19 February 1993

UNITED STATES - MEASURES AFFECTING IMPORTS OF SOFTWOOD LUMBER FROM CANADA

Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 27 October 1993 (SCM/162)

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I. INTRODUCTION

1. On 8 October 1991, Canada requested consultations with the United States under Article 3:1 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (hereinafter: "the Agreement"). This request followed an announcement made by the United States on 4 October that the United 11 Tf(s) TjETBT1 Tf1 Tf11 Tf(t) TjET1 Tf(U) TjETBT1 05BT1 0

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II. FACTUAL ASPECTS

7. The dispute before the Panel concerned (i) the suspension of liquidation and imposition of bonding requirements by the United States on 4 October 1991 under Section 304 of the Trade Act 1974 with respect to imports of softwood lumber from Canada, and (ii) the initiation by the United States on 31 October 1991 of a countervailing duty investigation on imports of softwood lumber from Canada. In taking these actions, the United States referred to the termination by Canada on 4 October 1991 of a Memorandum of Understanding on trade in softwood lumber, concluded between Canada and the United States on 30 December 1986, a brief description of certain aspects of the conclusion and implementation of this Memorandum of Understanding is therefore appropriate.

8. On 5 June 1986, the United States Department of Commerce initiated a countervailing duty investigation on imports of softwood lumber from Canada.[1] An affirmative preliminary determination

and that, in either eventuality, it might exercise its right to terminate the MOU. Article 9 of the MOU provided for the right of either party to terminate the MOU at any time upon thirty days written notice.

13. On 30 December 1986, immediately after signature of the MOU, the petitioner in the countervailing duty investigation, the Coalition for Fair Lumber Imports, withdrew its petition, "based upon the entry into force of the agreement between the Governments of Canada and the United States concerning trade in softwood lumber". At the same time, the petitioner indicated that this withdrawal was "without prejudice to the filing of another petition based upon the same Canadian acts and practices, should the Coalition determine at any time that it is in its interest to do so".[3]

14. On 5 January 1987, the Department of Commerce published in the Federal Register a notice of termination of the countervailing duty investigation on softwood lumber from Canada, based upon the withdrawal of the petition on 30 December 1986. The relevant part of the notice reads as follows:

"In a letter dated December 30, 1986, petitioner notified the Department that it is withdrawing its May 19, 1986, petition. Under section 704(a) of the Act, as amended by section 604 of the Trade and Tariff Act of 1984, upon withdrawal of a petition, the administering authority may terminate an investigation after giving notice to all parties to the investigation

17. In the exchange of Notes of 30 December 1986 effecting the MOU, the United States informed Canada that the MOU was "a trade agreement for purposes of United States law".[8] On the same date, the United States, by Presidential Proclamation 5595, imposed a temporary surcharge on imports of certain softwood lumber products from Canada, on the basis of a determination by the President under Section 301 of the Trade Act of 1974 that Canada's inability to collect an export charge on softwood lumber exported to the United States until at least 8 January 1987 was unjustifiable or unreasonable and constituted a burden or restriction of US commerce.[9] This temporary surcharge was suspended on 8 January 1987 when Canada began collecting the export tax. Also on 30 December 1986, the US President, acting under Section 301 of the Trade Act of 1974, instructed the Secretary of Commerce to determine periodically whether the Government of Canada and the Canadian provincial governments were fully imposing the export charge and any replacement measures therefor. The President announced that:

> "If the Secretary of Commerce determines that such export charges are not being fully imposed, I will take action (including the imposition of an increase in the tariff on softwood lumber imported from Canada) to offset any shortfall in the full imposition of the export charge or of the replacement measures therefor."[10]

18. On 17 January 1987, Canada submitted a diplomatic note to the United States in which it objected to the imposition of this duty under Section 301 as well as to the determination by the President to use Section 301 to offset any shortfall in the full imposition of the export charge or the replacement measures.

19. On 16 December 1987, Canada and the United States agreed to amend the MOU inter alia to exempt from the payment of export charges exports to the United States of certain softwood lumber products produced in New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island. It was also agreed that replacement measures described in an Appendix to the amendments for the Province of British Columbia would constitute full replacement of the export charge upon the fulfilment of the conditions described in this Appendix. Provisions to monitor these replacement measures in British Columbia were also put in place. In a subsequent amendment to the MOU, Canada and the United States agreed to reduce the export charge with respect to exports of certain softwood lumber products produced in Quebec as of 1 April 1988, as a consequence of replacement measures instituted by that Province. Finally, Canada and the United States agreed to exempt 365 million board feet of lumber produced from logs of US-origin from the export charge annually.

20. In a diplomatic note dated 3 September 1991, Canada gave the United States formal notice of its intention to terminate the MOU, as provided for in Article 9 of the MOU, effective 4 October 1991. This notice followed a series of informal ministerial discussions between Canada and the United States which occurred over a period of several months.

21. On 4 October 1991, following Canada's termination of the MOU, the USTR, acting under Section 304 of the Trade Act of 1974, determined "(a) That acts, policies, and practices of the Government of Canada regarding the exportation of softwood lumber to the United States, specifically the failure of the Government of Canada to ensure the continued collection of export charges of softwood lumber envisioned by the MOU, are unreasonable and burden or restrict US commerce; and (b) That expeditious action is required and that the appropriate action at this time is to impose contingent,

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[8] Letter from the United States Trade Representative to the Embassy of Canada in the United States, 30 December 1986.

[9] 52 Fed.Reg., 5 January 1987, pp.229-230.

[10] 52 Fed.Reg., 5 January 1987, p.233.

temporary increased duties on the parties identified in appendix 1 ( ) that originate on those provinces and territories listed in appendix 2 ( )".[11]

22. The notice of imposition of these measures described the reasons for these measures as follows:

> "As a consequence [of the termination of the MOU], the United States, which in December 1986 terminated its countervailing duty investigation in reliance upon Canada's undertakings in the MOU, will be denied the offset that had been provided by Canadian export charges against possible injurious Canadian subsidies. Due to the limited notice provided by Canada in terminating the agreement and the amount of time required for the Department once again to make a preliminary subsidy determination, the Department is unable in the short period leading up to that determination to impose interim protective measures. Accordingly, action by the United States is required during this interim period in order to restore and maintain the status quo ante. Since the Government of Canada has refused to collect export charges to offset possible subsidies during this period, the United States is compelled to exercise its rights and to take enforcement measures arising out of the MOU by imposing temporary measures to safeguard against an influx of possible injurious subsidized Canadian softwood lumber."[12]

23. The measures decided upon in this determination took the form of bonding requirements, the imposition of a duty, contingent upon affirmative final determinations of subsidization and injury, and the withholding or extension of liquidation of entries of certain softwood lumber from Canada. These measures took into account the replacement measures instituted in certain Canadian provinces. Thus in the case of lumber production in British Columbia, no bonding requirements were imposed and the rate of the contingent duty was zero.[13]

24. On 16 October 1991, Canada

the [illegible] of stumpage rights and the setting of stumpage prices, and that stumpage was preferentially priced.[27] [illegible]

Canada requested the Panel to find that the measures taken by the United States on 4 October 1991 in the form of a suspension of liquidation of entries of softwood lumber products from Canada and the imposition of bonding requirements on such entries were inconsistent with the obligations of the United States under Article 5:1, and were not justifiable as a form of "expeditious action" under Article 4:6 of the Agreement.

31. The **United States** requested the Panel to find that the measures taken on 4 October

October

36. **Canada** considered that the imposition

contemplated in Article 4:6 of the Agreement, reinforced the

the parties to suspend inter se the operation of Article 4, **Canada** argued that the principal fallacy in this argument was that the "right" that was supposedly being "waived" simply did not exist in the context of the MOU. The United States had no rights under Article 4:6 of the Agreement with respect to the MOU because the MOU was not an undertaking under Article 4:5 of the Agreement. N° "waiver" of rights under Article 4:6 had therefore been necessary and, accordingly, there had been no obligation to notify the signatories of the Agreement of such a "waiver". The termination of the countervailing duty investigation in January 1987 had extinguished any right of the United States to use the investigation initiated in June 1986 as a basis for the imposition of provisional measures. The fact that an independent trade agreement, outside the provisions of the countervailing duty law of the United States, was concluded at the same time a countervailing duty investigation was terminated did not make that agreement an undertaking for purposes of Article 4:5 of the Agreement and did not lead to the accrual of rights under the Agreement as a result of the conclusion of that independent agreement. This was confirmed by Article 4:8 of the Agreement which through the use of the word "shall" set out mandatory notification requirements whenever a countervailing duty investigation was suspended or terminated, pursuant to Article 4:5. Thus the rights and procedures of Articles 4:5 and 4:6 had to be invoked; they were not

48. The **United States** considered that the fact that paragraph 6 of the MOU is entitled "Additional undertaking" was of significance in that under the Agreement the MOU could not have been anything else.

49. **Canada** also argued that the fact that the MOU had not been treated by the United States as an undertaking supported its view that the MOU had not constituted an undertaking within the meaning of Article 4:5 of the Agreement. First, the United States had not notified the MOU as an undertaking in its semi-annual report of countervailing duty actions covering the period 1 July-31 December 1986 (SCM/84(Add.4), as required by Article 2:16 of the Agreement. Second, the MOU had not been notified as an undertaking in the Federal Register notice of the termination of the

of the Agreement. For example, in the context of the United States-Canada FTA Chapter 19 bilateral Working Group the suspension agreement on raspberries and the MOU on softwood

the Agreement. The United States was at that time and remained surprised that Canada would challenge that basic fact. Thus it was not until these pre-initiation consultations that the United States realized that Canada questioned that the United States and Canada both had rights and obligations under the Agreement with respect to the MOU. Accordingly, prior to that time, the

as it had become evident that the United States would take action, it had promptly notified the Committee on Subsidies and Countervailing Measures. In any event, even if (assuming arguendo) the United States had been unaware of its rights under the Agreement to act as it did, and even if it had not properly notified the Committee of a specific manner of implementation of those rights prior to taking such action, the failure to meet a procedural requirement could no more defeat rights of the United States than the failure to notify a subsidy could be taken as congruent with a violation of the Agreement based on providing that subsidy.

59. In response to a question by the Panel as to how the United States had informed the Committee on Subsidies and Countervailing Measures of the interim measures taken on 4 October 1991 with respect to imports of softwood lumber from Canada, the **United States** indicated that these measures had been notified to the Committee in the semi-annual report of the United States on countervailing duty actions taken in the second half of 1991.[23]

60. Responding to a question by the Panel as to how the nature of the US measures taken on 4 October 1991 as a form of "expeditious action" within the meaning of Article 4:5 of the Agreement was reflected in the text of the Federal Register Notice announcing these measures, the **United States** argued that under Article 4:6 "expeditious actions" could include "immediate application of provisional measures using the best information available". Provisional measures were defined in the Agreement as "provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization". The Federal Register Notice of 8 October 1991 had established a bonding requirement in the amount of the export charge established by the MOU less an amount reflecting replacement measures agreed to and implemented as of that date. Accordingly, the Federal Register Notice expressly described actions explicitly authorized by Article 4:6 of the Agreement. Significantly, in the case of a suspension agreement, the provisional measures would not have reflected the replacement measures introduced by some Canadian Provinces.

61. **Canada** also argued that the fact that the MOU was outside the framework of the countervailing duty legislation of the United States supported the view that the MOU had not constituted an undertaking within the meaning of Article 4:5(a)(i) of the Agreement. The Agreement required in Article 2:2 that the relevant authorities and procedures be notified to the Committee on Subsidies and Countervailing Measures. In the case of the United States, the legislative procedures notified to the Committee were those of the Tariff Act of 1930, as amended. The United States had concluded the MOU outside these procedures and could therefore not claim any rights under Articles 4:5 and 4:6 of the Agreement in relation to the MOU. In addition, the status of the MOU under US domestic law was relevant insofar

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procedures notified to the Committee by the United States. However, provisions for undertakings based on agreements to eliminate or offset completely a subsidy fell under section 704(b) of the Tariff Act of 1930, as amended, which were not the procedures followed in this case. What was outside of the procedures notified by the United States to the Committee was the reinstitution of a previously terminated countervailing duty investigation, or the imposition of interim measures following the termination of a countervailing duty investigation. Neither of these procedures was found in the Tariff Act of 1930, as amended.

63. In characterizing the MOU as being outside the framework of the domestic countervailing duty legislation of the United States, **Canada** made the following points.

64. First, the countervailing duty legislation of the United States distinguished between the procedures for termination of investigations and the procedures for suspension of investigations. Termination of a countervailing duty for

> As a result, the US industry is withdrawing its petition and the Department of Commerce will terminate its investigation."[24]

Canada observed that this statement indicated that the MOU had addressed issues sufficiently that the petitioning industry decided to withdraw its case under the US countervailing duty law. Upon withdrawal of the petition, the Department of Commerce was authorized to terminate the investigation and had done so. These facts, however, had not made the MOU an undertaking under Article 4:5 of the Agreement. Under the countervailing duty law of the United States, a suspension agreement resulting from a countervailing duty case fell under section 704 of the Tariff Act of 1930, as amended. The document referred to in the quotation was a notification under section 301 of the United States Trade Act of 1974; this Act had not been notified to the Committee on Subsidies and Countervailing Measures under Articles 2:2 or 19:5(b) of the Agreement. The three notices published in January 1987 in the Federal Register with respect to the MOU nowhere referred to section 704 of the Tariff Act of 1930, as amended.

68. The Panel asked Canada to explain whether it was of the view that in the case of the United States only "suspension agreements" could be considered as "undertakings" within the meaning of Article 4:5 of the Agreement. In response, **Canada** pointed out that the United States had implemented the Agreement only in the Tariff Act of 1930, as amended, and that this legislation did not contain p[rovisions for undertakings other than "suspension agreements". Thus, only suspension agreements could be considered to be "undertakings" within the meaning of the Agreement. The only type of agreement envisaged by the relevant provisions of

to suspension) of investigations, the **United States** argued that Section 704 of the Tariff Act 1930, as amended, did contemplate termination of cases

and Canada's action was a termination fully consistent with its negotiated rights under the MOU. An action specifically provided for in a bilateral agreement could not be construed as a violation of that agreement. Were the position of the United States to be accepted, the lawful termination of any agreement which settled a trade dispute could be considered grounds for an expedited self-initiation of an anti-dumping or countervailing duty investigation.

75. The **United States** pointed out that it did not contest that Canada had acted within its rights under the MOU by terminating the MOU on 4 October 1991. However, the United States too was acting within its rights under Article 4:6 of the Agreement to respond to Canada's action. The termination clause of the MOU could not be used to defeat rights of the United States under Article 4:6 of the Agreement. The termination clause in the MOU had served the same function as a termination clause in other types of bilateral agreement: providing an explicit right for either country to withdraw from the agreement. The consequence of invoking a termination clause was that a country could cease abiding by the terms of that agreement and not be in violation of an international treaty obligation on the basis of the bilateral agreement. Thus, it was not the position of the United States that Canada had violated the MOU by exercizing its right of termination. However, there was no support for Canada's argument that the termination clause in a bilateral agreement concluded in accordance with the provisions of a multilateral agreement also served to defeat the rights of the United States under that multilateral agreement. Canada's argument was contradicted by the terms of Article 4:6 which, inter alia, expressly reserved to the importing country the right to determine whether the terms of an undertaking were being fulfilled and related the concept of "violation" to the fulfilment of the objectives of the undertaking. Since the agreement of the importing country was necessary in order for a countervailing duty investigation to be suspended or terminated, the continued acquiescence of the importing country was required to maintain the undertaking. Certainly, either party had the right to withdraw from the undertaking; however, each must bear the consequences of doing so. In sum, Canada's right to withdraw from the MOU and the right of the United States to the remedy under Article 4:6 stood side by side; neither did (nor should be construed to) defeat the other. To do otherwise would discourage settlement of countervailing duty cases by making inclusion of a termination clause (a common clause in undertaking) unacceptable to the importing country.

76. The **United States** pointed out that the language in Article 4:6, which required that a "violation" of an undertaking occur prior to provisional action, was immediately preceded by the following language:

> "Authorities of an importing signatory may require any government or exporter from whom undertakings have been accepted to provide periodically

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review of the undertaking under Article 4 was certainly relevant in determining whether a unilateral withdrawal from the undertaking should be dealt with under Article 4:6.

77. In response to a question by the Panel on whether a legal procedure had existed in the case of the MOU to ensure that, as an undertaking, the MOU would "not remain in force any longer than countervailing duties could remain force under this Agreement" (Article 4:7), the **United States** pointed out that the MOU had included explicit consultation provisions which would have permitted Canada to seek a review of any provisions or of the Understanding as a whole. Since Canada had not fully replaced the export tax on over one-third of Canadian lumber production, this opportunity had never seriously materialized. It was worth noting, however, that Canada had refused to engage in the required quarterly consultations in the second quarter of 1991.

78. In response to a question by the Panel on whether a legal procedure had been available to the Government of Canada and to interested exporters or importers to request a review of the need for the continuation of the MOU, the **United States** stated that a petition to that effect could have been filed at any time with either the Department of Commerce or the USTR. Such a request would have been given due consideration.

79. The **United States** further argued in this context that in the practice of both the EEC and the United States a withdrawal from an undertaking was treated in the same manner as a violation of an undertaking. This practice made sense because the effect of a violation and a withdrawal was identical: the exporting country signalled its intention not to abide by the terms of the undertaking, on the basis of which the underlying countervailing duty proceeding had been suspended or terminated. Thus, the United States had included termination clauses in

to exist and there were continuing obligations thereunder. However, when a country terminated an agreement, in accord with the express terms of that agreement, there was no further obligation to comply with the terms of the agreement. The agreement no longer existed and, accordingly, the non-terminating party had no right to take action based on the act of termination, unless provided for in the agreement. N° such rights existed in the case of the MOU, since the only condition of termination of the MOU was the provision of 30 days notice. Both Canada and the United States agreed that Canada

existed

equal to the amount of the provisionally calculated amount of subsidization". Accordingly, under the Agreement, as soon as there was a violation of a suspension or termination agreement, authorities of an importing country were authorized to impose cash deposits in the amount of the estimated margin of subsidization. In the case of the interim action of the United States, there were two simple elements: a bonding requirement and a withholding or extension of liquidation. The result of these measures would be - at most - collection of a duty (contingent upon final affirmative determinations of subsidization and injury in the ongoing investigation) in the amount agreed between Canada and the United States in the termination agreement (15 per cent), less the amount of any replacement measures taken. These actions fell well within the scope of action permitted under the Agreement.

87. The Panel asked the United States to explain how in its view under the Agreement the termination by Canada of the MOU was a ground for the application of interim measures under Article 4:6 and at the same time constituted a "special circumstance" within the meaning of Article 2:1 justifying the self-initiation of a countervailing duty investigation. In response, the **United States** argued that Canada's abrupt withdrawal from the MOU had been based upon a unilateral claim that all subsidy practices in Canada had ceased to exist. The United States had asked Canada to maintain the status quo to allow the United States to investigate Canada's claim. Canada had refused this request, which had given rise to the need for the United States to protect itself in the short term by imposing the interim measures as well as to a "special circumstance" namely, the need to commence an investigation as quickly as possible to verify Canada's claim.

2. SELF-INITIATION BY THE United States OF A COUNTERVAILING DUTY INVESTIGATION ON 31 October 1991

88. **Canada** submitted that, in self-initiating a countervailing duty investigation on 31 October 1991 with respect to imports of softwood lumber products from Canada, the United States had acted inconsistently with its obligations under Article 2:1 of the Agreement. There had been no "special circumstances" to justify the self-initiation of this investigation. In addition, the United States had initiated this investigation absent sufficient evidence of the existence of a subsidy and sufficient evidence of injury and causality.

89. The **United States** submitted that Canada's withdrawal from the MOU had constituted "special circumstances" within the meaning of the Agreement, justifying self-initiation of the countervailing duty investigation. Furthermore, the United States had possessed sufficient evidence of the existence of Canadian provincial subsidies to softwood lumber producers, injury and a causal link between the subsidized imports and the alleged injury as required by Article 2:1 of the Agreement. Accordingly, the self-initiation by the United States of the investigation on softwood lumber products was consistent with the obligations of the United States under Article 2:1 of the Agreement.

2.1 Special circumstances to justify the self-initiation of a countervailing duty investigation

90. **Canada** argued that, while in the Notice of Initiation of the countervailing duty investigation of imports of softwood lumber from Canada the United States had acknowledged that Article 2:1 of the Agreement required that there be "special circumstances" to allow for the self-initiation of a countervailing duty investigation, the factors identified in this Notice as a basis for the self-initiation of the investigation did not constitute "special circumstances" for purposes of Article 2:1. The Notice had made the following statements regarding the alleged special circumstances:

> "We also determine that Canada's unilateral termination of the MOU…constitutes special circumstances within the meaning of Article 2:1 of the … Subsidies Code."[26]

and:

> "As a consequence of Canada's termination of the MOU, the U.S. lumber industry will be denied the offset that had been provided by Canadian export charges against what in 1986 preliminarily had been found to be injurious Canadian subsidies. Furthermore, the U.S. Government and the U.S. indust

United States Government and the US industry the ability to determine whether the timber fee increases instituted in some Canadian Provinces to replace or reduce the export charge would remain in place, because the exchange of information provided for under the Memorandum of Understanding would be terminated. In fact, the consultations had proven an important aspect of the MOU, particularly with respect to British Columbia, in the five years of the MOU. Canada's argument that the US industry itself could have filed a countervailing duty petition ignored the extremely short lead time that would have been available to the industry to prepare a petition in a situation where subsidised imports had already been preliminarily determined to be causing material injury. Also, unlike the typical countervailing duty case, in this case the Department of Commerce already had in its possession sufficient information concerning the subsidy and injury factors. Also, unlike in the typical situation, requiring the industry to present such information would have been unnecessary and would merely have delayed the initiation of the proceedings for no reason. Moreover, the industry already had presented a petition; imposing the burden of a new petition on the industry when the Department had possessed sufficient evidence to initiate an investigation would have been absurd. In short, in this special situation, the Department of Commerce had been in the best position to seek expeditious initiation of a countervailing duty investigation.

95. In response to Canada's argument that no "special circumstances" could have existed to warrant self-initiation of an investigation with respect to imports from British Columbia, the **United States** argued that Canada was incorrect in argu0 1 489.6 642 Tm/F8 11 Tc1 Tm/F8 11 Tf(in) TjETl22 Tm/F8 11 Tf(in) T

97. The **United States** observed that the

of proof which ordinarily satisfies an unprejudiced mind".[30] **Canada** considered that "evidence" in the context of Article 2:1 must be relevant, i.e. bear a logical relationship to the existence of (a) subsidy, (b) injury and (c) causality according to the meanings found in the Agreement.

101. The **United States** considered that the plain language of Article 2:1 did not support the view that a higher standard of "sufficient evidence" applied to cases of self-initiation of countervailing duty investigations. This provision allowed for self-initiation of an investigation subject to two conditions:

101.

by the fact that in the case of softwood lumber from Canada the only final ruling made by the Department of Commerce in 1983 had found that Canadian stumpage programmes were not subsidies). Article 2:1 of the Agreement clearly obliged investigating authorities to have evidence of the existence of a subsidy. The standard applied by the United States was to presume the existence of a subsidy unless the measure in question had been declared not to be a subsidy. To allow this standard to be the

Canada

rates".[38] The two key elements in this definition (the selective provision of the resource and the establishment of prices at preferential rates) reflected specific requirements of the countervailing duty legislation of the United States; the Agreement

"The fact that specific economic, as well as non-economic, criteria are considered indicates that the government may be trying to develop specific regions or sectors within the province."

120. **Canada** considered that the assertion of the United States that softwood lumber producers were favoured by the exercise of discretion on the part of Canadian provincial governments was unsupported by any statement or evidence in the Initiation Memorandum. The principle in paragraph 4.4 in the report of the Panel in "New Zealand - Imports of Electrical Transformers from New Zealand"[43] indicated that the obligation existed on the contracting

examination of whether there were dominant users of the programme), and the extent to which a government exercized discretion.

123. **Canada** noted that the reasons given for the reversal of the finding made in 1983 were almost exclusively based on the new factor of discretion (which in 1983 the Department had considered irrelevant) and on the changed view that pulp and paper and lumber producers tended to be horizontally integrated. As a result, in October 1986 the Department had found in a preliminary determination that stumpage programmes were provided to a specific group of enterprises. Since the concept of specificity was now subject to an "actual use" test, based on variable definitions of what constituted industries, the concept of discretion (which caught up almost any government programme) was virtually open-ended. Thus, the fact that governments exercised some discretion in managing a complex resource for a variety of reasons, plus the fact that the number of users of standing timber was perforce limited, were taken as evidence on its face that there was a subsidy. Such a test, if accepted as legitimate, was almost impervious to any objective review, besides being contrary to the Agreement.

124. **Canada** noted that this new administrative practice to determine the existence of specificity based on actual use of a programme had been incorporated into US countervailing duty law in 1988 by the following amendment:

> "Nominal general availability, under the terms of the law, regulation, program, or rule establishing a bounty or grant, or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant or subsidy is not, or has not been/F8 11 Tf(for) TjET4hing

standards were well-established and rigorous and in the case before the Panel the supporting documentation on, and analysis of, the existence of specificity and preferentiality were extensive. Canada's contention was simply an overstatement concerning the application by the United States of the specificity and preferentiality tests. If, as Canada had asserted, these tests were meaningless, the United States would countervail every foreign government domestic programme subject to investigation. That this was not the case was demonstrated by a recent decision of the United States Court of Appeals for the Federal Circuit in PPG Industries, Inc. v. United States[48] involving an investigation in which the United States had declined to countervail the sale by a foreign government of natural gas at controlled prices and exchange-risk programmes, based upon absence of specificity and lack of preferential pricing. Thus, contrary to Canada's sweeping assertion, the United States administered its specificity test in a rigorous manner: only if a foreign government programme was not de jure limited to a specific class of recipients did the Department of Commerce undertake its de facto analysis. Notably, Canada conveniently ignored that a binational

British Columbia[51]

129. **Canada** argued that the claim of the Department of Commerce that there was preferential stumpage pricing in British Columbia was inconsistent with testimony of the United States Deputy Assistant Secretary for Commerce before the US

131. In response

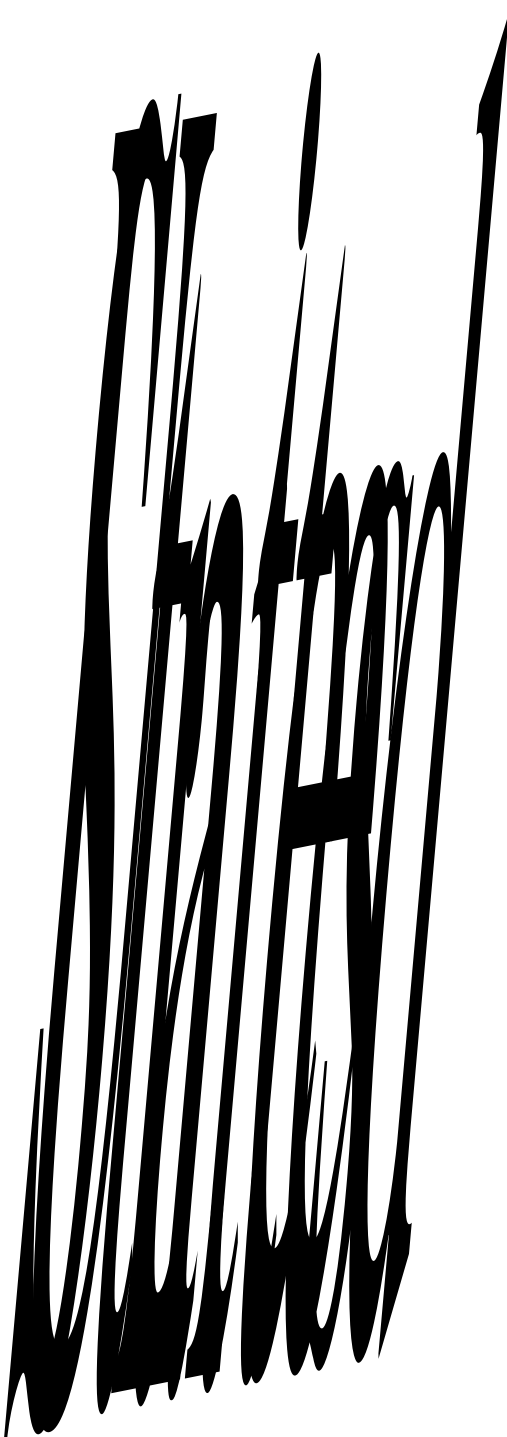
> "Each individual stand of timber is unique due to a variety of factors, such as species combination, density, quality, size, age, accessibility, and terrain and climate. Stumpage prices vary substantially both regionally and locally within Canada and the United States, even within a mill's timber supply area.... We believe that a comparison of stumpage prices with U.S. prices would be arbitrary and capricious".[59]

135. **Canada** observed that the Department of Commerce had possessed no current, accurate or appropriate eates,

138. The **United States** explained that, with respect to Alberta, the Department of Commerce had compared the stumpage price with the competitively bid price for the interior of British Columbia; this benchmark was used based on the fact that the species mix of the interior of British Columbia was similar to that of Alberta. Adjustments had been made to the competitive price for silviculture and road building costs and for differences in species and quality of mix of stumpage. Based on its comparison between the competitive price in British Columbia and the price in Alberta, the Department had estimated a subsidy of 21.58 per cent ad valorem. This evidence provided the basis - at a minimum for investigation.

139. The **United States** noted that Canada's argument that stumpage prices in Quebec were based on provincial market prices within Quebec and reflected competitive market conditions was not consistent with the facts of record. Regardless of whether this statement was correct, this was not the evidence in the possession of the Department of Commerce which had led it to believe that a subsidy existed. At the time of in

to the period April-June 1989 which showed that a higher stumpage price was charged to "integrated" companies for coniferous timber than charged to "non-integrated" companies for coniferous timber. Reliance on data for a three-month period did not meet the standard of sufficient evidence. The United States had not established that this was a representatie period. The United States had compared the level of stumpage fees charged to "integrated" firms between April and June 1989 (for softwood only) with the average stumpage fee paid on softwood and hardwood by all firms during the period 1 April 1989-30 March 1990. Since 1988 the Ontario Crown Timber Regulations had provided that all softwood timber



companies

Saskatchewan, Manitoba, the Northwest Territories and the Yukon[64]

145. **Canada** argued that the existence of subsidies in Saskatchewan and Manitoba had been

148. **Canada** also argued more generally that the preferentiality test as applied by the United States was so vague as to be open to any number of interpretations and application in a given case. There was no confidence that the same test, applied twice to the same situation, would give the sale result. In 1986, in the affirmative preliminary determination, the Department of Commerce had determined the existence of preferentiality based on a comparison of stumpage fees with the governments' costs of producing the good. This "cost of producing" standing timber had

2.3.3 Arguments on whether the setting of stumpage fees can be a subsidy within the meaning of the General Agreement and the Agreement

which went beyond the scope of the remedy requiring the active rôle of the CONTRACTING PARTIES found in

did not fall under the term subsidy because it worried about the impossibility of arriving at a precise definition of subsidy that would include "all measures withires

to a natural resource could not be considered to involve a subsidy, **Canada** noted that in the Initiation memorandum the Department of Commerce had not compared the administratively set price charged by a government for access to a natural resource in situ to a "market price" set by a private land owner within the same jurisdiction. Assuming that by "prices set by the market" was meant the price of access to private lands containing in situ natural resources, and that the Panel's question related to pricing within a jurisdiction, i.e. in this case within a province, there was no basis to compare what was a revenue collection measure with what was a market mechanism for transferring economic rent to the land owner. The levying of a stumpage fee did not relate to the sale of a good or service. If by "market prices" was meant a fee set by an auction or tender system for access to certain lands compared to other ways of setting the fees for access to other public lands, there was again no reason, in cases involving in situ natural resources, that the level of a fee or a charge could be considered a subsidy since the principle of economic rent established that such differences did not increase output or decrease prices of products made from the natural resources.

162. In response to a question by the Panel as to whether Canada considered that a revenue collection measure by a government could entail a financial contribution by that government if the measure involved the levying of different rates or charges to enterprises within the same jurisdiction, **Canada** argued

in Part I of the Agreement and, thus, the provisions of Article 11:1-11:3 relating to those subsidies which could cause injury to a domestic industry of another signatory also applied to actions taken pursuant to Part I. The text of the Agreement supported the view that Parts I and II were interrelated, particularly as regards the term subsidy. First, the provisions in Part II were not qualified by the words "for the purposes of this Part…" or any similar language which would expressly limit the definitions used in Articles 7 to 13 to Part II of the Agreement. If the signatories had

imposition of such duties by an importing signatory did not restrict the right of another signatory to provide subsidies; the two rights were

correlation between stumpage price and volume of timber harvested.[84] Even if one ignored that alternative theories existed, it would be difficult, if not impossible, for Canada to demonstrate conclusively for purposes of initiation that stumpage programmes could not, in any conceivable circumstances, confer a

concessionaires to sell good timber products at low prices, even though the practice may not be

theory of economic rent in relation to the Canadian stumpage programmes based on the investigation conducted in 1986. In that investigation the department had considered but rejected the application of this theory to the facts found. At the time of initiation of the investigation in October 1991, the Department had reasonably decided that it would be inappropriate, in the absence of additional analysis and information, to decline to self-initiate the countervailing duty investigation based upon economic theory alone. In other words, whether the theory of economic rent was at all applicable to, or had any validity in, the softwood lumber market was a question appropriately addressed during the course of an investigation, rather than addressed a priori during the initiation stage. Thus, while the extensive evidence before the Department of Commerce at initiation had suggested that the facts of the Canadian timber practices did not comport with the theory of economic rent, the Department had stood prepared to investigate this matter.

2.3.4 Measures relating to the export of logs

185. In support of its claim that the United States had acted inconsistently with the requirement of Article 2:1 of the Agreement that there be sufficient evidence of the existence of a subsidy, **Canada** also referred to the steps taken by the Department of Commerce with respect to the inclusion in the scope of the countervailing duty investigation on imports of softwood lumber from Canada of certain measures applied by Canadian authorities relating to exports of logs. At the time of the initiation of the countervailing duty investigation, the Department of Commerce had made the following statement regarding the available evidence on these measures:

> "… the Department requires evidence demonstrating that the restrictions had measurable downward effect

187. **Canada** also argued in this context that the measures applied in Canada relating to exports of logs were not subsidies within the meaning of the

conclusion that measures affecting the exports of logs could affect the quantity or price of lumber exported to the United States.

190. The **United States** argued that the inclusion of the measures relating to exports of logs in the countervailing duty investigation was consistent with the obligations of the United States under Article 2:1 of the Agreement. In the Initiation Memorandum the Department of Commerce had discussed Canada's export restrictions on logs but did not initiate an investigation into this programme. The Department had noted that there was clear evidence that such restrictions operated in Canada.

192. The **United States** argued that, on its face, the decision to investigate log export restrictions was fully consistent with Article 2:1 of the Agreement. On 23 October 1991, the Department of Commerce had properly initiated a countervailing duty investigation on imports of softwood lumber from Canada. In the Notice of Initiation of the investigation, the Department had identified Canadian federal and provincial log export restrictions as potential subsidies but had stated that it had insufficient evidence to initiate an investigation of those restrictions. The Department had also stated that, if it received additional information showing the extent to which the restrictions artificially lowered the domestic price of logs, it would consider investigating the export restrictions. On 23 December 1991, based on the submission of new information, the Department had determined to include log export restrictions in its investigation. Accordingly, the Department had begun analysing the export restrictions in its ongoing investigation of subsidies provided to imports of softwood lumber from Canada. Moreover, at the same time as it had included the export restrictions in its investigation, the Department had decided to extend the investigatory period to accommodate any additional information and/or documentation that might be required by inclusion of the export restrictions in the investigation.

193. The **United States** considered that, by taking the formal step to include an additional potential subsidy practice in an ongoing countervailing duty investigation, the Department of Commerce had gone beyond what the Agreement required in terms of providing notice to Canada. In particular, the decision to delay commencement of the export restriction portion of its inquiry demonstrated the importance the United States attached to the need to have sufficient evidence to investigate each and every programme. Article 2:1 of the Agreement only required sufficient evidence of the existence of a subsidy, not each and every subsidy programme. Therefore, the Department's action in this case had exceeded the "sufficient evidence" standard of Article 2:1. Moreover, the provisions of the Agreement throughout Part I were oriented toward the investigation of whether subsidized imports were causing material injury to a domestic industry, not the number of individual subsidy programmes or whether such programmes had certain effects. This iss

195. In response to Canada's argument that the Department of Commerce had improperly included the log export restrictions in the investigation because the Department had not possessed sufficient evidence as to these potential subsidies at the time of the initiation of the overall investigation, the **United States** argued that it was unclear on what legal basis in the Agreement Canada was suggesting that investigating authorities should ignore additional subsidy programmes discovered during the course of an investigation. The **United States** also noted that Canada had not challenged the sufficiency of the evidence before the Department of Commerce at the time it actually included the export restrictions in its investigation. Thus, the only issue presented was whether the Agreement permitted the inclusion of additional subsidy programmes in an investigation once properly commenced. Not only did the Agreement permit investigation of multiple subsidy programmes in a single investigation (even when the existence of some programmes might become apparent only after inquiry) but in fact was oriented toward such investigation.

196. In response to the argument of the United States that Canada had not identified a specific requirement of

199. The United States consider
history of the Agreement and
could not lawfully have i
restrictions were not
the logical r
very function of ... determination as to whether
or practice di... the meaning of the Agreement. The
determinati... on this issue would require gathering and evaluating
facts and ... economic issues. This process by its nature must take
place d... ot be addressed prior to initiation. The initiation standard
in Arti... determine whether an investigation should go forward. By
contr... governed the actual collection of information and analysis. Canada
trea... tandard of Article 2:1 as though it were the "positive evidence"
sta... on to initiate an investigation as though it were a final determination,
c... basis of standards applicable only to a final determination. Second,
t... ement or in the General Agreement for Canada's argument that export
... vernment. Neither the General Agreement nor the Agreement established
... ment or in the General Agreement for its argument that there was an express
... ibution" limitation on the definition of a subsidy. Finally, although neither
... eneral Agreement provided a universally accepted definition of the term
... ng of the GATT texts demonstrated that harder measures, such as export
... tute a "subsidy" within the meaning of Articles VI or XVI of the General
... ted by the Agreement. Just as the doctrine of ejusdem generis applied as an
... on, so this doctrine was equally

as

the type of minimum price scheme which had been the subject of the Report of the Group of Experts. Second, the Report did not establish a financial contribution or cost to government criterion as a necessary condition for the existence of a subsidy. To the contrary, the Report had expressly recognized that a subsidy did not require a financial contribution as long as a benefit was provided, if the benefit was provided by the government. For example, in discussing the question of levy/subsidy schemes, the Group had recognized that such schemes were not countervailable if purely voluntary, but were covered by Article XVI of the General Agreement when they were "dependent for their enforcement on some form of government action" even though no financial contribution would be necessary in that case.[95] Similarly, the paragraph of the report following that cited by Canada noted that a subsidy could be countervailed awhen a government regulation turned over to a private body the function of subsidization, even though no financial cost to the government occurred. Obviously, such schemes would not necessarily involve a government financial contribution. Notwithstanding that a financial contribution by the government was not a universal requirement to establishing the existence of a countervailable subsidy, evidence had been presented to the Department of Commerce that the log export restrictions did curtail government revenues, at least in the provinces which permitted any competition for timber and (to the extent that private logs were affected and the loss of tax revenue was considered) perhaps in all provinces. Canadian log export restrictions could be seen in two lights. First, in one sense there was a direct government revenue

the first situation considered in the Report, these latter measures were analogous to Canada's export regulations. To the extent that export regulations might have any effect on domestic prices of logs in Canada, it was not through government purchases and resales at a loss (which the Report had found to be a subsidy) but, rather, through export restrictions and/or tariffs. The Report had explicitly acknowledged that under such latter circumstances "there would be no loss to the government" and the desired effect would be achieved "without resort to a subsidy".

203. **Canada** further argued in this context that the fact that the 1960 Report had discussed import restrictions was of no moment, since Article XVI of the General Agreement applied equally to programmes affecting imports and to those affecting exports. Thus, the 1960 Report provided direct support for Canada's position that export restrictions and/or tariffs, even if they might have a domestic price effect, could not considered to be subsidies under the General Agreement. The Reports adopted in 1960 and 1961 had formed the staring point for the discussions in the Uruguay Round on the issue of the definition of a subsidy. In those discussions, the issue of export restrictions had been raised by the United States but had been soundly rejected by all other participants in the negotiations. As a result, this issue had found no expression in the final Uruguay Round text on subsidies and countervailing measures.

204. In response to the argument of the United States that, even if one assumed that a financial contribution by a government was a necessary condition of the existence

Canada's assertion that Article VI did not extend to practices which might be covered by other provisions of the General Agreement was therefore incorrect. Similarly, Canada's argument that other provisions of the General Agreement restrained the application of Article VI in the manner suggested by Canada was unsupported.

206. The **United States** contested in this context the view that Article XI of the General Agreement provided expressly or implied that it was the exclusive remedy concerning all aspects of import or export restrictions or prohibitions. In conducting a countervailing duty investigation with respect to the log export restrictions the United States was not challenging these export restrictions themselves as a violation of Article XI. Rather, the purpose of the investigation was to determine whether these export restrictions constituted a subsidy practice which might warrant the imposition of countervailing duties (assuming the appropriate findings with respect to injury and causation were made). Similarly, there was no general GATT precept that coverage of a particular practice under one Article of the General Agreement somehow supplanted or pre-empted a proceeding against that practice under another, equally applicable Article. To the contrary, the General Agreement envisioned that different Articles might cover the same practice, and that a complaining party might choose to proceed against the practice under one or more of the applicable provisions of the General Agreement. Thus, a subsidy was actionable under both Article VI or Article XVI of the General Agreement and there was no requirement that a contracting party proceed against the subsidy under one Article rather than another. Indeed, the Agreement envisioned in note 3 to Article 1 that a signatory could invoke one or the other. The only instance in which the General Agreement did not permit the imposition of a countervailing duty on the ground that the same situation could be addressed by another remedy under the General Agreement was provided for in Article VI:5 of the General Agreement. This provision demonstrated that, when the drafters of the General Agreement wanted to impose a restriction on the availability of the countervailing duty remedy because the same situation was remedied by another provision of the General Agreement, they had specifically provided for such a restriction. N° such limitation appeared in the invis-à-v

only in accordance with the General Agreement and the Agreement. Footnote 38 then provided that that this stricture did not "preclude action under other relevant provisions of the General Agreement, where appropriate". This was the reverse of the spin the United States was attempting to put on this. Thus, for example, although a country might countervail a subsidy, this did not preclude its right to challenge the same subsidy on the ground that it was inconsistent with Article II of the General Agreement in nullifying or impairing a tariff concession. However, it did not mean that measures treated in other aspects of the General Agreement, such as tariffs and quantitative restrictions, could be considered subsidies under Article VI of the General Agreement. In short, the point was that the practice to be investigated under Article 2 of the Agreement had to be a subsidy in the sense in which that term was used in the General Agreement.

209. **Canada** considered that the basic structure of the General Agreement supported its position that export restrictions were not subsidies. Export regulations were not mentioned

MOU had worked as an offset to the subsidies. It was clear throughout her testimony that her description of the MOU's purpose and effect was to act as such an offset. The countervailing duty investigation, by contrast, was to determine whether the subsidized imports were materially injuring or threatening to materially injury a domestic industry. Articles 6:1, 6:2 and 6:4 of the Agreement directed investigating authorities to examine whether the subject imports were causing material injury. The testimony of the

half of 1991.[101] In addition, even when US producers were cutting back on production and lowering prices they were having an

(Table E-2) showed that the annual Canadian market share of the US domestic market had declined from 28.2 to 26.8

had found that the Canadian import penetration rate had risen from 26.2 per cent in the first quarter of 1991 to 27.1 per cent in the second quarter. Recent information gathered by the Department indicated that import penetration had continued to increase in July and August 1991, climbing to 28.6 per cent of the United States market.[112] This import penetration rate of 28.6 was the highest since 1987 (with the exception of the third quarter of 1989, which had been

spring. For example, domestic and import prices, capacity utilization, and Canadian imports had tended to experience the highest percentage increase in the second quarter.[113] To account for this apparent seasonal fluctuation, the Department of Commerce had relied upon yearly averages. Any seasonal fluctuations would average out over the course of a year. Regardless of the within-year fluctuations, the economic factors examined in the Initiation Memorandum (e.g., production, shipments, apparent consumption, capacity utilization, costs, prices and the like) showed an average annual downward trend from 1988 to 1990, and many of these trends had continued in the first half of 1991. Seasonal fluctuations could not account for these declining annual trends. Moreover, the cause of an increase in imports was r

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(ii) Price effects of the imports

234. **Canada** noted that the Department of Commerce had claimed that imports of certain softwood lumber products from Canada had "… suppressed domestic prices to a point significantly below the level they would have been had it not been in the subsidized imports."[115] However, the Department had failed to present any evidence of what the domestic price level would have been in the absence of the allegedly subsidized imports or whether any supposed difference in prices was "significant".

235. In response to Canada's argument that the Department of Commerce had presented no evidence of what the domestic price level would have been in the absence of subsidized imports or whether any supposed difference in prices was significant, the **United States** argued that the Agreement did not require a consideration of what the domestic price level would have been in the absence of the imports under investigation. The price data relied upon by the Department of Commerce were sufficient evidence of the adverse

market share. Nor had the United States explained how price suppression during the first half of 1991 could be present in the face of the reversal of all the indexes used as evidence of injury during 1988-1990.

239. The **United States** argued that the Department of Commerce had recognized that the reduction in US housing starts might have contributed to the low price increases for domestic softwood lumber. Nonetheless, this factor was just one of the many factors which could have an effect upon price increases. For example,

fungible with US-produced softwood lumber and that this substitutability was not dependent on the products being fabricated from the same species of tree.[122]

243. The **United States** argued that Canada's argument on the rise of domestic and import prices in the second quarter of 1991 was based on the erroneous assumption that price suppression could not occur if prices were increasing. However, price suppression could include instances in which prices were increasing but not as much as they would in the absence of subsidized imports. Thus, the fact that the US softwood lumber price and the Canadian imported softwood lumber price had increased more rapidly in the second quarter of 1991 than in any other quarter since 1988 did not contradict that there had been evidence of price suppression. Even in the second quarter of 1991, despite the sharp price increases, the price of imported Canadian lumber had been 8.5 per cent lower than the domestic price[123] Table E-6 in the Initiation Memorandum showed that for Douglas Fir green 2x4s the

and prices for imported softwood lumber were unchanged over the same period[125]. Moreover, the data also demonstrated that the revised domestic price index tumbled downwards from 109.47 in 1989 to 106.63 in 1990 partly as a result of the lower-priced Canadian imports. By the second quarter of 1991, the price undercutting and

and transcribing data had been reported in subsequent months, when found. But no reconciliation between the volume and value data had ever been undertaken, as this was not the purpose for which the data were reported. In summary, the two sets of data had never been designed to be used to estimate average values. The Department of Commerce had been well aware of the limitations of these data through their dealings with Canada regarding the MOU and the export charge collection system. Second, the data used by the Department of Commerce did not reflect the US market value of softwood lumber products. The value for export charge purposes related to production costs and not to final sales prices. Therefore, these data could not be used as a legitimate basis for comparison with Random Lengths price data.

250. The **United States** reiterated that the price comparisons made on page 35 of the Initiation Memorandum were valid and accurate. This conclusion followed from the incontestable fact that these price comparisons were based in large measure upon official data compiled by the Government of Canada. In particular, Table E-[illegible] of the Initiation Memorandum unambiguously demonstrated that the Department of Commerce had relied on export charge collection data (i.e. monthly volume and value data compiled by Canada) submitted directly by the Government of Canada to the Department of

Columbia to the northeast market. The Department of Commerce had also used this comparison on a product accounting for, at s8vhis

used in the consumption in this region. Thus, a comparison of SPF and SYP

(iii)

that imports had caused net income declines in the industry. The United States had misrepresented its data and had used the third quarter of 1988 (index = 109.6) and the first quarter of 1991 (index = 105.0) to show the decline in import price index. This covered the period July 1988 to April 1991 (not to June 1991 as claimed) and purposefully left out the large increase in the import price index in the second quarter of 1991 (118.6). Had the stated time period been used, the import price index would have shown an increase of 8.2 per cent in that period.

264. The **United States** argued that as admitted by Canadian witnesses in the current proceedings before the USITC, the increase in the import price index in the second quarter of 1991 had been anomalous. Moreover, all of the price comparisons used by the Department of Commerce had shown similar results.

265. The Panel asked Canada to explain the factual basis of its argument that the Department of Commerce had misrepresented the data regarding the evolution of the import price index. In response, **Canada** pointed to the following statement in the Initiation Memorandum:

> "One indication of these data was price depression resulting from Canadian imports of 4.6 per cent

269. See supra, paragraphs … for the views of the United States on the question of economic rent.

(v) Other factors allegedly injuring the domestic industry

270. **Canada** argued that Article 6:4 of the Agreement required that there be sufficient evidence that injuries caused by factors other than the allegedly subsidized imports not be attributed to the subsidized imports. In its Initiation Memorandum the Department of Commerce had described the evidence of injury to the domestic industry as including evidence of declining exports, rising costs and declining apparent consumption between 1988 and 1991. The Department had failed to demonstrate how declining exports, rising costs and declining apparent consumption could be the result of "subsidized imports" and had thereby attributed injury caused by other factors to the allegedly subsidized imports from Canada. This was particularly true for injury to the domestic industry between 1988 and 1990, when the evidence before the Department showed that imports of softwood lumber from Canada had been declining in volume and market share. The United States had not considered any causes other than imports which could have resulted in injury to the domestic industry.

271. The **United States** argued that Canada mis-stated the requirements of Article 2:1 of the Agreement. Article 2:1 required that the investigating authorities have sufficient evidence of "a causal link between the subsidized imports and the alleged injury". The Department of Commerce had had more than ample evidence

Article 6.

poorly[140] the Department had made no attempt to determine if the industry was performing any differently than could be expected in the cyclical downturn in the softwood lumber market.

276. The **United States** argued in response that Canada mischaracterized the basic tenet of injury analysis. Material injury existed if subsidized imports were a cause, albeit not the only cause, of injury. The Department of commerce had recognized that the recession had affected the condition of the US industry. One relevant question was whether the industry would be doing materially better but for the subsidized imports. This question had been appropriately addressed.

277. The **United States** pointed out in this context that the presence of large volumes of heavily subsidized Canadian lumber in this commodity market had been considered, for purposes of initiation, to demonstrate that these imports were at least a cause of injury. Evidence of price suppression and lost sales buttressed this conclusion Additional evidence had indicated that lumber prices were not even keeping pace with inflation. Moreover, strong evidence of a threat of injury had been present, a threat to which the US industry had been particularly susceptible given the then-current market conditions. The data upon which the Department of

then-current

the US lumber market and as a unified whole possessed a great deal of price setting power within that market. While cost components peculiar to individual Canadian firms might not be passed on to the market as a whole, cost components experienced by all or most Canadian producers were likely to be passed on to the market. As the Department of Commerce had determined, depressed domestic log prices had resulted from imports benefiting from cheap stumpage payments and log export restrictions. The issue was not whether ever individual Canadian exporter had the power to affect the price within the US market but rather whether all of those exporters taken as a whole had the power to influence the prices within the US market - which they did. This influence did not need to be, and, indeed almost certainly was not, intentional or the result of a collaborative effort. Rather, it resulted naturally from the fact that a sizeable portion of the market enjoyed a clear cost advantage over the result of the market. Many markets might properly be characterized as having individual price takers. This did not mean that a countervailing duty could never be imposed in these markets. If subsidized imports significantly depressed the average domestic price injury was likely to exist.

281. **Canada** argued that in the case of the Canadian stumpage system, the perspective of the individual producer was not relevant as it did not change the fact that overall lumber output or prices were not affected. Regardless of how the firm regarded the stumpage or collection of economic rent, it did not derive any economic advantage that would affect output or price, as any increased output would only reduce profits.

(vi) <u>Arguments relating to the respective rôles of the Department of Commerce and the USITC</u>

282. **Canada** argued that under the countervailing duty legislation of the United States the task of determining the existence of material injury and causality had been assigned to the USITC. The Senate Finance Committee Report on the Trade Agreements Act of 1979 described as follows the manner in which the provisions of this Act were intended to implement the requirements of the Code regarding the initiation of countervailing duty investigations:

> "Before a countervailing duty investigation is initiated, Article 2(4) of the [Subsidies] Agreement requires consideration whether both a subsidy and injury exist. The petition determination by the authority [ITA] under section 702 (c) and the determination by the ITC under section 703(a) will implement the requirement for the United States."[142]

The determination by the USITC referred to in this part of the legislative histoT1 0 0 1 198.72 369.6 0 1 .6 Tf(142)

sufficient evidence and did not specify which authorities would initiate investigations. Moreover, the issue before the Department of Commerce at the time of initiation was whether there was sufficient evidence to warrant the initiation of an investigation, not whether there was enough evidence to make an injury determination. If an investigation was initiated, the USITC subsequently rendered the actual determination of injury based on the evidence acquired during the course of its investigation.

284. **Canada** considered that the arguments of the United States did not refute its position. The Department of Commerce only had a technical requirement to ensure that a complaint contained allegations of injury. It had no rôle with respect to considering the sufficiency of the evidence of injury, a matter left to the USITC. The Agreement allowed a signatory to self-initiate an investigation subject to the authorities possessing sufficient evidence of the existence of injury. US law precluded the authority identified as responsible for self-initiation from having such information at the time of self-initiation.

2.5 **Evidence of the existence of a threat of material injury**

285. **Canada** contested that, at the time of the self-initiation of the countervailing duty investigation of imports of softwood lumber from Canada, there had been sufficient evidence within the meaning of Article 2:1 of a threat of material injury caused by imports from Canada. In the Initiation Memorandum, the Department of Commerce had given two reasons why it considered that the termination by Canada of the MOU had produced a threat of material injury. First, exports

required to pay the full 15 per cent export charge under the terms of the MOU, effectively re[illegible] the price charged to exporters in these provinces.[144]

287. The **United States** noted that the Department of Commerce had possessed evidence that production of softwood lumber in Alberta, Manitoba, Saskatchewan and Ontario "accounted for an increasingly larger share of total Canadian softwood lumber production in each of the three years from 1982 to 1989 (15.7, 16.6 and 17.4 per cent, respectively)."[145] During this same period, the "combined softwood lumber exports of these four provinces accounted for a declining share of total Canadian softwood lumber exports to the United States (14.6, 11.2 and 9.8 per cent, respectively)."[146] Based on the foregoing, the Department of Commerce had concluded that:

> "elimination of the total export tax for these provinces, and the elimination of the partial export tax in Quebec, can be expected to produce the greatest shift in trade back to the United States by provinces which did

subsidies before Canada had terminated the MOU. It had been demonstrated at the initiation of the investigation that the provinces which were still subject to the export tax had controlled a greater share of Canadian exports prior to the imposition of the MOU. It was natural to assume that their exports would grow significantly without the export tax. Second, Canada ignored the fact that the MOU had been terminated to a large extent at the behest of the Canadian industry which had hoped to again lower timber fees as had been done in the early 1980s. The **United States** noted in this context that nominal timber fees in British Columbia were lower than they had been in 1979. Moreover, Canada had refused to give official assurances that timber fees would not be reduced in the provinces which had increased the timber fees.

291. The **United States** noted that in the proceedings before this Panel Canada had not even attempted to rebut the evidence presented in the Initiation Memorandum regarding the existence of excess capacity in the Canadian softwood lumber industry. Excess capacity was a strong indicator that a contracting domestic industry was vulnerable to lower-priced import competition, especially in a price-sensitive market. Therefore, the Department

293. The **United States** considered that Canada refused to recognize that declines in capac ion indicated an ability to ship additional product to the United States and ignored the impli the elimination of the export c.2 73sr TjETBT1 0 0 136 11 496.BT1 0 0 1 293.76

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of subsidization and of injury to the domestic industry in the United States caused by the subject imports and were as such inconsistent with the requirements of Article 5:1 of the Agreement. The provisions in Article 4:6 regarding the possibility to take "expeditious actions" in case of a violation of an undertaking did not provide a legal basis for the measures taken by the United States because (1) the MOU on softwood lumber concluded between Canada and the United States on 30 December 1986 had not been an undertaking under Article 4:5 of the Agreement, and (2) even if the MOU could have been considered to be such an undertaking, the exercise by Canada of its right to terminate the MOU did not constitute a violation of an undertaking within the meaning of Article 4:6 of the Agreement.

298. In support of its view that the MOU on softwood lumber concluded between Canada and the United States was not an undertaking within the meaning of Article 4:5 of the Agreement, **Japan** presented the following arguments. First, the acceptance of an undertaking as the basis for the termination of a countervailing duty proceeding was not mandatory under the

300. **Japan** questioned whether there had been

304. In the proceedings before

lumber products" constituted an "undertaking" within the meaning of Article 4:5 of the Agreement; second, whether this "undertaking" could be considered to have been violated by Canada when it terminated the MOU in October 1991; and third, whether the measures taken by the United States on 4 October 1991 were otherwise consistent with Article 4:6 as a response to this alleged violation of an undertaking.

310. The Panel examined whether the conclusion of the MOU on trade in softwood lumber between Canada and the United States on 30 December 1986 was covered by Article 4:5(a) of the Agreement, which read in relevant part:

> "Proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties, if undertakings are accepted under which:
>
> (i) the government of the exporting country agrees to eliminate or limit the subsidy or take other measures concerning its effects ... ."

311. The Panel noted that, with respect to this question, the parties to this dispute had presented arguments based on (1) the text of the MOU, (2) various circumstances surrounding the conclusion of the MOU and the subsequent practice of the parties and (3) the treatment of the MOU under United States trade legislation. The parties had differed in respect of the importance to be attached to each of these elements. Thus, the United States had essentially argued that the MOU by its terms constituted an undertaking for purposes of Article 4:5(a) of the Agreement. Canada had contested that the text of the MOU indicated that it constituted an undertaking and had referred to other factors, such as an alleged lack of notification of the MOU to the Committee on Subsidies and Countervailing Measures and the treatment of the MOU

of

basis for the termination of the investigation, as provided for in Article 4:8 of the Agreement. Rather, the basis of the termination had been identified as the withdrawal of the petition and the determination by the Department of Commerce that termination of the investigation was in the public interest of the United States.

318. The Panel further took into consideration that in an Agreed Minute to the MOU, Canada and the United States had agreed that promptly after implementation of the MOU, both parties would notify the GATT secretariat "that a mutually satisfactory settlement has been reached in the dispute concerning the countervailing duty proceeding by the United States of America on certain softwood lumber products from Canada." In letters addressed to the Chairman of the Panel established by the Committee on Subsidies and Countervailing Measures in August 1986, Canada and the United States informed the Panel in January 1987 that a mutually satisfactory resolution of the dispute before the Panel had been reached. The Report of this Panel (SCM/83, 25 May 1987), limited to a brief summary of the provisions of the MOU, noted that a copy of the MOU was available in the secretariat for consultation by interested delegations. The Panel considered that these letters, a direct consequence of the provisions of the MOU, were relevant to the Panel's interpretation of the common understanding of the parties to the MOU with respect to its status under the Agreement. The Panel noted that the letters addressed to the Chairman of the Panel established in 1986 and the summary of the provisions of the MOU in the Panel Report consistently referred to the MOU as a mutually satisfactory settlement of the dispute before the Panel but never described the MOU as an undertaking under Article 4:5(a) of the Agreement.

319. The Panel thus concluded that until April 1992, well after the dispute settlement proceeding before this Panel had been initiated, the United States had not referred to the MOU as an undertaking under Article 4:5(a) of the Agreement in its notifications to the Committee on Subsidies and Countervailing Measures. Furthermore, the United States had not treated the MOU as such an undertaking in the Federal Register notice of 5 January 1987 of the termination of the countervailing duty investigation on imports of softwood lumber from Canada. The United States also had not treated the MOU as such an undertaking in the notices of various actions taken under Section 301 of the Trade Act of 1974 with respect to the MOU in December 1986 and January 1987. The Panel further noted that in imposing the interim measures under Section 304 of the Trade Act of 1974, the United States made no reference to the enforcement of a countervailing duty action. The Panel found that these facts were relevant as evidence of the intention of the parties to the MOU with respect to the status of the MOU under the Agreement.

320. In addition to the above-mentioned facts, the Panel considered that another relevant factor to ascertain the intention of the parties to the MOU with regard to its status under the Agreement was whether the MOU could be interpreted to constitute an alternative to ordinary countervailing duties in the same manner in which undertakings under Article 4:5 were alternatives to such countervailing duties.

321. The Panel noted in this

which were identical to those contained in Article 4:9 governing the duration and review of unilaterally imposed countervailing duties. In the case

3. Self-initiation by the United States on 31 October 1991 of a countervailing duty investigation of imports of softwood lumber from Canada

3.1 Existence of "special circumstances"

326. The Panel first examined Canada's contention that the special circumstances required by Article

issue of log export restrictions. However,

that subsidies may exist and that the domestic industry may be injured by reason of the subsidized imports". The Panel was

of Article 2:1, not to a different level of "sufficient evidence". What was required in addition to "sufficient evidence" was the existence of "special circumstances".

3.3 Evidence of Existence of a Subsidy

(i) Canadian Stumpage Pricing Practices as Subsidies

337. The Panel then turned to the question of whether there was sufficient evidence of the existence of a subsidy, as required by Article 2:1, to justify the initiation by the United States of a countervailing duty investigation on imports of softwood lumber from Canada. In examining this matter, the Panel was guided by the considerations set forth in paragraph 335. It was therefore not for the Panel to determine whether Canadian stumpage pricing practices were in fact subsidies.

338. The Panel noted that the Canadian stumpage pricing practices at issue concerned the governmental setting of a fee for the right of access to, and harvest of, standing timber. In this regard, the Panel recalled the Notice of Initiation in the Federal Register on 31 October 1991 in which the Department of Commerce had indicated the following with respect to the alleged subsidy:

> "The Department has current information indicating that discretion is exercised in the awarding of stumpage rights and the setting of stumpage prices. The exercise of discretion in the awarding of stumpage rights is an indication of specificity, and as such, is sufficient to meet the threshold for initiation. … We also have evidence that stumpage is preferentially priced. … [W]e estimate that subsidies exist, based on comparisons of administratively set stumpage prices to either

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be achieved, inter alia, by means of subsidies granted with the aim of giving an advantage to certain enterprises." Article 11:3 then went on to provide an illustrative enumeration of forms of such subsidies, all of which appeared to involve a cost to the government[155] and a benefit to certain enterprises. The Panel realized that although the examples of subsidies given in Article 11:3 contained these two elements, it was not perforce the case that these elements were required for a governmental measure to be subject to countervailing duty actions under Part I of the Agreement. The Panel did not consider it necessary to pronounce itself on the issues raised by the parties regarding the relationship between Parts I and II of the Agreement: assuming that considerations in Article 11 of Part II of the Agreement applied also to Part I of the Agreement, and assuming further that Article 11 contained a "cost to government" requirement, the Panel considered that neither of these assumptions would necessarily lead to the conclusion that the Canadian stumpage pricing practices at issue could not be determined, pursuant to investigation, to be countervailable subsidies.

343. In the Panel's view, even assuming as argued by Canada that "cost to government" (also referred to as "financial contae

were not part of the per unit production cost or variable cost of producing the logs in that the stumpage fee did not

been compared to market stumpage prices or to stumpage prices in other jurisdictions because there was no "right" price for publicly owned natural resources and that reliance by the Department of Commerce on the exercise of governmental discretion as an indicator of "specificity" was improper. As for the factual arguments, Canada had argued that much of the data relied upon by the Department of Commerce in assessing "preferentiality" was either wrong or inappropriate. In addition, the Panel recalled the United States' position that while it agreed with Canada that there was no single "right" price for stumpage, the Department of Commerce nonetheless had reasonably determined that evidence of subsidization existed when it had information that stumpage was being provided to certain users at a price which was lower than the price that would obtain under competitive market conditions.

352. The Panel considered each of these arguments, noting first that it had earlier addressed Canada's contention that stumpage pricing per se could not be a subsidy.[156]

353. As for Canada's argument that the existence of governmental discretion was not a proper measure of "specificity" in examining the question of subsidy, the Panel agreed with Canada that the mere existence of governmental discretion might not be very probative evidence of "specificity". However, to the extent that such governmental discretion was exercised so as to favour access to stumpage by certain groups of enterprises, it appeared to the Panel that this aspect of governmental discretion could potentially constitute probative evidence of "specificity". This view was of course without prejudice to the question of whether or not specificity was a requirement under Part I of the Agreement.

354. As for Canada's argument that there was no right price for publicly owned natural resources and that it was improper to compare administratively set stumpage prices to market stumpage prices or to administratively set stumpage prices in other jurisdictions, the Panel considered that in determining whether or not a subsidy existed it was not necessarily unreasonable for the Department of Commerce to attempt to make stumpage price comparisons as a measure of "preferentiality". In the view of the Panel, preferential pricing could be one of several elements relevant to examining the question of subsidy.

355. Before considering Canada's arguments regarding the use by the Department of Commerce

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be compared. But the Panel noted that the Department had made certain adjustments in its analysis to account

by the Department of Commerce was such as to disqualify the initiation action under Article 2:1 of the Agreement.

360. In the Panel's view, a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the Department of Commerce at the time of initiation, that sufficient

A more detailed description of the factual basis for the Department's conclusion on the existence of evidence on material injury and causation was contained in the Initiation Memorandum, pp.30-39. As reflected in Section 2.3 of this Report, in the proceedings before the Panel the analysis presented on pp.30-39 of the Initiation Memorandum and the statistical data referred to on these pages were the basis of the arguments of both parties to the dispute.

364. As indicated in the passage from the Notice of Initiation quoted in paragraph 363, the Department of Commerce had referred both to material injury currently experienced by the domestic industry and to a threat of material injury caused by allegedly subsidized imports from Canada. In the Initiation Memorandum the Department had first presented an analysis of data pertaining to current material injury experienced by the domestic industry as a

to find that the United States had initiated this countervailing duty investigation in the absence of sufficient evidence of the existence of material injury or threat of material injury.

3.4.1 Whether there was sufficient evidence of the existence of material injury

366. The Panel then proceeded to examine the issues raised by Canada with respect to the specific data relied upon by the Department of Commerce in its finding that there was sufficient evidence of material injury currently experienced by the domestic industry as a result of allegedly subsidized imports of softwood lumber from Canada to warrant an investigation. In so doing, the Panel applied the standard set forth in paragraph 335. Accordingly, the Panel considered whether, based on the data presented by the Department of Commerce, a reasonable, unprejudiced person could have concluded that sufficient grounds existed to warrant an investigation of whether the subject imports from Canada were causing material injury to the domestic softwood lumber industry

half of 1990), it would have found that the Canadian market share was static at 26.7 per cent. Alternatively, had the Department examined the industry indicators over the same time period as the increased import penetration (second quarter of 1991-first quarter of 1991), it would have found that the industry indicators showed large increases during that period. Second, the Department of Commerce had ignored that, as demonstrated by data in Table E-2, during the period 1988-1990, the volume of the imports from Canada had been decreasing consistently both in absolute and in relative terms. Third, the increase in imports from the first to the second quarter in 1991 was due to seasonal fluctuations and therefore insignificant.

370. The Panel noted with respect to Canada's argument on the use of differing time frames that Canada had specifically stated that the increase

372. The Panel observed in this latter respect that under Article 6:2 of the Agreement a consideration of the significance of the increase of the volume was a mandatory factor in an investigation of whether material injury was caused by allegedly subsidized imports; however,

in its examination of the price effects of the imports from Canada: (1) a comparison of an index of prices of domestic softwood lumber with an all commodity producer price index; (2) a comparison of prices of imported softwood lumber with prices of domestic softwood lumber over the period 1988-1990; (3) a comparison of the Random Lengths composite framing lumber price in the period 1987-1990 with what were alleged to be "average Canadian f.o.b. export prices" to the United States over the same time frame, and (4) a comparison of Random Lengths prices of Douglas Fir (green) 2x4s, from both Portland and Vancouver.[164]

377. With regard to the first of th

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fact based on the period June 1988-April 1991. Had the Department used the period June 1988 -June 1991, it would have found an increase of the import price index of 8.2 per cent.

380. With regard to the issue raised

constructed an artificial export price for purposes of comparison with the Random Lengths composite framing lumber price. However, the Panel did not consider that it could be concluded from the document provided by the United States that the prices derived from the export notices

Panel noted that Canada had only referred to the fact that the Department of Commerce had explicitly stated that such evidence was difficult to identify clearly and that it had obtained "limited data" on this issue. The Panel found that this statement alone could not be a basis for the Panel to conclude that the evidence before the Department on this issue was insufficient.

(iv) Injury caused by the allegedly subsidized imports from Canada "through the effects of the subsidy"

389. The Panel noted that Canada had argued that the Department of Commerce had not provided any evidence of how the alleged subsidies enabled the subsidized imports to cause material injury to the domestic softwood lumber industry in the United States. Canada had pointed out that the level of fees charged for the right of access to a natural resource could not cause any countervailable market distortion.

390. The Panel recalled its view expressed previously that the question of the applicability of the theory of economic rent to the specific facts of the Canadian stumpage pricing practices was an empirical question which could not be decided in the abstract.[169] Therefore, even if one assumed that Article 6:4 of the Agreement contemplated the type of analysis suggested by Canada and that such an analysis was required at the initiation stage of an investigation, Canada's argument on the nature of the stumpage fees as reflective of the collection of economic rent could not be a basis to find that the Department of Commerce did not have sufficient evidence of causation to warrant the initiation of an investigation.

(v) Other factors allegedly injuring the domestic industry

391. Regarding the issue of the causal relationship between the alleged injury and the subject imports, the Panel noted that Canada had in particular argued that the Department of Commerce had failed to give any consideration to the effects on the domestic softwood lumber industry of factors such as the cyclical downturn in the industry, the general economic recession and exchange rate developments, thereby acting inconsistently with the requirement of the second sentence in Article 6:4 of the Agreement.

392. The Panel found that, as a matter of fact, it was correct that the Initiation Memorandum nowhere referred to the factors mentioned by Canada. However, while an express consideration of these factors would in the circumstances have been appropriate, it was not clear to the Panel that this lack of express consideration of possible alternative causes of material injury at the time of the initiation of an investigation warranted a conclusion that the Department of Commerce had acted inconsistently with its obligations under Article 2:1 of the Agreement. For purposes of a final injury determination, Article 6:4 did not require that imports under investigation be a more important cause of injury than other factors. Rather, injury caused by such other factors could not be attributed to the subsidized imports under investigation. Therefore, assuming arguendo that this requirement had to be observed at the initiation stage of an investigation (a matter on which the Panel did not consider it necessary to pronounce itself), the Department's decision that there was sufficient evidence of causation would have been inconsistent with Article 2:1 only if material injury to the domestic industry was entirely explained by other factors. The Panel considered that the data before it did not warrant the conclusion that, had the Department considered this issue at the initiation stage, it would necessarily have come to that conclusion. Nonetheless, in the view of the Panel, factors such as the cyclical downturn and the economic recession continued to merit further examination during the course of the investigation.

[169] Supra, paragraph 347.

(vi) Effects of the MOU

393. The Panel noted that the major focus of the evidence relied upon by the Department of Commerce was on the volume and price effects of the subject Canadian imports of softwood lumber and on the impact of these imports on the domestic industry. As explained in the previous paragraphs, the Panel considered that, while in certain respects the data were of varying quality, the data before the Department of Commerce could have constituted a basis upon which a reasonable, unprejudiced person co

397. First, the Department had observed that without the MOU, the Government of British Columbia would have the flexibility to use stumpage prices to aid its lumber industry because stumpage prices in that province would no longer be subject to an MOU-approved pricing formula. Quebec, which had partially replaced the export tax under the MOU with higher stumpage prices, would enjoy the same flexibility in stumpage pricing.

398. Second, the Department had identified as another circumstance indicating the existence of a threat of injury to the domestic industry in the United States the fact that four of the Canadian provinces (Alberta, Manitoba, Saskatchewan and Ontario) had not enacted replacement measures under the MOU. While exports from these four provinces had been subject to the full export tax of 15 per cent, the absence of replacement measures meant that exporters from these provinces had not incurred increased costs on either domestic sales or on sales to countries other than the United States. Data before the Department indicated that in 1987, 1988 and 1989 the combined softwood lumber production of these four provinces had accounted for an increasingly larger share of total Canadian softwood lumber production (15.7, 16.6 and 17.4 per cent respectively). At the same time, the combined softwood lumber exports of these four provinces to the United States had accounted for a declining share of total Canadian softwood lumber exports to the United States (14.6, 11.2 and 9.8 per cent, respectively). Based on these data, the Department had considered that it could logically be expected that:

> "the elimination of the total export tax for these four provinces, and the elimination of the partial export tax in Quebec, can be expected to produce the greatest shift in trade back to the United States by provinces which did the least to offset any unfair cost advantage. Given that these provinces will have the greatest potential for undercutting U.S. prices,

in the Initiation Memorandum was based on speculation and did not involve evidence of events which could constitute a real threat of imminent material injury to the domestic industry in the United States. Thus, in respect of British Columbia and Quebec, the Department of Commerce had presumed that these provinces would change their legislation to reduce stumpage prices but had not provided evidence that such legislative action was a real possibility or imminent. In the view of Canada, to accept this presumption of a change in legislation as evidence of a threat of injury would amount to allowing the initiation of investigations based on the assumption that a signatory might change its laws. With regard to the Department's analysis on the consequences of the removal of the 15 per cent export tax on exports from Ontario, Manitoba, Saskatchewan and Alberta, Canada considered that the Department had not provided evidence that there would be a significant increase in exports, an increase in the share of the United States market, or price undercutting in the United States market by exports from these provinces. In addition, exports from these four provinces accounted for only 8.3 per cent (by value) of Canadian softwood lumber production to the United States which suggested that any possible threat of material injury was minimal. Finally, Canada had contested that the data before the Department of Commerce on excess production capacity provided evidence of the existence of a threat of

actions in the case of possible future subsidies. The Panel also noted in this respect that Canada had argued that its Government had given informal assurances to the United States in October 1991 that the replacement measures in British Columbia and Quebec would continue.

405. The Panel then turned its attention to the second element relied upon by the Department of Commerce in finding that

therefore considered that the reliance by the Department on the data before it with respect to excess production capacity as an element of evidence of a threat of material injury had not amounted to mere speculation.

409. The Panel noted in this connection that Canada had argued that any increase in capacity utilization would result in only a very limited increase in the market share of Canadian imports in the United States. It appeared to the Panel that Canada's argument did not accurately reflect the manner in which the Department of Commerce had relied on its data on the existence of excess capacity utilization in the Canadian industry. Canada had calculated that there would be an increase in Canadian market share in the United States of, at maximum, 1 per cent, based on full capacity utilization in Alberta, Ontario, Saskatchewan and Manitoba. However, the text of the Initiation Memorandum indicated that the
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