers to Questions from the Panel after the Second Meeting, para. 82

⁸² US Second Written Submission.

⁸³ As the Appellate Body stated in the *United States – Standards for Reformulated and Conventional Gasoline* case: "... One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* case, WT/DS2/AB/R adopted on 20 May 1996, p.23.

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

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

7.49 The US justifies its reliance on US prices as the benchmark by arguing that, although the use of Canadian private stumpage prices would have been the preferred option to calculate the amount of benefit, in this particular case it was not possible to use such prices as the benchmark because they were distorted and suppressed by the very large number of government sales. According to the US, the trade-distorting potential of the government's provision of a good can be identified only by reference to an independent market price, i.e., a price that is unaffected by the very trade distortion the test is designed to identify.⁸⁶

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

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

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

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

⁸⁷ Concise Oxford Dictionary, Ninth Edition, p. 1084..

"prevailing", we are of the view that the text of Article 14 (d) SCM Agreement does not in any way require the "market" conditions to be those of a hypothetical undistorted or perfectly competitive market.

7.51 Moreover, the chapeau of Article 14 SCM Agreement clearly states that Article 14 SCM Agreement establishes guidelines for the calculation of "benefit" *to the recipient*.⁸⁸ We are of the view that in order to calculate the benefit to the recipient, an authority is to compare the price the recipient paid the government with the prices prevailing in other market transactions. We do not consider that the goal of the examination of the benefit enjoyed by the recipient is to determine what the market price would have been absent the government's financial contribution, as the US is suggesting⁸⁹, or to measure the trade distorting potential of the government's financial contribution.⁹⁰ The text of Article 14 SCM Agreement does not require a general "*but for*" test to the prevailing market conditions. We are thus of the view that Article 14 (d) SCM Agreement does not require that the authority construct a market price that could have existed but for the government's involvement, nor does it allow the authority to decline to use in-country prices because they may be affected by the government's financial contribution.

7.52 We consider that if the drafters of the SCM Agreement had wanted to exclude the use of market prices in case of price suppression due to the government's involvement, they would have explicitly provided so, but they have not. The opposite is the case. As we found above, when it comes to the market conditions, the only qualifier in the text of the Agreement is "prevailing". Thus, the market conditions are those that are actually existing in the country and are those faced by the recipient of the financial contribution. The reference prices are those that the producer would have had to pay if it had to buy the goods now provided by the government from a different and independent seller.

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

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

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

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

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

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

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

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

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

7.56 Finally, the US argues that as a practical matter, the USDOC could not have calculated the benefit on the basis of the private sales prices even if it had wanted to, since the Canadian provinces failed to provide the necessary information. We note first of all that, while the US has argued before us that private sales data were not provided, it is clear from the Preliminary Determination that this was not an element in the USDOC's decision to use a cross-border price analysis. In fact the USDOC clearly acknowledged that the Canadian provinces reported private stumpage prices but that "an examination of the information on the record demonstrates that the private stumpage prices reported by the Provinces do not constitute market determined prices ...".⁹³ The alleged lack of information is thus not mentioned by the USDOC as a consideration which led to its decision to use a cross-border price analysis. In any case, even the US acknowledges that at least two provinces (Quebec and Ontario) did provide private market standing timber prices.⁹⁴ Nevertheless, even for those two provinces no private stumpage sales data were used as a benchmark, because of the alleged price suppression.⁹⁵

7.57 Accordingly, based on our interpretation of the text of Article 14(d) SCM Agreement, which does not require the prevailing market conditions to be those of an "undistorted" market, we consider

⁹¹ USDOC Preliminary Determination, p. 43195.

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

⁹³ USDOC Preliminary Determination, p. 43194.

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

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

that the USDOC provided no rationale in the context of Article 14 (d) SCM Agreement for rejecting Canadian private stumpage prices as the basis for calculating the benefit.⁹⁶

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

(c) Conclusion

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

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

(a) Arguments of the parties

(i) *Canada*

7.60 Canada asserts that the USDOC impermissibly assumed that the alleged financial contribution to timber harvesters through the stumpage rights conferred a benefit on the downstream producers of softwood lumber. Canada notes that standing timber is harvested and processed into logs which are then processed in sawmills and pulp mills to produce a wide variety of products including softwood lumber, and that the lumber may then be sold at arm's-length as an end-product or sold to re-manufacturing industries that make a vast array of products. Canada argues that it is not the case, as the US is suggesting, that all tenure or licence agreements require tenure/licence holders to own a sawmill. Nor are there in general any requirements either by law or by the terms of tenure that require tenure holders to sell to specific mills or to sell at specific prices or under specific terms and conditions. Canada argues that only in certain cases are tenure holders required to construct or

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

maintain a facility with the ability to mill harvested timber.⁹⁷ Stumpage tenure holders are therefore in general free to sell their logs to unrelated sawmills.⁹⁸

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

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

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

(ii) *United States*

7.64 The United States proffers two main arguments against the need for a pass-through analysis for determining benefit to the lumber producers. First, the US argues that no truly arm's-length

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

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

⁹⁹ Canada's Second Written Submission, para. 83.

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

¹⁰¹ Canada argues that a subsidy is either direct in the case it confers a benefit on the recipient thereof (Article 1.1(a)(iii)), or is indirect in case a private entity is entrusted or directed by government to provide goods in a manner that confers a benefit (Article 1.1 (a) (iv)). In Canada's view, since in this case the alleged financial contribution (standing timber) was provided to the log producers and not to the downstream lumber producers, Article 1.1(a)(iv) SCM concerning indirect subsidies applies. In such a case, Canada argues, an investigating authority must also always establish both elements of a subsidy as regards a downstream producer that has allegedly been subsidized: a financial contribution to that downstream producer, and a benefit. According to Canada, in addition to failing to determine any benefit, the USDOC failed to establish that the lumber producers received a financial contribution, as it did not demonstrate that the Canadian provinces directed the log producers to provide a financial contribution (logs) to the lumber producers. Canada's Answers to Questions from the Panel after the First Meeting, para. 81.

transactions between independent harvesters and independent lumber mills existed. Second, the US asserts that a pass-through analysis was not required in this case as the investigation was conducted on an aggregate basis.

7.65 Concerning the first point, the US argues that no pass-through analysis was required because the subsidies were bestowed directly on the producers of the subject merchandise, since the entity receiving the financial contribution (standing timber) and the entity receiving the benefit (a below-market stumpage price) are "generally one and the same".¹⁰² The United States asserts that a very significant number of timber harvesters also own sawmills and are therefore at the same time producers of softwood lumber. In other words, according to the US, most lumber producers are also harvesters of standing timber, which they obtain through the conclusion of tenure agreements with the Canadian provincial governments. The United States asserts that in fact each Canadian province generally requires that tenure holders be sawmills or own a sawmill.¹⁰³ The small portion of Crown timber harvested by tenure holders that do not own sawmills is subject to restrictions that tie the timber to specific sawmills in Canada.¹⁰⁴ In such circumstances, the US argues, the loggers and the lumber producers (sawmills) are thus not operating at arm's-length with each other¹⁰⁵, and there is no need to examine the pass-through issue. Thus, according to the US, the evidence indicates that there are virtually no truly arm's-length transactions between harvesters and lumber mills, and the independent logger is therefore "largely a myth".¹⁰⁶

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

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

¹⁰² US Answers to Questions from the Panel after the First Meeting, para. 43.

¹⁰³ US Answers to Questions from the Panel after the First Meeting, para. 1.

¹⁰⁴ US Answers to Questions from the Panel after the First Meeting, para. 9.

¹⁰⁵ US Answers to Questions from the Panel after the First Meeting, para. 87.

¹⁰⁶ US Answers to Questions from the Panel after the First Meeting, para. 44.

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

¹⁰⁸ US Answers to Questions from the Panel after the First Meeting, para. 50.

¹⁰⁹ The US argues that if the government made the financial contribution to an entity that does not produce the subject merchandise, it would be necessary to analyse whether that financial contribution benefited

(b) Analysis

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

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

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

7.71 We are of the view that an authority may not assume that a subsidy provided to producers of the "upstream" input product automatically benefits unrelated producers of downstream products, especially if there is evidence on the record of arm's-length transactions between the two.¹¹¹ Rather, we consider that in such circumstances the investigating authority should examine whether and to what extent the subsidies bestowed on the upstream producers benefitted the downstream producers. In this respect, we recall that in the *US – Lead and Bismuth II* case (WT/DS138/AB/R) the Appellate Body concluded in a different context involving subsidies provided to entities subsequently privatized, that an entity other than the original recipient of the subsidy should not be deemed to have received a benefit in the case where an arm's-length price was paid to acquire the entity that had received the subsidies:

another entity that does produce the subject merchandise. In this case, according to the US, the only allegation of a financial contribution to an entity that does not produce the subject merchandise is Canada's claim that there is a significant volume of Crown timber that the provincial governments provide to independent loggers who then sell the timber at arm's-length to lumber mills. However, the US submits, the evidence does not support Canada's claim. The US refers to its discussion in paras. 1–11 of its answers to questions from the Panel. US Answers to Questions from the Panel after the First Meeting, paras. 46–47.

¹¹⁰ US Answers to Questions from the Panel after the First Meeting, para. 46.

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

“68. The question whether a "financial contribution" confers a "benefit" depends, therefore, on whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. In the present case, the Panel made factual findings that UES and BSplc/BSES paid fair market value for all the productive assets, goodwill, etc., they acquired from BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995 and 1996. We, therefore, see no error in the Panel's conclusion that, in the specific circumstances of this case, the "financial contributions" bestowed on BSC between 1977 and 1986 could not be deemed to confer a "benefit" on UES and BSplc/BSES. (emphasis added)¹¹²

7.72 Canada and the US agree that the evidence on the record demonstrates that a large number of tenure holders own a sawmill and are thus at the same time softwood lumber producers. It is clear that in such circumstances of complete identity between the tenure holder/logger and the lumber producer, no pass-through analysis is required. Canada argues however that in a significant number of cases, lumber producers purchase logs at arm's-length from unrelated tenure holders. In addition, Canada argues that logs are traded at arm's-length between lumber producers and that lumber is sold at arm's-length by sawmills to remanufacturers who also produce the subject merchandise. According to Canada, in all these situations, USDOC failed to examine whether the subsidy passed through to the producers of the subject merchandise, softwood lumber. The US submits that the evidence does not support Canada's argument concerning independent loggers. As far as the two other categories is concerned, the US submits that the question of pass-through is moot in an aggregate investigation since all of the entities concerned are also producers of the subject merchandise.

7.73 We first examine the evidence on the record with regard to the relationship between the lumber producers and the tenure holders/loggers. The USDOC Preliminary Determination and additional clarifying statements of the US in the current proceedings reveal that not all logging companies are at the same time softwood lumber producers. For Ontario, the USDOC states in its Preliminary Determination that lumber producers may obtain the forest products they need in five ways. One such way is to pay the government stumpage fees and harvest the timber themselves, but another way is to purchase logs at arm's-length from a company that harvested them from Crown lands.¹¹³ As the US clarified before the Panel, the record shows that for British Columbia, between 9 and 17 per cent of Crown timber harvest is done by independent harvesters.¹¹⁴ For Alberta, the US states that 95 per cent of softwood timber was provided to tenure holders who own sawmills. This suggests that some 5 per cent of the timber provided would have been sold to sawmills by unrelated loggers. For Saskatchewan and Manitoba, the US gives a similar figure of 95 per cent of softwood timber which was provided to entities that also hold provincial licences to operate sawmills.¹¹⁵ The USDOC also acknowledged that it received a number of company specific requests for exclusion,

¹¹² Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, ("US - Lead and Bismuth II"), WT/DS138/AB/R, adopted on 7 June 2000, para. 68. We further note that the Panel in the *US – Lead and Bismuth II* case (WT/DS138/R) observed in a footnote that:

fn 69. " ... a "financial contribution" does not have to be bestowed directly on a company in order to confer a "benefit" on that company. For example, one company may be found to "benefit" from a "financial contribution" conferred on another company. Furthermore, in certain circumstances an untied, non-recurring "financial contribution" bestowed directly on, and benefiting, a prior company may be deemed to have been bestowed indirectly on the successor company".

Panel Report, *US - Lead and Bismuth II*, WT/DS138/R, adopted as upheld by the Appellate Body Report WT/DS138/AB/R on 7 June 2000, footnote 69.

¹¹³ USDOC Preliminary Determination, p. 43203

¹¹⁴ US Answers to Questions from the Panel after the Second Meeting, para. 18.

¹¹⁵ US Answers to Questions from the Panel after the Second Meeting, paras. 21-23.

thirteen of which from companies "purchasing logs at arm's-length, from private lands, or from US suppliers".¹¹⁶

7.74 We find that the US has thus conceded before us that in a certain number of cases, the lumber producers were independent from the tenure harvesters and may well have had to pay an arm's-length price to obtain the allegedly subsidized logs from the harvesters. Nothing in the record indicates, and the US does not argue, that in such cases where the harvesters and lumber producers are unrelated, the USDOC examined whether the prices charged between the harvester and its customer, the unrelated lumber producer, were at arm's-length, and hence whether any benefit passed through. We find that in such circumstances, where a downstream producer of subject merchandise is unrelated to the allegedly subsidized upstream producer of the input, an authority is not allowed to simply assume that a benefit has passed through. We further consider that conducting the investigation on an aggregate basis versus a company-by-company basis is irrelevant to this issue. The fact that in the large majority of cases the lumber producers and the harvesters are related, does not imply that it is no longer necessary in cases where there is no such relationship to examine and determine whether a benefit existed for the independent producers of the subject merchandise including independent remanufacturers. By failing to examine whether the independent lumber producer paid arm's-length prices for the logs that they purchased, the USDOC determined the benefit to the producers of the subject merchandise inconsistently with the SCM Agreement.

7.75 The US argues, with regard to the situations of sawmills buying logs from other sawmills at arm's-length and of remanufacturers purchasing lumber from unrelated sawmills, that no pass-through analysis was required as all of the entities involved are producers of the subject merchandise. In sum, the US position, both in the investigation and before us, is that in an aggregate case, no pass-through analysis is necessary where all of the entities involved are producers of the subject merchandise. We find no basis in the SCM Agreement for this argument, however. In our view, the purpose of the original investigation is precisely to determine whether and to what extent a subsidy has been granted to the producer of the subject merchandise. An authority cannot simply assume the existence of such a benefit in the original investigation. As the Appellate Body in the *Lead and Bismuth* Case stated:

"In an original investigation, the investigating authority must establish that *all* conditions set out in the *SCM Agreement* for the imposition of countervailing duties are fulfilled."¹¹⁷

7.76 Here we recall that any calculation of the rate of subsidization in a countervailing duty investigation involves three distinct steps. First is the calculation of the total amount of the subsidy provided during the period of investigation (the establishment of the numerator of the equation). Second is the calculation of the total amount of relevant sales to which the subsidy amount can be attributed (the establishment of the "sales denominator"). Third is the calculation of the rate of subsidization, by dividing the subsidy amount numerator by the denominator of relevant sales. The result is an *ad valorem* rate of subsidization of the subject merchandise.¹¹⁸

7.77 In this dispute, the US seems to be approaching the issue of pass-through of benefits as if it can be resolved solely by correctly identifying the value of relevant sales of the subject merchandise (softwood lumber) to be used as the denominator. This appears to be the reasoning behind the US position that a pass-through analysis for the purchases of inputs by unrelated producers of softwood

¹¹⁶ USDOC Preliminary Determination, p. 43188

¹¹⁷ Appellate Body Report, *US - Lead and Bismuth II*, WT/DS138/AB/R, adopted on 7 June 2000, para. 63.

¹¹⁸ This is of course without prejudice to other bases for calculating the rate for the levying of countervailing duties such as on a per unit basis, by using as the denominator the number of units of relevant sales.

lumber would be unnecessary where the calculation is performed on an aggregate basis. We disagree. In our view, the issue of pass-through has to do in the first instance with correctly establishing the amount of the subsidy benefiting the producers of the subject merchandise, i.e. the numerator. That is, alleged benefits from the stumpage programmes can only be included in the total subsidy amount to the extent that they benefit the producers of the subject merchandise, softwood lumber. Where a given producer of the subject merchandise itself harvests logs, and thus itself is the recipient of the alleged benefit, the entire amount of the alleged benefit to that recipient can be included in the subsidy amount (numerator) without further analysis. Where, however, a producer of softwood lumber does not itself harvest logs, but instead buys logs or lumber from unrelated suppliers, any alleged benefit from the stumpage programmes that may have benefitted the producer of the logs or lumber involved could only be included in the total subsidy amount to the extent that it has been established as a factual matter that the purchaser has received some or all of the benefit.

7.78 We find particularly important in this respect that, as Canada pointed out¹¹⁹, prior to the Preliminary Determination, the USDOC had applications for exclusion from 98 producers who purchased logs or lumber from unrelated suppliers.¹²⁰ Of these, 78 were remanufacturers unrelated to firms with harvesting rights and at least 8 were first mills that purchased all of their log inputs from unrelated suppliers. In light of the fact that, at the Preliminary Determination, the USDOC had knowledge of a sizeable number of lumber producers purchasing log and lumber inputs from unrelated suppliers allegedly at arm's-length, the USDOC should have examined, in calculating the total amount of the alleged subsidy, whether and to what extent any benefit passed through to those lumber producers.

(c) Conclusion

7.79 In sum, we find that in this case, there was evidence on the record of a certain amount of sales by producers of logs that did not own a lumber-processing facility, and were not related to the downstream lumber producers to which they sold their logs. In addition, there is evidence on the record that USDOC was aware of the fact that a number of lumber producers buy logs or lumber inputs from unrelated sawmills. We therefore find that, given such record evidence, the absence of any examination of these transactions by the USDOC was not consistent with the SCM Agreement. The USDOC should have examined, in the original investigation, whether, in cases where the tenure holders were not at the same time processing the logs in their own sawmills, the lumber producers benefited from the financial contribution given to the tenure holders. We therefore conclude that the USDOC imposed a provisional countervailing duty without determining the existence and amount of the benefit conferred on the allegedly subsidized product, and, therefore, in a manner inconsistent with the SCM Agreement.¹²¹

5. Claim 4: impermissible application of a provisional duty in excess of the subsidy rate

(a) Arguments of the parties

(i) Canada

7.80 Canada argues that the US calculated the subsidy rate of 19.31 per cent *ad valorem* on a first mill basis, but applied it on an entered value basis with the effect of significantly increasing the provisional measures applied to a considerable portion of Canadian exports of softwood lumber to the United States. Canada argues that in all of the subsidy calculations, the denominator was the value of

¹¹⁹ Canada's Answers to Questions from the Panel at the First Meeting, para. 60.

¹²⁰ See Letter to the Honourable Donald L. Evans from Weil, Gotshal & Manges, Certain Softwood Lumber From Canada: Company Exclusions, p. 3-4 and appendices A-F (August 8, 2001) (Exhibit CDA-44).

¹²¹ In light of this finding, we see no need to address the issue raised by Canada in footnote 101.

sawmill (first mill)¹²² exports. Nevertheless, in a decision memorandum¹²³ accompanying the USDOC's instructions to Customs, the USDOC claims that the record for the Preliminary Determination supports the collection of countervailing duty deposits on an entered value basis. Canada submits that this practice implies that the importer of the value-added product faces an actual duty of above 19 per cent of the first mill value. This application of a duty in excess of the rate is inconsistent with the SCM Agreement.

7.81 Canada asserts that the statement by Statistics Canada on which the USDOC based its decision in this regard, which stated that the data provided related to both first-mill and "re-manufacturers" reflects a typographical error. Canada argues that, in actuality, the statement which caused the alleged confusion intended to say that "it was not possible to exclude 're-manufacturers' from its results." Canada argues that the actual calculation methodology in the survey makes clear that the data provided were in fact from a survey of "sawmills" (also noted as "first mills"), and that the discussion of the methodology further intended to explain that the data also included a small portion of remanufactured products that were produced by the sawmills. According to Canada, this is because Statistics Canada stated that it was unable to isolate the small portion of further millwork or value added that was performed within the sawmills, and therefore, such values were included in the reported data. Canada argues that it explained this clearly in its 21 August and 27 August submissions to the USDOC, prior to the time at which the USDOC issued its Customs instructions implementing the decision on a final mill basis.¹²⁴ However, Canada submits, even though Canada had fully explained that the data used in the preliminary calculations did not contain any final mill sales, the United States applied provisional measures on a final mill basis.

(ii) *United States*

¹²² Sawmills produce lumber from logs and ship the lumber to either end-users or downstream value-added re-manufacturers (final mills) that use lumber inputs and produce further processed lumber products..

¹²³ Memorandum from M.G. Skinner, Director, Office of AD/CVD Enforcement VI to B.T. Carreau, Deputy Assistant Secretary, AD/CVD Enforcement, re "Basis of the Countervailing Duty Deposit Rate," dated 31 August 2001, p. 3. (Exhibit CDA-31)

¹²⁴ See, e.g., Letter from Weil, Gotshal & Manges, counsel for the Government of Canada, to the Department of Commerce regarding Certain Softwood Lumber Products from Canada: StatsCan Data Based on "First Mill" Values, dated 21 August 2001 (Exhibit CDA-96), where Canada explained:

Confusion on this issue arose as a result of a statement in the GOC Questionnaire Response that, "[b]ecause the MSM does not collect commodity data, it was not possible to exclude 're-manufacturers' from its results." See Questionnaire Response on Behalf of the GOC, Volume I, Exhibit GOC-GEN-2 ("Calculation Methodology Summary") (28 June 2001) [Exhibit US-13]. As was explained in the meeting with the Department, however, this statement does not mean that the data on the record relate to any manufacturers other than "sawmills." Rather, when read in context (*i.e.*, in relation to the Monthly Survey of Manufacturing for the Sawmills industry), the explanation simply indicates that, if a primary sawmill performed additional manufacturing within its own mill, such additional millwork would be included in the data, because commodity details on the production of sawmills are not broken out in the survey. Any such further processed products of the sawmills would, moreover, be "first mill" products. As is demonstrated in the Attachment to this letter, the reported StatsCan data, which was limited to NAICS subsection 321111, do not contain any sales or production information for "remanufacturers."

See also Letter to the Honourable Donald L. Evans from Weil Gotshal and Manges (27 August 2001) (Exhibit CDA-46) ("As explained in [Canada's August 15, 2001 (Exhibit CDA-45) and 21 August 2001 (Exhibit CDA-96)] submissions, with the exception of insignificant amounts for first-mill further manufactured products, these data do not include shipments made by 'remanufacturers.'")

7.82 The United States submits that the USDOC calculated the duty based on the total value of all sales (first mill and remanufactured) which was the information requested from and provided by Canada in the Questionnaire.¹²⁵ The US argues that the Canadian argument is flawed since the USDOC at the time of making its determination did not know and could not know that the information provided by Canada only referred to first mills, since Canada only informed the USDOC of this for the first time after the Preliminary Determination. As this is evidence and information not before the USDOC at the time of the determination, the Panel cannot take it into account when reviewing the USDOC's Preliminary Determination.¹²⁶

(b) Analysis

7.83 In light of our finding above concerning the USDOC's incorrect determination of the amount of benefit which formed the basis for the calculation of the countervailing duty rate, we consider that it is not necessary for us to address this claim in order to resolve the dispute before us and we therefore decide to apply judicial economy in respect of this claim.

6. Conclusion on Canada's claims relating to the Preliminary Countervailing Duty Determination.

7.84 In light of our conclusions above that the USDOC Preliminary Countervailing Duty Determination

- was not inconsistent with Article 1.1(a) SCM Agreement when it found that the provision of stumpage constituted a financial contribution, in the form of the provision of a good or service;
- failed to determine the existence and amount of benefit to the producers of the subject merchandise on the basis of the prevailing market conditions in Canada as required by Article 1.1 (b) and Article 14 and 14(d) SCM Agreement; and
- failed to establish that a benefit in the sense of Article 1.1 (b) SCM Agreement was conferred to certain producers of the subject merchandise, since the USDOC did not examine whether a benefit was passed through by the unrelated upstream producers of log inputs to the downstream producers of the subject merchandise;

we conclude that the USDOC's imposition of provisional countervailing measures was inconsistent with the US' obligations under Articles 1.1 (b), 14, 14 (d) SCM Agreement as well as Articles 10 and 17.1 (b) of the SCM Agreement, as these provisional measures were imposed on the basis of an inconsistent preliminary determination of the existence of a subsidy.¹²⁷ We do not consider it

¹²⁵ The US argues that the USDOC asked for information on total value of sales and specifically requested to include information on remanufactured products, and that Canada replied that the information provided included both. US First Written Submission, footnotes 84 -85; Exhibit US-12 and US -13.

¹²⁶ The US refers to the Panel report in *US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, which stated that: "When assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination. In respect of the US determination at issue in the present case, we consider, therefore, that this Panel is requested to make an objective assessment as to whether the United States respected the requirements of Article 6.2 and 6.3 of the ATC at the time of the determination". Panel Report, *US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted as modified by Appellate Body Report WT/DS33/AB/R on 23 May 1997, para. 7.21.

¹²⁷ Article 10 SCM Agreement provides that "Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of

necessary to address Canada's additional claims regarding the consistency of USDOC's actions with Articles 17.2, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994. In light of our conclusions above, we do not find it necessary either to rule on Canada's claim that the USDOC instructions transmitted to the United States Customs Service on 4 September 2001, imposed provisional measures in excess of the subsidy preliminarily found to exist in a manner inconsistent with Articles 10, 17.2, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994.

B. CLAIMS RELATING TO THE PRELIMINARY CRITICAL CIRCUMSTANCES DETERMINATION AND THE RETROACTIVE APPLICATION OF PROVISIONAL COUNTERVAILING MEASURES

7.85 The second set of claims of Canada relates to the USDOC Preliminary Critical Circumstances Determination which formed the basis for the retroactive application of provisional measures in this case. Canada argues, first, that the SCM Agreement does not under any circumstances allow for the retroactive application of provisional measures, and thus considers that the USDOC Preliminary Critical Circumstances Determination is inconsistent with the SCM Agreement. In addition, Canada argues that the retroactive application of the provisional measures violated the disciplines of Article 17 SCM Agreement. Finally, Canada submits that, in any event, and even if we were to find that the SCM Agreement would in certain circumstances allow for the retroactive application of provisional measures, the USDOC failed to establish the existence of critical circumstances which would have justified the retroactive application of the provisional measures in question.

1. Claim 1: retroactive application of provisional measures is inconsistent with Article 20.6 SCM Agreement and violates Article 17.3 and 17.4 SCM Agreement.

(a) Arguments of the parties

(i) *Canada*

7.86 Canada is challenging the USDOC Preliminary Critical Circumstances Determination on the basis of which the United States retroactively applied the provisional measures to entries occurring 90 days prior to the date of publication of the preliminary determinations, *i.e.* entries occurring in the period of May 19 through August 16, 2001.

7.87 According to Canada, a retroactive application of provisional measures inevitably violates Article 20.6 SCM Agreement as this provision only allows for the retroactive application of definitive duties. Canada argues that the plain and ordinary meaning of the terms of Article 20.6 SCM Agreement, read in context and in the light of the object and purpose of the provision, make clear that only definitive countervailing duties, if warranted, can be applied retroactively, and that retroactive application of provisional measures is simply not permitted. In addition, Canada argues that Article 17.3 SCM Agreement provides that provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation. Due to the Preliminary Critical Circumstances Determination, provisional measures in this case were applied to entries occurring within 90 days prior to the date of publication of the Preliminary Determination (17 August 2001), *i.e.* as of 19 May 2001. As a consequence, the date of application of provisional measures in this case was less than a month after the initiation (23 April 2001), thereby violating Article 17.3 SCM Agreement,

another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture".

Article 17.1 (b) SCM Agreement states that "provisional measures may be applied only if:

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports;"

which provides that provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation. In addition, Canada submits that Article 17.4 SCM Agreement provides that the maximum period of application of provisional measures is 4 months following the Preliminary Determination. According to Canada, as the US applied provisional duties retroactively for 90 days in addition to the 4 month period following the Preliminary Determination, provisional measures were applied for almost 7 months thereby violating Article 17.4 SCM Agreement. Accordingly, Canada argues, not only is the retroactive application of provisional measures not permitted under Article 20.6 SCM Agreement, but any such action by the United States also constitutes a violation of Article 17.3 and 17.4 of the SCM Agreement.

7.88 Canada therefore considers the USDOC's Preliminary Critical Circumstances Determination to be inconsistent with Articles 17.1(b), 17.3, 17.4, 17.5, 19.4 and 20.6 of the SCM Agreement.

(ii) *United States*

7.89 The United States is of the view that the retroactive application of provisional measures, in this case in the form of suspension of liquidation and the posting of a bond or cash deposits, is allowed under Article 20 SCM Agreement. The United States argues that both suspension of liquidation of import entries and the posting of bonds or cash deposits are necessary to ensure that it retains the possibility of exercising the right to retroactive relief provided for in Article 20.6 SCM Agreement. Suspension of liquidation alone would not be sufficient, the United States asserts, since, if no amount is guaranteed by a cash deposit or bond, Article 20.3 SCM Agreement would, on its face, preclude the collection of duties retroactively. The retroactive application of provisional measures is thus necessary, according to the US, to preserve the possibility and the ability to exercise the retroactive definitive remedy.¹²⁸ According to the United States, Article 20 SCM Agreement provides an exception to the timing provisions of Article 17.3 and 17.4 SCM Agreement relating to the maximum duration of the provisional measures and the earliest possible date of application of such measures. The US argues that Article 20.1 and 20.6 SCM Agreement establish an exception which, although not altering the date when provisional measures may be imposed, expands the universe of "entries" of the subject merchandise to which those measures apply.¹²⁹

7.90 In sum, according to the United States, where provisional measures are imposed in accordance with the requirements of Article 17 SCM Agreement (i.e. after preliminary determinations of subsidization and injury), Article 20.1 SCM Agreement permits a Member to expand the scope of these provisional measures to encompass entries during the 90 days prior to the preliminary determination if there is sufficient evidence that the circumstances described in Article 20.6 SCM Agreement exist.

(b) *Analysis*

(i) *Does Article 20.6 SCM Agreement allow for the retroactive application of provisional measures?*

7.91 The USDOC made a preliminary determination of the existence of critical circumstances on the basis of which it ordered the retroactive application of provisional measures. The USDOC

¹²⁸ The United States acknowledges that there is no equivalent to the early measures provision of Article 10.7 Anti-Dumping Agreement, but argues that this only implies that a critical circumstances determination in the countervailing duty context may not be made as early as in the anti-dumping context where Article 10.7 Anti-Dumping Agreement allows Members to take precautionary measures "after initiation of the investigation". US Answers to Questions from the Panel after the Second Meeting, para. 57.

¹²⁹ US First Written Submission, footnote 103. Thus, according to the US, in a case of retroactive application, the period of 4 months during which the provisional measures are applied remains the same, but the amount of entries covered becomes larger.

accordingly directed the US Customs Service to suspend liquidation of all entries of the subject merchandise from Canada, entered or withdrawn from warehouse for consumption on or after 90 days prior to the date of publication of the Preliminary Determination, and instructed Customs to require a cash deposit or bond for such entries of the subject merchandise.¹³⁰ The US argues that both suspension of liquidation and the posting of bonds or cash deposits are necessary to ensure the possibility of exercising the right to retroactive definitive relief provided for in Article 20.6 SCM Agreement. Thus, for the US, the USDOC Preliminary Critical Circumstances Determination is consistent with Article 20.6 SCM Agreement.

7.92 Article 20 SCM Agreement provides as follows:

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing

¹³⁰ USDOC Preliminary Determination, p. 43215

duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures." (emphasis added)

7.93 As its text indicates, Article 20.1 SCM Agreement provides that provisional measures and countervailing duties shall only be applied to products entering the country following the imposition of such measures, "*subject to the exceptions set out in this Article*". While Article 20.2 and Article 20.6 SCM Agreement provide for explicit exceptions in the case of the *definitive* countervailing duties, we find no similar exceptions relating to provisional measures. Article 20.2 SCM Agreement sets forth the circumstances in which definitive countervailing duties may be applied retroactively for the period during which provisional measures were applied.¹³¹ Similarly, in critical circumstances, Article 20.6 SCM Agreement allows for the definitive duties to be assessed on imports which entered the country from 90 days prior to the date of application of the provisional measures.

7.94 Pursuant to the Preliminary Critical Circumstances Determination, the USDOC ordered the retroactive imposition of provisional measures in the form of the suspension of liquidation and a cash deposit or bond requirement. The US acknowledges in this dispute that such measures constitute provisional measures within the meaning of Article 17 SCM Agreement.¹³² We are of the view that the only two exceptions to the general rule of non-retroactivity of Article 20.1 SCM Agreement as set forth in Article 20.2 and 20.6 SCM Agreement do not apply to provisional measures, but concern definitive countervailing duties only. On the basis of the clear language in the SCM Agreement, we therefore consider that the general rule of non-retroactivity applies to provisional measures, without exceptions. We therefore find that the retroactive application of the provisional measure imposed by the USDOC is inconsistent with Article 20.6 SCM Agreement.

7.95 We agree with the United States that a Member is allowed to take measures which are necessary to preserve the right to later apply definitive duties retroactively. In our view, an effective interpretation of the right to apply definitive duties retroactively requires that a Member be allowed to take such steps as are necessary to preserve the possibility of exercising that right. What kind of measures may thus be taken by the Member concerned will have to be determined on a case-by-case basis. In this case, the US argues that both suspension of liquidation and the posting of a cash deposit or bond are necessary for the US authorities to be able to collect the duties retroactively. According to the United States, without suspension of liquidation, the products will have definitively entered the country and no duties can be assessed on such entries after liquidation. The United States further argues that the posting of a bond or a cash deposit is equally necessary because Article 20.3 SCM Agreement would not allow the retroactive duty collection beyond the amount guaranteed by the cash deposit or bond. In the view of the United States, if no cash deposit or bond is required, Article 20.3 SCM Agreement would imply that no definitive countervailing duty for the period preceding the Preliminary Determination could be levied either.

7.96 We are not convinced by the US argument in respect of the posting of cash deposits or bonds. We consider that Article 20.3 SCM Agreement states that if the amount guaranteed by the cash deposit is lower than the definitive countervailing duty, the difference shall not be collected. If the reverse is true, the excess amount shall be reimbursed and the bond released in an expeditious manner. Article 20.3 SCM Agreement thus concerns the wholly different issue of how to deal with a discrepancy between the provisional and the final rates of the countervailing duty. It does not address

¹³¹ We note that the use of the term "countervailing duties" in Article 20.2 SCM Agreement reflects the distinction made in Article 20.1 SCM Agreement between "provisional measures" on the one hand and "countervailing duties" on the other. It is clear from the immediate context of the term "countervailing duties" in Article 20.2 SCM Agreement that this term refers to definitive duties, as the text of the provision juxtaposes the terms countervailing duties and provisional measures. "Countervailing duties" in the context of Article 20.2 SCM Agreement thus refers to definitive duties only.

¹³² United States Answers to Questions from the Panel after the First Meeting, para. 52.

the retroactive imposition and collection of definitive duties for the period before the application of provisional measures. Article 20.6 SCM Agreement provides that definitive duties may in certain circumstances be assessed on imports which were entered for consumption from 90 days *prior to the date of application of provisional measures*.

7.97 The text thus clearly indicates that the Agreement allows for the retroactive application of definitive duties at a time when no provisional measures were in place and thus no provisional duties were collected. To accept the US argument that Article 20.3 SCM Agreement would preclude a Member from collecting definitive duties for the period prior to the date of application of provisional measures, would mean that a Member doing what Article 20.6 SCM Agreement expressly allows for, would be violating the Agreement nevertheless. We cannot accept an interpretation which leads to this contradictory result. We consider that the principle of effective treaty interpretation requires the treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."¹³³

7.98 We therefore find that the USDOC retroactive application of provisional measures is inconsistent with Article 20.6 SCM Agreement, as this provision allows for the retroactive application of definitive duties only. In our view, and leaving aside the question which sorts of actions of a conservatory nature a Member would be allowed to take in order to preserve the right to apply definitive duties retroactively, provisional measures such as the requirement of a cash deposit or the posting of a bond are not necessary to preserve the right to apply definitive duties retroactively under the SCM Agreement.¹³⁴

(ii) *Does the retroactive application of provisional measures also violate the disciplines of Article 17 SCM Agreement.*

7.99 We next turn to Canada's claim pursuant to Article 17.3 and 17.4 SCM Agreement in respect of the date of application and the duration of the provisional measures in this case. These provisions read as follows:

"17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months".

7.100 In our view, Article 17.3 and 17.4 SCM Agreement are unambiguous, clearly specifying that provisional measures shall not be applied sooner than 60 days after initiation and their application shall be limited to maximum 4 months. Article 20.1 SCM Agreement provides that provisional measures may be applied only to products which entered the country after the time when the decision under paragraph 1 of Article 17 SCM Agreement was taken, subject to the exceptions set out in that Article. In respect of the starting-point for the application of provisional and final measures, Article 20 SCM Agreement thus establishes two exceptions to the general rule of non-retroactivity of final countervailing duties and no exceptions to the general rule of non-retroactivity of provisional measures. Nothing in Article 20 SCM Agreement provides an exception to the rules relating to the

¹³³ Appellate Body Report, *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted on 12 January 2000, para. 81.

¹³⁴ We consider that the US argued before us that both the suspension of liquidation and the bond or cash deposit requirement are necessary conservatory measures, and we therefore have treated them jointly. We note on the other hand that Canada recognised that in a retrospective duty assessment system, Members "may keep liquidation open for a long enough period that would allow the retroactive imposition of definitive duties following a critical circumstances determination". Canada's Answers to the Questions from the Panel after the Second Meeting, para. 65.

minimum period between initiation and application of provisional measures or the maximum period of application of such measures as provided for in Article 17.3 and 17.4 SCM Agreement.

7.101 The USDOC initiated its countervailing duty investigation on 23 April 2001, and applied retroactive provisional measures on imports entering from 19 May 2001, i.e. less than 60 days after initiation. The USDOC applied provisional measures on imports entering from 19 May 2001, until 14 December 2001, which is 4 months after the Preliminary Determination. In total, the provisional measure thus covered imports for a period of almost 7 months. We therefore find that the US application of provisional measures during the period prior to the 60 days after initiation, and for longer than 4 months is inconsistent with Article 17.3 and 17.4 SCM Agreement.

7.102 We consider that the US argument that the period of application in Article 17.4 SCM Agreement refers to the period during which cash deposits or bonds are taken rather than the period during which the affected imports enter for consumption would have the effect of nullifying the provision, particularly in light of Article 20.1 SCM Agreement. We cannot accept such an interpretation which would reduce a provision of the treaty to redundancy or inutility.¹³⁵ The US interpretation would allow significantly more than 4 months worth of entries to be covered by a provisional measure. For example, under this interpretation, a decision under Article 17.1 SCM Agreement could be taken after 60 days, following which the importing country would wait say 3 months before "applying" the provisional measures for 4 months, including retroactively to imports entering after the date of the decision. In our view this would render meaningless the disciplines imposed by Article 17 SCM Agreement.

(c) Conclusion

7.103 In sum, we find that the United States' application of provisional measures in the form of cash deposits or bonds under the USDOC Preliminary Critical Circumstances Determination is inconsistent with Article 20.6 SCM Agreement, as this provision does not allow for the retroactive application of provisional measures. In addition, we find that the provisional measures at issue were applied in violation of Article 17.3 and 17.4 SCM Agreement as they were imposed less than 60 days after initiation and covered imports for a period of more than four months.

2. Claim 2: USDOC failed to establish critical circumstances under Article 20.6 SCM Agreement

(a) Arguments of the parties

(i) *Canada*

7.104 Canada argues that even if, in theory, retroactive application of provisional measures were permitted under Article 20.6 SCM Agreement, the USDOC Preliminary Critical Circumstances Determination is still inconsistent with Article 20.6 SCM Agreement since the USDOC failed to establish the existence of critical circumstances.

7.105 Canada asserts that the Investissement Quebec Small and Medium Businesses Guarantee programme (the "IQ SMB" programme) upon which the USDOC Preliminary Critical Circumstances Determination was based is not a prohibited export subsidy, as it is contingent upon developing markets outside Quebec, not outside Canada. Therefore the determination that the alleged massive imports have benefitted from subsidies bestowed inconsistently with the provisions of GATT 1994 and of the SCM Agreement is, in Canada's view, flawed. In any case, Canada submits, even if the IQ

¹³⁵ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS/2/AB/R, adopted on 20 May 1996, p. 23.

SMB programme were a prohibited subsidy, the amount of the subsidy found (0.005 per cent) is *de minimis*. Canada argues that Article 11.9 SCM Agreement provides that a *de minimis* rate is an insufficient basis for applying any countervailing measure whether final or provisional, and the determination was thus made in the absence of any critical circumstances in the sense of Article 20.6 SCM Agreement.¹³⁶

7.106 Canada argues that even if the IQ SMB Guarantee programme were a prohibited export subsidy, Articles 17.5 and 19.4 SCM Agreement, as well as Article 20.6 SCM Agreement, require that the rate to be applied retroactively to this programme should have been no more than the rate of subsidization under this programme, i.e. 0.005 per cent rather than the country-wide rate of 19.3 per cent. Canada argues that the text of Article 20.6 SCM Agreement allows for the retroactive application of only the rate that is commensurate with the benefit bestowed by the alleged prohibited subsidy. By applying a duty at this higher rate, the US countervailed to an amount in excess of that required to "preclude the recurrence of the injury" caused by such subsidies in "critical circumstances", which is the object and purpose of Article 20.6 SCM Agreement. The US thus violated Article 20.6 SCM Agreement as well as Articles 17.5 and 19.4 SCM Agreement.

7.107 Canada further asserts that countervailing measures were applied retroactively without a finding by USDOC or USITC of "injury which is difficult to repair" or that the retroactive application of the duties was "necessary to preclude the recurrence of such injury" in violation of the explicit requirements of Article 20.6 SCM Agreement. Canada adds that the USDOC itself admitted as much, as it acknowledged that these findings would have to be made by the USITC at the time of the final critical circumstances determination.¹³⁷

7.108 Canada submits that the USDOC's finding of "massive imports" is flawed as it is based on all imports from Canada while the SMB subsidy programme applies only to shipments from Quebec. Moreover, in Canada's opinion, the increase in imports of 23.34 per cent following the petition was not due to the alleged export subsidy of a *de minimis* level but rather to the anticipated and then actual expiration of the Softwood Lumber Agreement between the US and Canada, which first sharply reduced exports in the first quarter of 2001 and whose actual expiry led to an increase in the second quarter. Canada submits that the retroactive application of provisional measures in the absence of "massive imports of a product benefitting from subsidies paid or bestowed inconsistently with the GATT 1994 and the SCM Agreement" is in violation of Article 20.6 SCM Agreement.

7.109 Canada finally argues that if it is permissible to include for purposes of determining massive imports, shipments that have not benefitted from the prohibited subsidy, an authority should include all such shipments and not just the portion of such shipments that an authority needs in order to find a high rate of subsidization. Canada asserts that the finding of "massive imports" violates Article 20.6 SCM Agreement, as it did not include all shipments from Canada, but rather excluded imports from the Maritime provinces, which would have resulted in a negative "massive imports" finding under the SCM Agreement.

(ii) *United States*

7.110 The United States argues that there existed a sufficient basis for a preliminary critical circumstances determination, especially as in its view the evidentiary standard in the case of a preliminary determination should be lower than in case of a final determination.

¹³⁶ Canada asserts that the USITC recognized as much in a case involving certain steel products from Korea (Exhibit CDA – 36).

¹³⁷ USDOC Preliminary Determination, p. 43189.

7.111 According to the US, one Canadian provincial subsidy programme was an Article 3-inconsistent export subsidy which was meant to promote economic development in Quebec by encouraging growth of exports. The US argues that the existence of a prohibited export subsidy suffices to preserve the possibility of retroactive application later, and the fact that this programme's subsidy rate was *de minimis* is not relevant in this respect.

7.112 The US further submits that, as no methodology is prescribed in the SCM Agreement for determining the existence of "massive imports", it was reasonable for the USDOC to consider an increase of 23 per cent as massive. The US notes that the USDOC's analysis in this respect took the expiration of the Softwood Lumber Agreement between Canada and the US into account and came to the conclusion that it did not have the distorting effect Canada is alleging.

7.113 The US finally notes that the USITC had already made a preliminary finding of injury before the USDOC made its Preliminary Critical Circumstances Determination. According to the US, the remaining conditions for the retroactive application of definitive duties, relating to injury which is difficult to repair, are necessarily determinations that can only be made at the time of the final determination. For the purpose of the Preliminary Critical Circumstances Determination and the retroactive application of provisional measures, the preliminary determination of injury by the USITC was sufficient.

(b) Analysis

7.114 Canada argues that "[e]ven if the Panel found that provisional measures could be applied retroactively under Article 20.6, Commerce had not established the existence of any or all of the elements required under that provision".¹³⁸ In light of the fact that we uphold Canada's principal claim by finding that the Agreement does not allow for the retroactive application of provisional measures, we do not consider it necessary for the resolution of the dispute before us to address the arguments made by the parties concerning the specific hypothetical conditions that would need to be met for such inconsistent measures to be applied. For this reason we apply judicial economy and do not rule on this claim.

3. Conclusion on Canada's claim concerning the USDOC Preliminary Critical Circumstances Determination

7.115 In light of the conclusions above, we find that the United States' retroactive imposition of provisional measures on the basis of the USDOC Preliminary Critical Circumstances Determination is inconsistent with Article 20.6 SCM Agreement, as there does not exist a basis for the retroactive application of provisional measures in the SCM Agreement. Moreover, the retroactive application of provisional measures in the form of a cash deposit or bond in this case violated Article 17.3 and 17.4 SCM Agreement, as the measures covered imports for a period of almost seven months and were applied before sixty days after the initiation of the investigation. In light of this finding, we do not consider it necessary or appropriate to examine Canada's claims with regard to a violation of Articles 17.1 (b), 17.5 and 19.4 SCM Agreement and Article VI:3 GATT 1994.

C. CLAIM OF INCONSISTENT CVD LAW CONCERNING EXPEDITED AND ADMINISTRATIVE REVIEWS

(a) Arguments of the parties

(i) *Canada*

¹³⁸ Canada's First Written Submission, para. 116.

7.116 Canada claims that US countervailing duty law¹³⁹ violates the United States' obligations under the WTO because it fails to provide for company-specific expedited reviews and "administrative reviews"¹⁴⁰ in countervailing duty cases in which the investigation was conducted on an aggregate basis¹⁴¹, and because it mandates that a single country-wide duty rate calculated in an administrative review supersedes all individual rates previously determined in the countervailing duty proceeding.¹⁴² Canada considers that these measures are inconsistent with US obligations under Article VI:3 of GATT 1994 and Articles 10, 19.3, 19.4, 21.2 and 32.1 of the SCM Agreement.¹⁴³

7.117 In particular, Canada submits that the US legislation is in violation of Article 19.3 SCM, which according to Canada provides that exporters "not actually investigated" are entitled upon request, with "no exceptions" to an "expedited review" to establish an individual countervailing duty rate for that exporter.¹⁴⁴ Canada further submits that the US legislation is in violation of Article 21.2 SCM Agreement, which in Canada's view entitles exporters and producers to a "company-specific administrative review" upon request, again with "no exceptions".¹⁴⁵

7.118 Canada submits that by maintaining legislation which is inconsistent with the SCM Agreement, the US also failed to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the SCM Agreement in violation of Article XVI:4 WTO Agreement and Article 32.5 SCM Agreement.

7.119 Canada further submits that, since the USDOC conducted the softwood lumber investigation on a country-wide basis, the cited US legislation denies expedited reviews and company specific administrative reviews to the exporters concerned in the investigation, which in turn will necessarily amount to a duty being applied to certain exporters in excess of their individual duty rate. This, Canada argues, is in violation of Articles 19.3, 21.2 and 19.4 SCM Agreement.

7.120 According to Canada, the US statute, Section 777A(e)(2)(B), by failing to explicitly provide for company-specific expedited and administrative reviews where an investigation has been conducted on an aggregate basis, makes such reviews impossible. Canada further submits that Section 351.213(b) of the USDOC Regulations specifically denies exporters and producers an "administrative review" if the investigation was conducted on an aggregate basis. Finally, Canada argues, the requirement of Section 351.213 (k) (2) of the Regulations, that a single country-wide duty

¹³⁹ The relevant US law is found in Section 777 A (e) (2) (A) and (B) Tariff Act of 1930 and USDOC Regulations at 19 C.F.R. Sections 351.214 (k) (1) with regard to expedited reviews and section 351.213 (b) and (k) concerning administrative reviews.

¹⁴⁰ Canada does not define the term "administrative review", which is not a term found in the SCM Agreement. From its arguments before us, we understand Canada uses this term to refer to the reviews conducted to finalize the rate of duty collection under the retrospective duty assessment system used by the United States in applying countervailing duties. This is the meaning that we ascribe to this term in our findings.

¹⁴¹ We understand Canada to use the term "aggregate" to refer to an investigation where instead of individual rates of subsidization being calculated, an overall average rate or "country-wide" rate is calculated, for the purpose of applying countervailing duties.

¹⁴² Canada asserts that under US law the only exception is for requests for administrative review concerning zero or *de minimis* subsidies, and even there, only where practicable.

¹⁴³ In its Request for Establishment of a Panel (WT/DS236/2), Canada also cites Article 21.1 SCM Agreement in connection with its claims concerning US legislation. Canada does not pursue an allegation of a violation of this provision in its submissions in this dispute, however. Rather, it argues in its oral statement at the first meeting that Article 21.2 SCM Agreement should be read in conjunction with Article 21.1 SCM Agreement as meaning that the review obligations in Article 21.2 SCM Agreement relate not only to whether countervailing duties should continue, but also to the level at which duties should continue to be imposed. Canada's First Oral Statement, para. 106. We therefore do not address any allegation of violation of Article 21.1 SCM Agreement in our findings.

¹⁴⁴ First Written Submission of Canada, paras. 163 - 165.

¹⁴⁵ First Written Submission of Canada, paras. 166 - 168.

rate calculated in an administrative review supersede all individual rates previously established through expedited reviews, undoes the benefit of the expedited review under Article 19.3 SCM Agreement, and prevents exporters from obtaining an individual rate in an administrative review.

(ii) *United States*

7.121 The US argues that the US laws and regulations referred to by Canada do not constitute mandatory legislation, and therefore cannot be challenged as such before a WTO panel.¹⁴⁶

7.122 In particular, the US argues, US law does not prohibit the conduct of such reviews. The United States maintains that the USDOC Regulations cited in Canada's claim do not apply to cases in which investigations are conducted on an aggregate basis – a very rare situation - and the fact that no regulations concerning expedited or administrative reviews have yet been promulgated for this situation does not mean that such reviews are prohibited. Rather, the US submits, Section 751 of the US Tariff Act provides for a broad authority to conduct reviews, and does not require further regulations to be implemented by the USDOC. The US further notes its view that Article 21.2 SCM Agreement in any case does not imply an unfettered right to a review in all cases upon request as Canada seems to be suggesting. The US asserts that Canada also is mistaken when it claims that a decision by USDOC to conduct an investigation on an aggregate basis necessarily implies the denial of an expedited review or a company-specific "administrative review".

(b) *Analysis*

7.123 Canada argues that the US laws and regulations are inconsistent with Articles 19.3 and 21.2 SCM Agreement relating to expedited and administrative reviews respectively.

7.124 With regard to expedited reviews, Article 19.3 SCM Agreement provides as follows:

"When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter". (emphasis added)

7.125 Article 21.2 SCM Agreement concerning certain kinds of reviews provides that:

"The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or

¹⁴⁶ The United States further considers that the Panel should decline to address Canada's challenge to these laws and regulations as applied because, in the absence of any final measures at the time of the request for establishment of this case, no reviews have been initiated yet. Canada is thus, in the US view, seeking an advisory opinion from the Panel. US First Written Submission, para. 102.

varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately".

7.126 Due to the US laws and regulations' alleged inconsistencies with Articles 19.3 and 21.2 SCM Agreement, Canada also alleges that the US violates Article 32.5 SCM Agreement, which provides as follows:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question."¹⁴⁷

7.127 Canada further, and finally, alleges that because exporters in the lumber case are denied by US law the possibility of expedited reviews and company-specific administrative reviews, the United States also violates Articles 10, 19.4 and 32.1 SCM Agreement and Article VI:3 of GATT 1994. Article 19.4 SCM Agreement provides that no countervailing duty shall be levied in excess of the amount of the subsidization found to exist, calculated per unit of the subsidized exported product. Canada argues that the legislatively required denial of the reviews at issue will necessarily result in a violation of Article 19.4 SCM Agreement as certain exporters will be subject to countervailing duties in excess of their rates of subsidization. As a consequence, according to Canada, Articles 10 and 32.1 SCM Agreement are violated, as these provisions require Members to ensure conformity with the SCM Agreement and Article VI:3 of GATT 1994 in conducting investigations and applying countervailing duties.

(i) *Mandatory versus discretionary legislation*

7.128 We consider that it is a well established GATT/WTO practice that legislation can only be challenged as such before a WTO panel, when it is mandatory in nature and *requires* the violation of the Agreement. As the Appellate Body in the *United States – 1916 Act* stated:

"88. As indicated above, the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations. The practice of GATT panels was summed up in *United States – Tobacco* as follows:

... panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge. (emphasis added)

89. Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the executive branch of government". (footnotes omitted) (emphasis added)¹⁴⁸

¹⁴⁷ Canada also alleges on the same basis a violation of Article XVI:4 of the WTO Agreement.

¹⁴⁸ Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, adopted 26 September 2000, paras. 88 – 89.

7.129 We thus consider that legislation which merely gives the executive authority the discretion, either through silence or otherwise, to act inconsistently with the Agreement cannot as such be challenged before a Panel, i.e. independent of its actual application in a particular case.

7.130 The question before us is thus whether the US laws and regulations on administrative and expedited reviews are inconsistent with the SCM Agreement by mandating a violation of the relevant provisions of the SCM Agreement. Canada challenges the following US legislative provisions as inconsistent with the obligations of the United States under the SCM Agreement:

- Section 777A(e)(2)(A) and (B) of the Tariff Act of 1930, as interpreted by the Statement of Administrative Action (SAA)(pages 941-942); and
- the Department of Commerce Regulations at 19 C.F.R. Section 351.214(k) and Section 351.213(b) and (k)¹⁴⁹

(ii) *The US Statute and the Statement of Administrative Action*

7.131 Sections 777A(e)(2)(A) and (B) of the US Tariff Act provide as follows:

" (e) Determination of Countervailable Subsidy Rate.

...

(2) Exception. If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may

(A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to

(i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or

(ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or

(B) determine a single country-wide subsidy rate to be applied to all exporters and producers."

7.132 The relevant part of the SAA reads as follows:

"Section 265 (1) of the implementing bill repeals section 706 (a)(2). It eliminates the presumption in favor of a single country-wide CVD rate and amends section 777A of the Act to establish a general rule in favor of individual CVD rates for each exporter or producer individually investigated. [...] In addition, instead of examining a limited number of individual exporters and producers, section 777 A (e)(2)(B) would permit Commerce to calculate, on the basis of aggregate data, a single country-wide

¹⁴⁹ 19 C.F.R. §§ 351.213(b) and (k) and 351.214(k). (Exhibit CDA-39)

subsidy rate to be applied to all exporters and producers of the subject merchandise."¹⁵⁰

7.133 Section 777 of the US Tariff Act of 1930 does not deal with the conduct of administrative or expedited reviews as such, but merely provides for the possibility in investigations and reviews to calculate the rate of subsidization on an aggregate basis and to determine a country-wide subsidy rate. In our view, the SAA¹⁵¹ only confirms that although no longer the rule, it remains possible to conduct an investigation or a review on an aggregate basis and determine a country-wide duty rate. Nothing in the statute or the SAA indicates that expedited reviews or company-specific administrative reviews are necessarily excluded where an investigation has been conducted on an aggregate basis. In other words, neither the statute nor the SAA on its face appears to prohibit the USDOC from conducting such reviews where the investigation has been conducted on an aggregate basis.

(iii) *USDOC Regulations*

7.134 We now consider whether the US Department of Commerce Regulations cited by Canada prohibit the USDOC from conducting either expedited reviews or company-specific "administrative reviews", and if so, whether any such prohibition would violate Articles 19.3 or 21.2 SCM Agreement, as Canada alleges.

(a) *Expedited reviews*

7.135 With regard to expedited reviews, Canada alleges that USDOC Regulations Section 351.214(k)(1) prohibits the conduct of expedited reviews where an investigation has been conducted on an aggregate basis.

7.136 We recall the relevant part of Article 19.3 SCM Agreement, namely that any exporter whose exports were not actually investigated for reasons other than a refusal to cooperate is "entitled" to an expedited review to establish an individual countervailing duty rate. To us, this text makes clear that an expedited review to establish an individual countervailing duty rate must be conducted, upon request, for any exporter of the type referred to in Article 19.3 SCM Agreement. Thus, the question before us is whether the relevant regulations prohibit the USDOC from conducting such reviews in aggregate cases.

7.137 Section 351.214(k)(1) of the USDOC Regulations provides in relevant part:

(k) *Expedited reviews in countervailing duty proceedings for noninvestigated exporters.* (1) *Request for review.* If, in a countervailing duty investigation, the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act, an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent (*see* § 351.204(d)) may request a review under this paragraph (k).

¹⁵⁰ "Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, vol. 1, p. 941 (1994). (Exhibit CDA-38)

¹⁵¹ We note that as was recognized by the Panel in the *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* case, the SAA is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law". Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted as modified by Appellate Body Report WT/DS184/AB/R on 23 August 2001, para. 7.198.

7.138 Canada argues that because this regulation refers only to expedited reviews in the case of investigations conducted on the basis of the exception set forth in Section 777A(e)(2)(A) of the Act (sampling), it is impossible for the USDOC to conduct such reviews in investigations conducted on the basis of the *other* exception in the statute (aggregate cases), which is provided for in Section 777A(e)(2)(B) of the Act. Canada bases this argument on the fact that expedited reviews are expressly provided for in the Regulations, except in respect of aggregate cases. In Canada's view, it is a basic principle of statutory construction that if a right is provided for in certain circumstances, its deliberate exclusion in other circumstances must be given meaning, in particular, that no such right exists in those other cases. Thus, Canada argues, Section 351.214(k)(1), by providing for expedited reviews for cases other than aggregate cases, precludes the possibility of such reviews in aggregate cases.

7.139 The United States responds that Section 351.214(k)(1) does not cover aggregate cases. According to the United States, the fact that the USDOC has not issued regulations to cover such cases, which are rare, does not justify Canada's conclusion that US law prohibits expedited reviews in aggregate cases. The United States further argues that the USDOC has broad discretion under the statute, in particular Section 751 of the US Tariff Act (which is not before us in this dispute), to conduct the kinds of reviews required by the SCM Agreement.¹⁵² According to the US, Section 751 of the Tariff Act provides the USDOC with ample authority to fulfil all of the United States' obligations under the SCM Agreement, with regard to expedited and administrative reviews alike.

7.140 We note that the regulation at issue in respect of Canada's claim concerning expedited reviews, Section 351.214(k)(1) USDOC Regulations, addresses only one of the two situations identified in the US statute as an exception to the general rule of company-specific rates of subsidization. Namely, this regulation addresses the exceptional situation of an investigation conducted on the basis of some sort of a sample. Canada would have us infer, *a contrario*, that the silence of this regulation and the absence of any other in respect of the other exceptional situation – an investigation conducted on an aggregate basis – means that the USDOC is prohibited by law from conducting expedited reviews in such a situation. We find Canada's *a contrario* argument to be unjustified. We consider that the fact that no regulation exists regarding the apparently rare case of aggregate investigations does not imply that the USDOC is required by law to deny any requests for expedited review where an aggregate countervailing duty rate has been applied. In other words, the USDOC Regulations are simply silent on the issue.

7.141 We thus agree with the US that the fact that the USDOC has not elected to codify specific rules for handling what could potentially be an extremely large number of expedited reviews in an aggregate case does not in any way diminish the Department's statutory authority to conduct such reviews.¹⁵³ We therefore find that the fact that 19 C.F.R. § 351.214(k)(1) does not specifically address the possibility of expedited reviews in aggregate cases does not prohibit such reviews. In fact, as Canada acknowledged in the course of the second meeting with the Panel, "with respect to

¹⁵² The US argues that Section 751 of the US Tariff Act authorizes reviews to "determine the amount of any net countervailable subsidy" at least annually, upon request. It also authorizes reviews of "new shippers," defined as exporters and producers that did not export the subject merchandise to the United States during the period of investigation and were not affiliated with exporters or producers who did. In addition, the United States argues, the statute authorizes the USDOC to conduct a review "whenever [Commerce or the ITC] receives information concerning, or a request from an interested party for a review . . . which shows changed circumstances sufficient to warrant a review of," *inter alia*, a countervailing duty order. US First Written Submission, para. 110.

¹⁵³ The US asserts that it is a long-established principle of US law that administrative agencies have the discretion to promulgate formal procedures or to proceed on a case-by-case basis, especially when the agency has not had sufficient experience with a particular issue to formulate binding regulations. See *Securities & Exchange Commission v. Chenery Corporation*, 332 US 194, 202-203 (1947). US First Written Submission, para. 112.

expedited reviews, we note that the United States has in fact posted a notice indicating that it will accept requests for such reviews in the *Lumber IV* case.¹⁵⁴ We consider that this is further evidence of the fact that the US laws and regulations challenged by Canada do not require the authority to deny any expedited reviews in case of an aggregate investigation. We consider that the fact that no regulation exists regarding the apparently rare case of aggregate investigations, does not imply that exporters are denied by law the right to an expedited review where an aggregate countervailing duty rate was applied. The US laws and regulations cited by Canada thus do not mandate a violation of the requirement under Article 19.3 SCM Agreement to conduct an expedited review in order that the authority promptly establish an individual countervailing duty rate for any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate. For this reason also, we do not find that the USDOC is required by law to violate Article 19.4 SCM Agreement in the softwood lumber case by inevitably levying countervailing duties in excess of the amount of the subsidy found.

7.142 In sum, we find that the above-cited US laws and regulations concerning expedited reviews do not mandate a violation of Article 19.3 SCM Agreement, or thereby, of Article 19.4 SCM Agreement, and thus reject Canada's claims in this respect.

(b) *Company specific "administrative reviews"*

7.143 Canada submits that Article 21.2 SCM Agreement, read in the light of Article 21.1 SCM Agreement, contains the clear obligation to provide company-specific "administrative reviews" i.e., calculation of duty rate for a given period, upon request, without exceptions. Thus, Canada argues, the United States must provide for, and conduct, administrative reviews *upon request* to determine not only whether countervailing duties are necessary at all, but also to establish company-specific rates. Canada asserts that there are no exceptions to the US obligation to provide for administrative reviews.¹⁵⁵

7.144 According to Canada, under US law, contrary to the clear obligation in Article 21.2 SCM Agreement, an administrative review is not available to an exporter (nor to a producer, domestic interested party, foreign government, or importer) where the USDOC has conducted its investigation or prior administrative review under Section 777A(e)(2)(B) of the Act (*i.e.* where the USDOC has established a country-wide rate).

7.145 Canada further argues that because US law prohibits such company-specific administrative reviews, it also violates the requirement in Article 19.3 SCM Agreement to conduct expedited reviews upon request. Here, Canada argues, because exporters and producers are denied an administrative review (to finalize the rate of duty collection) if the investigation was conducted on an aggregate basis, this means that an exporter or producer would still be denied the opportunity to obtain a *final* individual countervailing duty rate, contrary to Article 19.3 SCM Agreement, even if that exporter or producer were given the right to an expedited review to establish an individual *cash deposit* rate. Canada further argues that, as a result, Article 19.4 SCM Agreement is also violated, as the legislatively required denial of the reviews at issue will necessarily result in a violation of 19.4 SCM Agreement since certain exporters will be subject to countervailing duties in excess of their rates of subsidization.

7.146 The United States argues, in the first instance, that Article 21.2 SCM Agreement does not contain the obligation asserted by Canada. The United States notes that what its law refers to as

¹⁵⁴ Canada's Oral Statement at the Second Meeting, para. 71 referring to USDOC, *Countervailing Duty Order on Softwood Lumber Products from Canada: Request for Expedited Review*, available online at <http://www.ia.ita.doc.gov/lumber/expedite/index.html> (posted 24 May 2002). (Exhibit CDA-103).

¹⁵⁵ Canada's Oral Statement at the Second Meeting, para. 78

"administrative reviews" are the annual reviews that it conducts to finalize the duty collection rate under its retrospective duty assessment system. In the US view, these sorts of reviews are not covered by Article 21.2 SCM Agreement. Rather, according to the United States, Article 21.2 SCM Agreement provides for, and requires, three completely different types of review: reviews to determine (1) whether the continued imposition of the duty is necessary to offset subsidization; (2) whether the injury would be likely to continue or recur if the duty were removed or varied; or (3) both.¹⁵⁶ Furthermore, the United States argues, even if Canada were correct that Article 21.2 SCM Agreement does require administrative reviews in the US sense of the term, Section 751(a) of the Tariff Act gives the USDOC ample discretion to conduct administrative reviews.

7.147 The legislative provisions cited by Canada as violating US obligations in respect of administrative reviews are Section 351.213(b) subparagraphs (1) and (2), and Section 351.213(k) subparagraph (2) of the USDOC Regulations.

7.148 Section 351.213(b) subparagraphs (1) and (2) of the USDOC Regulations provide as follows:

(b) *Request for administrative review.* (1) Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government) may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers.

(2) During the same month, an exporter or producer covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) may request in writing that the Secretary conduct an administrative review of only that person.

(3) During the same month, an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only an exporter or producer (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) of the subject merchandise imported by that importer. (emphasis added)

7.149 Section 351.213(k) subparagraph (2) on administrative review provides:

(2) *Application of country-wide subsidy rate.* With the exception of assessment and cash deposit rates of zero determined under paragraph (k)(1) of this section, if, in the final results of an administrative review under this section of a countervailing duty order, the Secretary calculates a single country-wide subsidy rate under section 777A(e)(2)(B) of the Act, that rate will supersede, for cash deposit purposes, all rates previously determined in the countervailing duty proceeding in question. (emphasis added)

7.150 Canada further asserts that the only requests the Secretary of the USDOC will consider for an individual administrative review in cases where administrative reviews are conducted on an aggregate

¹⁵⁶ According to the United States, the USDOC has the discretion under US law to conduct the first type of review, while the second type of review, falls under the authority of the US International Trade Commission.

(country-wide) basis, are those for individual assessment and cash deposit rates of zero under subparagraph (1) of Section 351.213(k) and even then, "only to the extent practicable." This regulation provides in relevant part as follows:

"(k) *Administrative reviews of countervailing orders conducted on an aggregate basis – (1) Request for a zero rate.* Where the Secretary conducts an administrative review of a countervailing duty on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and review requests for individual assessment and cash deposits of zero to the extent practicable...."

7.151 In view of the nature of Canada's claim the first question that we must address is the nature of the obligations under Article 21.2 SCM Agreement, and in particular, whether that provision requires "administrative reviews" as that term is used in this dispute, i.e. the yearly review procedure undertaken by the United States in its retrospective duty assessment system. Here, we agree with the United States that Article 21.2 SCM Agreement deals with different kinds of review mechanisms, requiring the authority to provide for the right of interested parties to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Thus, the first type of review addresses the question of whether subsidization is present at all, while the second type of review, by its very terms, has to do primarily with injury questions, that is, the effect on the domestic industry of changing or removing entirely the countervailing duty. This second type of review thus does not have to do with finalizing the rate of countervailing duty during a particular period for which estimated duties have been collected, but rather with the underlying need and rationale, from the standpoint of the affected domestic industry, for maintaining a countervailing duty. In short, Article 21.2 SCM Agreement is silent on the question of "administrative reviews".

7.152 In the USDOC Regulations, Section 351.213 quoted above deals with administrative reviews under Section 751 (a) of the US Tariff Act entitled "periodic review of amount of the duty" and sets forth the yearly duty assessment and review mechanism as part of the US retrospective duty assessment system. Section 751 (b) of the Tariff Act entitled "reviews based on changed circumstances" provides that the US International Trade Commission shall upon receipt of a substantiated request from an interested party review whether revocation of the order is likely to lead to the continuation or recurrence of injury.¹⁵⁷ In our view, Section 751 (b) of the Tariff Act is the

¹⁵⁷ Section 751 (a) (1) and 751 (b) (1) of the US Tariff Act of 1930, as amended, provide as follows:

SEC. 751. ADMINISTRATIVE REVIEW OF DETERMINATIONS

(a) PERIODIC REVIEW OF AMOUNT of DUTY. -

(1) IN GENERAL. - At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this title or under Section 303 of this Act, an anti-dumping duty order under this title or a finding under the Anti-Dumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall

(A) review and determine the amount of any net countervailable subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any anti-dumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement, and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

relevant provision of the US legislation implementing the US obligations under Article 21.2 SCM Agreement to review the need for continued imposition of the duty, *inter alia* upon request from an interested party to examine whether injury would be likely to continue or recur if the duty were removed or varied. Leaving aside the question of whether the US legislation provides for detailed regulations to deal with all the rights exporters are entitled to in this context, we find that the US statute allows the investigating authority to provide for and conduct reviews consistently with the SCM Agreement.

7.153 In addition, we consider that although Section 351.213 (b) states that the rules relating to administrative duty assessment reviews are not applicable to cases where the original investigation or the prior administrative review was conducted on an aggregate basis, it does not restrict the USDOC's authority to conduct reviews, nor does it require the authority to deny interested parties the right to request reviews in the sense of Article 21 SCM Agreement. We further note that subparagraph (k) of the same Section 351.213 provides an opportunity for exporters to request reviews where their subsidy rates are zero.¹⁵⁸ We consider that this review possibility tracks Article 21.2 SCM Agreement which provides for reviews to determine *inter alia* whether the continued imposition of the duty is necessary to offset subsidization.¹⁵⁹

7.154 We conclude that with regard to "administrative reviews", the challenged USDOC Regulations specify the rules that apply to a certain kind of review, and do not on their face alter the general statutory requirement to conduct reviews in the sense of Article 21 SCM Agreement. In our view, and in light of the broad statutory authority for the US authorities to conduct administrative reviews under Section 751 of the Tariff Act, and the specific provision in the Regulations which allows for review requests in case of a zero duty rate, we do not consider that the US laws and regulations mandate the executive authority to deny interested parties the opportunity to request a review of the need for the continued imposition of the duty under Article 21.2 SCM Agreement. In the absence of provisions in the legislation which require the executive authority to act in violation of the SCM Agreement, we reject Canada's claim in this respect.

7.155 We next consider Canada's claim that the alleged prohibition under US law of company-specific administrative reviews in aggregate cases also violates Article 19.3 SCM Agreement, by foreclosing the possibility in such cases that the results of expedited reviews would ever give rise to

[...]

(b) REVIEWS BASED ON CHANGED CIRCUMSTANCES. -

(1) IN GENERAL. - Whenever the administering authority or the Commission receives information concerning, or a request from an interested party for a review of -

(A) a final affirmative determination that resulted in an anti-dumping duty order under this title or a finding under the Anti-Dumping Act, 1921, or in a countervailing duty order under this title or Section 303,

(B) a suspension agreement accepted under Section 704 or 734, or

(C) a final affirmative determination resulting from an investigation continued pursuant to Section 704(g) or 734(g), which shows changed circumstances sufficient to warrant a review of such determination or agreement, the administering authority or the Commission (as the case may be) shall conduct a review of the determination or agreement after publishing notice of the review in the Federal Register.

We note that the relevant section in the USDOC Regulations dealing with changed circumstances reviews is Section 351.216 which has not been challenged by Canada.

¹⁵⁸ US Answers to Questions from the Panel after the First Meeting, para. 63.

¹⁵⁹ We note that the second leg of the review under Article 21.2 SCM Agreement relates to the injury analysis which in the US is not performed by the USDOC, but by the US International Trade Commission (USITC). We note that Canada is not challenging the USITC Regulations.

company-specific final countervailing duty rates, and Article 19.4 SCM Agreement, as certain exporters will be subject to countervailing duties in excess of their rates of subsidization. As we have found that the legislation challenged by Canada does not mandate a violation of Article 21.2 SCM Agreement, and that the USDOC has broad discretion to conduct reviews under Article 21 SCM Agreement, we also reject this claim. In addition, and more specifically, we note that Section 351.213(k) subparagraph (2), cited by Canada in connection with this claim, does not directly address the situation alluded to by Canada, and thus does not mandate the violation alleged by Canada. In particular, this regulation provides that where an administrative review is conducted on an aggregate basis, the final results of that review will supersede the previously-established countervailing duty rates. This regulation therefore does not address, or contain any requirements regarding, the circumstances under which an administrative review will be conducted on an aggregate basis.

7.156 Finally, Canada challenges what it views as the inevitable denial of expedited reviews and company-specific "administrative reviews" in the current softwood lumber investigation as a necessary result of the USDOC's decision to conduct this countervailing duty investigation on an aggregate basis. In light of the fact that at the time of the Preliminary Determination which is under review by the panel, no final determination had yet been made, no reviews of such a determination could have actually been requested, let alone denied, nor has Canada argued that this has happened.

7.157 Therefore, given our finding that the laws and regulations cited by Canada do not preclude the USDOC acting consistently with the US' obligations under Articles 19.3 and 21 SCM Agreement with respect to expedited and administrative reviews, we consider that it is not appropriate to rule on a potential denial of a request for review if no such request has even been made. The WTO dispute settlement system allows a Member to challenge a law as such or its actual application in a particular case, but not its possible future application.

7.158 In sum, we find that the US laws and regulations challenged by Canada do not require the executive authority to violate Articles 19.3 and 21.2 SCM Agreement in respect of the reviews required thereby, and are therefore not inconsistent with the SCM Agreement.

(c) Conclusion

7.159 For the reasons set forth above, we find that the US laws and regulations on Expedited and Administrative Reviews as challenged by Canada do not constitute a violation of the provisions of Articles 19 and 21 SCM Agreement in respect of the reviews required thereby, and we therefore reject all of Canada's claims in this respect.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the findings above that the USDOC Preliminary Countervailing Duty Determination

- (a) was not inconsistent with Article 1.1 (a) SCM Agreement when the USDOC found that the provision of stumpage constituted a financial contribution, in the form of the provision of a good or service;
- (b) failed to determine the existence and amount of benefit to the producers of the subject merchandise on the basis of the prevailing market conditions in Canada as required by Article 1.1 (b) and Article 14 and 14 (d) SCM Agreement; and
- (c) failed to establish that a benefit was conferred to certain producers of the subject merchandise as the USDOC did not examine whether a benefit was passed through by the

unrelated upstream producers of log inputs to the downstream producers of the subject merchandise;

we conclude that the USDOC's imposition of provisional measures based on the preliminary countervailing duty determination was inconsistent with the US obligations under Articles 1.1 (b), 10, 14, 14 (d), and 17.1(b) SCM Agreement. In light of our conclusion, we apply judicial economy, and therefore do not rule on Canada's claim that the USDOC instructions transmitted to the United States Customs Service on 4 September 2001, imposed provisional measures in excess of the subsidy preliminarily found to exist in a manner inconsistent with Articles 10, 17.2, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994.

8.2 In light of the findings above concerning the USDOC Preliminary Critical Circumstances Determination, we conclude that the retroactive imposition of a provisional measure on the basis of the USDOC Preliminary Critical Circumstances Determination is inconsistent with Articles 20.6, 17.3, and 17.4 SCM Agreement. In light of this conclusion, we decide to apply judicial economy and therefore do not rule on Canada's claim that the USDOC failed to establish the existence of critical circumstances under Article 20.6 SCM Agreement in its Preliminary Critical Circumstances Determination.

8.3 Finally, in light of the findings above concerning the US countervailing duty laws and regulations, we conclude that the US laws and regulations challenged by Canada on expedited and administrative reviews are not inconsistent with the SCM Agreement as they do not require the executive authority to act in a manner inconsistent with the US obligations under Articles 19 and 21 of the SCM Agreement concerning expedited and administrative reviews. As a result we also reject Canada's claims that the United States has failed to ensure that its laws and regulations are in conformity with its WTO obligations as required by Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

8.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the SCM Agreement, it has nullified or impaired benefits accruing to Canada under that Agreement. We recommend that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the SCM Agreement.
