

SECTION F - PROCEDURAL ISSUES

I. THE DEPARTMENT'S PROCEDURES COMPLIED WITH ALL STATUTORY AND REGULATORY REQUIREMENTS

The countervailing duty investigation of softwood lumber from Canada was one of the “most complex ever presented” to Commerce.¹ From the filing of the petition, the Department understood that potentially thousands of interested parties would be involved, that many billions of dollars of trade would be covered and that many complex legal and factual issues would be contested. Given this understanding, in order to meet the statutorily-imposed deadline to complete the investigation, the Department assigned almost forty individuals to work on the investigation.

As the courts have recognized, the statutory and regulatory procedures under which AD and CVD investigations must be conducted provide all the process to which the interested parties are due.² The Department followed all of these procedures in the investigation, and even exceeded many of them, thereby providing all of the parties procedural safeguards in excess of those to which they were entitled under law.³

¹ See Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber from Canada, 67 Fed. Reg. 15539 (April 2, 2002) and accompanying Issues and Decision Memorandum, at Comment 50 (addressing arguments concerning the scope of both the antidumping and countervailing duty investigations).

² See Gulf States Tube Division of Quanax Corp. v. United States, 981 F. Supp. 630, 652 (CIT 1997).

³ Pursuant to Article 1904(3) of NAFTA, this Panel shall apply the general legal principles that a U.S. court would apply in reviewing the Department's countervailing duty determination. General legal principles “includes principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies.” NAFTA, Art. 1911. Nonetheless, in defining the countervailing duty law that the Panel shall apply, NAFTA Article 1904(2) does not give the Panel the jurisdiction to rule on U.S. Constitutional issues. See

At the initiation stage, Commerce carefully examined the petition to ensure that it fulfilled all of the statutory and regulatory requirements. During the investigation, Commerce went beyond the statutory and regulatory requirements and gave interested parties more than the normal (and adequate) opportunities to comment on the issues in the case. Simply determining the scope of the investigation was a daunting task, as indicated by the fact that the Department received numerous requests for exclusions and scope clarifications, covering over fifty products.⁴ In making these scope determinations, the Department not only adhered to its practice of receiving comments early in the investigation, but also set aside a special period for comment at the end of the investigation.

At several times during the investigation, the Department exercised its discretion to request information be placed on the record.⁵ When it did so, the Department ensured all interested parties their statutory opportunity to comment on that information. The Department met its statutory and regulatory requirement to verify all information it relied upon in making its determination. For those companies that requested exclusion from this investigation, the Department followed its regulations, and considered those requests to the extent practicable. Finally, it published its decision, explaining the basis for its determination, and addressing the relevant arguments raised by the interested parties. In sum, the Department complied with all

also 19 U.S.C. § 1516a(g)(4)(B). What process a party is due, therefore, must be defined by the procedures required by the statute and the Department's regulations. See Gulf States Tube Division of Quanax Corp. v. United States, 981 F.Supp. 630, 652 (Ct. Int'l Trade 1997).

⁴ The Department addresses the issues concerning scope more fully in another section of this brief.

⁵ See, e.g., P. R. 752, the Department's March 20, 2002 New Factual Information Letter, p. 1.

statutory and regulatory procedures.

All of these procedural safeguards were observed despite the fact that Commerce was operating under the additional strain of complying with the Government of Canada's request to negotiate a settlement agreement that would have suspended the investigation. These negotiations were very extensive. Over twelve meetings were held, in various cities in Canada and in Washington. Given the high level at which they were conducted, the Department was required to divert five senior level officials to them, a disruption which would have made it substantially more difficult to conduct even a normal investigation under its standard procedures. Given the extraordinary burden presented by the lumber investigation, simultaneously conducting the negotiations strained the Department's resources to the breaking point. Nevertheless, the Department succeeded in meeting and even exceeding the statutory and regulatory procedural requirements.

The GOC argues that alleged procedural glitches require the Panel to vacate the countervailing duty determination, or give the Department no deference to its statutory interpretations. As demonstrated below, this argument has no basis either in fact or law.

A. THE PROCEDURES SET FORTH IN THE STATUTE AND REGULATIONS GIVE ALL INTERESTED PARTIES AMPLE PROTECTION

The U.S. Court of Appeals for the Federal Circuit recognizes that the Department's statutory and regulatory procedures provide protections for interested parties to an antidumping or countervailing duty investigation.⁶ Indeed, the statutory and regulatory procedures provide all

⁶ See NEC Corp. v. United States, 151 F.3d 1361, 1373-74 (Fed. Cir. 1998), cert. denied, 525 U.S. 1139 (1999).

the process to which interested parties are due.⁷ Moreover, the courts recognize that the Department has the discretion to be flexible in administering its procedural requirements, and that a decision to exercise such discretion is not reviewable so long as the substantial rights of the parties are not affected.⁸ Furthermore, administrative decision makers are presumed to act with the highest degree of honesty and integrity.⁹

A review of the procedures set forth in the statute and Commerce's regulations demonstrates that interested parties receive ample procedural protections. First, when an industry alleging material injury from subsidized imports files a countervailing duty petition, Commerce must examine "the accuracy and adequacy of the evidence provided in the petition" to determine if it alleges all of the elements necessary to impose a countervailing duty before initiating the investigation.¹⁰ Commerce must also determine whether the petition has the requisite industry support.¹¹ Upon receipt of such petition, the Department must notify the government of the exporting country.¹² Once Commerce initiates an investigation, it must publish a notice of that initiation in the Federal Register, and provide a public version of the

⁷ See Gulf States Tube Division of Quanax Corp. v. United States, 981 F.Supp. 630, 652 (Ct. Int'l Trade 1997) (holding "parties simply have a right to the procedures set forth in the antidumping statute or in the agency regulations implementing that statute.").

⁸ See, e.g., NEC, 151 F.3d at 1373; Nippon Steel Corp. v. United States, 118 F.Supp.2d 1366, 1376-77 (Ct. Int'l Trade 2000); Taiyuan Heavy Machinery Import & Export Corp. v. United States, 23 C.I.T. 701, 703-04 (1999).

⁹ Withrow v. Larkin, 421 U.S. 35, 47 (1974); NEC, 151 F.3d at 1373.

¹⁰ 19 U.S.C. § 1671a(c)(1)(A)(i); 19 C.F.R. § 351.203(b)(1).

¹¹ 19 U.S.C. §§ 1671a(c)(1)(A)(ii), 1671a(c)(4); 19 C.F.R. § 351.203(e).

¹² 19 U.S.C. § 1671a(b)(4)(A)(i).

petition to all known exporters of the subject merchandise.¹³ This ensures that the Department does not initiate an investigation in an arbitrary fashion, and that all parties potentially adversely affected by the investigation are given notice of the investigation.

After Commerce initiates an investigation, the statute requires that the preliminary determination and final determination be based on “information presented to or obtained by” the Department.¹⁴ This requires the Department to solicit much of the information it needs through the distribution of questionnaires to the respondents.¹⁵ All interested parties have the ability to submit factual information “to rebut, clarify, or correct factual information submitted by any other interested party.”¹⁶ If the Department finds a submission to be deficient, the Department must inform the party making the submission “of the nature of the deficiency,” and “provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations”¹⁷ Moreover, the Department cannot decline to consider factual information submitted, so long as certain requirements are met.¹⁸ Commerce must verify information it relies upon in a countervailing duty investigation.¹⁹ Prior to issuing the final determination, Commerce must issue a report on the “methods, procedures,

¹³ 19 C.F.R. § 351.203(c).

¹⁴ 19 U.S.C. § 1516a(b)(2).

¹⁵ See 19 C.F.R. § 351.301(a).

¹⁶ 19 C.F.R. § 351.301(c)(1).

¹⁷ 19 U.S.C. § 1677m(d).

¹⁸ 19 U.S.C. § 1677m(e).

¹⁹ 19 U.S.C. § 1677m(i)(1); 19 C.F.R. § 351.307(b)(1)(i).

and results of a verification.”²⁰ Pursuant to the statute, all interested parties have a final opportunity to comment on the information obtained by the Department.²¹ These requirements ensure that the Department’s determination is based on facts contained in the administrative record, made available to interested parties, and that the Department finds to be sufficiently reliable.

Pursuant to 19 U.S.C. § 1671b(b), Commerce must issue its preliminary determination within sixty-five days of initiating the investigation, unless the time period has been extended under 19 U.S.C. § 1671b(c). Fifty days after the publication of the preliminary determination, interested parties have the opportunity to file case briefs with the Department, making written arguments that the Department must consider.²² Five days after the deadline for filing case briefs, interested parties may file rebuttal briefs, addressing arguments made by other interested parties in their case briefs.²³ If an interested party requests a hearing, then the statute and regulations require Commerce to hold a hearing, usually scheduled two days after the filing of the rebuttal briefs.²⁴ These requirements ensure that interested parties receive an opportunity to be heard on the issues involved in the investigation.

The statute requires the Department to publish a notice supporting its final determination

²⁰ 19 C.F.R. § 351.307(c).

²¹ 19 U.S.C. § 1677m(g).

²² 19 C.F.R. §§ 351.309(b)(1), 351.309(c)(i).

²³ 19 C.F.R. § 351.309(d)(i).

²⁴ 19 U.S.C. § 1677c(a)(1); 19 C.F.R. § 351.310(d)(1).

in the Federal Register.²⁵ This notice must provide “an explanation of the basis for its determination that addresses relevant arguments . . . concerning the establishments of . . . a countervailable subsidy”²⁶ This ensures that the Department does not make a decision in an arbitrary or capricious fashion, and considers the arguments interested parties raise.

In total, the procedural requirements of the statute and regulations are designed to inform interested parties of the progress of an investigation, afford interested parties sufficient notice of alternatives being considered by the Department, give interested parties the opportunity to comment on the issues involved in the investigation, and ensure that Commerce considers the parties’ legal arguments in making its final determination. From the outset of this investigation, Commerce recognized that an extraordinarily large number of interested parties would participate, contesting an extraordinarily large number of issues. Nonetheless, Commerce conducted this investigation consistently with the procedures set forth in the statute and the Department’s regulations, allowing all of the parties the opportunity to comment on the issues raised, and enabling the Department to complete the investigation within the statutorily set time limit. By following these procedures, Commerce ensured that all parties had the process which was due to them.

B. THE DEPARTMENT’S DETERMINATION IS ENTITLED TO CHEVRON DEFERENCE

This Panel must apply the standard of review applicable in a U.S. court reviewing a countervailing duty determination.²⁷ This requires the Panel to give the Department’s statutory

²⁵ 19 U.S.C. § 1677f(i)(1).

²⁶ 19 U.S.C. § 1677f(i)(3).

²⁷ NAFTA, Art. 1904(3), Annex 1911; 19 U.S.C. § 1516a(b)(1)(B).

interpretations deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).²⁸

The GOC manufactures an argument, based on alleged procedural glitches, that the Department's determination must be vacated or given no deference. Through this argument, the GOC invites the Panel to engage in a *de novo* review of the Department's determination, citing United States v. Mead, 533 U.S. 218 (2001) as its authority. The GOC's argument lacks any legal basis.

In Mead, the Supreme Court explained that an agency's determination reached through a "*relatively formal administrative procedure*" tending to foster the fairness and deliberation has the force of law, and is therefore entitled to Chevron deference.²⁹ The Court of Appeals for the Federal Circuit decided that Commerce's antidumping and countervailing proceedings satisfy the requirements of Mead, so that they are entitled to full Chevron deference because they may "be fairly characterized as 'relatively formal administrative procedures' that adjudicate parties' rights."³⁰ Specifically, in finding Commerce's determinations to result from "relatively formal administrative procedures," the court recognized that Congress delegated to Commerce the authority to make antidumping and countervailing duty determinations, and publish those determinations in the Federal Register.³¹ Congress requires Commerce's determinations to be

²⁸ See Pesquera Mares Australes Ltda v. United States, 266 F.3d 1372, 1381-82 (Fed. Cir. 2001).

²⁹ 533 U.S. at 230 (emphasis added).

³⁰ Pesquera Mares Australes Ltda v. United States, 266 F.3d 1372, 1381 (Fed. Cir. 2001) (quoting Mead, 533 U.S. at 230).

³¹ See id.

reviewed based on the “substantial evidence” standard, and evidence contained in the administrative record.³² Additionally, Commerce, the CIT and the Federal Circuit all consider the legal interpretations announced in Commerce’s antidumping and countervailing duty determinations to be precedential.³³ Moreover, Commerce’s decision are binding without the need for judicial enforcement.³⁴ The Federal Circuit concluded that Commerce’s statutory interpretations “are entitled to judicial deference under Chevron.”³⁵

Second, as stated above, the Department’s decision to exercise its discretion to be flexible with its procedural requirements is not reviewable, unless it affects a party’s substantial rights.³⁶ In this regard, the complaining party must show substantial prejudice from Commerce’s exercise of discretion.³⁷

In this instance, Commerce observed all procedural requirements of the statute and regulations. Moreover, the GOC has failed to allege any prejudice as a result of Commerce’s exercise of discretion. Therefore, contrary to the GOC’s argument, there is no legal basis to vacate Commerce’s determination, or refuse to grant the Department Chevron deference.

We address below all of the alleged deficiencies in the Department’s procedures which the GOC claims, collectively or individually, deprives the Department’s Final Determination of

³² Id. (citing 19 U.S.C. §§ 1516a(b)(1)(B)(i), 1516a(b)(2)(A)).

³³ Id. at 1381-82.

³⁴ Id. at 1382.

³⁵ Id.

³⁶ Taiyuan, 23 C.I.T. at 703-04.

³⁷ Kemira Fibres Oy v. United States, 61 F.3d 866, 871 (Fed. Cir. 1995).

the deference it is due. We show, in all cases, and certainly collectively, that the GOC's claim is baseless.

C. THE PETITION DISCLOSED THE IDENTITY OF THE PETITIONERS

In accordance with 19 C.F.R. § 351.202(b), the Department ensured that the identity of the petitioners was disclosed, and that the petitioners were the appropriate interested parties permitted to file a petition. All petitions filed with the Department must contain the names, addresses and telephone numbers of the petitioners, and any persons the petitioners represent.³⁸ The regulations impose this requirement to ensure that the petition is filed by an interested party as permitted by 19 U.S.C. §§ 1671a(b)(1). Specifically, the statute allows unions and business associations to file a petition.³⁹

In this case, the petition and the cover letter accompanying the petition identify the petitioners as the Coalition for Fair Lumber Imports Executive Committee, the United Brotherhood of Carpenters and Joiners of America, and the Paper, Allied-Industrial, Chemical and Energy Workers International Union.⁴⁰ Exhibit IB-1 of the petition discloses the addresses

³⁸ 19 C.F.R. § 351.202(b)(1).

³⁹ Pursuant to 19 U.S.C. § 1671a(b)(1), interested parties as defined by 19 U.S.C. § 1677(9) (C), (D), (E), (F), and (G) may file a countervailing duty petition. Those categories include:

(D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,

(E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States

19 U.S.C. § 1677(9).

⁴⁰ P. R. 1, Petition, pp. 1-2, Vol IA, p. I-1.

and telephone numbers of the Executive Committee itself, all of the members of the Executive Committee, as well as the two labor unions.⁴¹ This information allowed Commerce to conclude that the petition had been filed by an association of lumber producers and two labor unions involved in the manufacture, production or wholesale of lumber. Commerce, therefore, ensured that the petition met the statutory and regulatory requirements.

The GOC argues that the Department accepted a petition that ignored the statutory and regulatory disclosure requirements, thereby demonstrating that the Department had prejudged the issue of whether the petitioners were indeed interested parties under the statute. As demonstrated above, the record contradicts the GOC's argument.⁴² The Department fulfilled its statutory and regulatory obligation to ensure that the petition contained all required components. Indeed, the names and addresses of the petitioners were public data, available for the GOC to examine.

D. COMMERCE FOLLOWED THE STATUTORY AND REGULATORY PROCEDURAL REQUIREMENTS CONCERNING THE SCOPE ISSUES, AND EVEN GAVE ALL INTERESTED PARTIES MORE OPPORTUNITY TO COMMENT THAN REQUIRED BY LAW

During the course of this investigation, Commerce decided that the scope issues were important enough to be given special treatment and consideration. Commerce, therefore, exercised its discretion to be flexible with its administrative procedures and created a special comment and rebuttal period for the issues concerning scope and class or kind. This special comment period benefitted all parties by ensuring that Commerce would pay particular attention

⁴¹ P. R. 1, Petition, Exhibit IB-1.

⁴² The Department addresses the GOC's argument that the petitioners did not qualify as interested parties in another section of this brief.

to these issues. Commerce, therefore, not only followed the procedures it set forth in the Preamble to its regulations, but gave the parties additional time and opportunities to comment on these scope issues.

In the Preamble to the Department's Regulations, Commerce announced that it would set aside a period early in the investigation for issues regarding product coverage.⁴³ Consistent with this practice, Commerce specifically requested all interested parties to submit comments regarding the scope of the investigation within twenty days after the publication of the Notice of Initiation.⁴⁴ In its August 17, 2001 Preliminary Determination, Commerce noted the large number of comments it had received on scope issues:

We have received numerous comments, including scope clarification requests, scope exclusion requests, and requests for determinations of separate classes or kinds. The requests covered approximately 50 products, ranging from species, like Western and Douglas fir, to fencing products, bed frame components, pallet stock, and joinery and carpentry products.⁴⁵

Commerce made a preliminary determination that some products were outside of the scope coverage.⁴⁶

However, Commerce was not able to digest all of the comments and come to a full preliminary determination of the scope issues at that time:

With regard to all other products, we have determined that, because of the large number of requests, the even larger number of products, and, in some instances,

⁴³ See Antidumping Duties; Countervailing Duties: Final Rule, 62 Fed. Reg. 27296, 27323 (May 19, 1997).

⁴⁴ Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 21332, 21332 (April 30, 2001).

⁴⁵ 66 Fed. Reg. at 43187.

⁴⁶ Id. at 43188.

deficiencies in the information currently on the record, it is not practicable for the Department to complete the analysis of each request by the issuance of the notice of preliminary determination. Therefore, we have requested additional information.⁴⁷

Commerce therefore created a special comment procedure to address scope issues. Rather than leaving this issue to be addressed in the parties' case briefs, along with all of the other issues contested in this investigation, Commerce issued a separate preliminary determination on the remaining scope issues on March 12, 2002, and requested that the parties submit briefs specifically on the scope issues by March 15, 2002. Any rebuttal briefs were due to the Department by noon on March 18, 2002. The Department held a hearing on the scope issues on March 19, 2002.

Commerce has the discretion under its regulations to "request written argument *on any issue* from any person or U.S. Government agency *at any time during a proceeding*."⁴⁸

Moreover, under the statutory and regulatory procedures, Commerce gives parties to the investigation sufficient notice of an issue if the parties are apprised of the alternatives Commerce is considering for the final determination:

An agency's reconsideration of its determination after issuance of preliminary results does not necessarily mean that the parties affected by the determination have been denied due process of law. A party subject to or affected by the review does not have a due process right to notice and comment on the agency's change in position if, throughout the agency's investigation, the party was reasonably on notice that the agency was considering the alternative ultimately used in the final determination.

Peer Bearing Co. v. United States, 182 F.Supp.2d 1285, 1301-02 (Ct. Int'l Trade 2001).

⁴⁷ 66 Fed. Reg. at 43,188 (citation omitted).

⁴⁸ 19 C.F.R. § 351.309(b)(2) (emphasis added).

In this instance, contrary to the impression the GOC made in its Joint Brief, interested parties were not limited to commenting on scope issues solely from March 12, 2002. Rather, consistently with its practice, Commerce requested comments on the scope early in the investigation. All parties continued to have ample opportunity to submit their comments on the scope issues throughout the pendency of the investigation. The Department even invited additional comments on the scope issues in its August 17th Preliminary Determination.

With the submission of these comments, all interested parties had notice of the alternatives Commerce was considering for the final determination. That is, the record contained requests by some parties to consider certain products as being outside of the scope of the investigation. The record also contained the petitioners' comments that a number of these requests be denied. Therefore, because these alternatives were on the record, Commerce was not required to reach a full preliminary determination on all scope issues. Rather, because the parties had notice of the alternatives being considered, and could address these alternatives in their case briefs, Commerce provided the parties with sufficient notice of these issues under the statutory and regulatory regime.

Nonetheless, Commerce decided to exercise its discretion pursuant to 19 C.F.R. § 351.309(b)(2), and requested written arguments from all parties specifically addressing the scope issues. Commerce was under no statutory or regulatory duty to do so. However, by creating this special procedure through which to address solely the scope issues, the Department ensured that these issues would receive special consideration. Commerce, therefore, not only acted in accordance with the statutory and regulatory procedural requirements, but provided all interested parties with an additional opportunity to comment on the scope issues.

E. COMMERCE PROPERLY EXERCISED ITS DISCRETION TO REQUEST THAT INFORMATION RELEVANT TO THE INVESTIGATION BE PLACED ON THE RECORD, AND GAVE INTERESTED PARTIES SUFFICIENT OPPORTUNITY TO COMMENT

The Department exercised its regulatory discretion and requested certain information be placed on the record, even after the deadline for interested parties to submit new factual information had passed. In doing so, Commerce specifically gave all interested parties their statutorily required opportunity to comment. Commerce's reasonable exercise of discretion should be affirmed by this Panel.⁴⁹

Pursuant to 19 C.F.R. §351.301(b)(1), the deadline for interested parties to submit factual information in an investigation is "seven days before the date on which the verification of any person is scheduled to commence" In this investigation, the Department set January 14, 2002 as the day on which it would commence verification of the GOO's submissions. Therefore, this established January 7, 2002 as the deadline for the submission of new factual information by interested parties.

The deadlines established for the submission of factual information is for the benefit of the Department. The Court of International trade has recognized, "The Commerce Department clearly cannot complete its work unless it is able at some point to 'freeze' the record and make calculations and findings based on that fixed and certain body of information."⁵⁰ Nonetheless, Commerce's regulations grant the Department the discretion to "request any person to submit

⁴⁹ The GOC strings together a list of alleged procedural glitches, arguing that the Department managed the record in a manner that favored the petitioners. Interestingly, the petitioners argues that the Department "arbitrarily sought information helpful to Respondents while resisting that helpful to Petitioner." Petitioners Brief, at 66.

⁵⁰ Bowe-Passat v. United States, 17 C.I.T. 335, 339 (1993).

factual information *at any time during a proceeding.*⁵¹ Therefore, should information relevant to the proceeding come to the Department's attention after the regulatory deadline for the interested parties to submit of factual information, the Department may, by regulation, exercise its discretion, and place that information on the administrative record. Commerce's discretion to accept such information after the deadline is tempered only by the statutory requirement that the interested parties to the proceeding be given an opportunity to comment on that information within a reasonable time frame set by the Department.⁵²

1. The Department Acted in Accordance with the Statute and Gave All Interested Parties an Opportunity to Comment on Factual Information the Department Requested Be Placed on the Record

On December 20, 2001, the Maine Forest Products Council complied with a request by the Department, and submitted information relevant to the benchmark for Quebec. This letter, however, was not filed in accordance with the Department's regulations, and not initially placed on the administrative record.

On January 28, 2002, the petitioners filed a three volume submission addressing which conversion factor the Department should use in converting metric measurements (as used by Canada) to feet and inches (as used by the United States), and the benchmark issue.⁵³ By the petitioners' admission, this submission contained new factual information that was not submitted

⁵¹ 19 C.F.R. § 351.301(c)(2) (emphasis added).

⁵² 19 U.S.C. § 1677m(g). To the extent that the GOC bases its argument on information not contained in the administrative record, the Department has addressed those arguments in a motion to strike filed simultaneously with this brief.

⁵³ P. R. 692, Petitioners' January 28, 2002 Submission.

by the January 7th deadline.⁵⁴ On February 14, 2002, the petitioners filed a legal memorandum with the Department, outlining their legal arguments for the Department.⁵⁵ This submission relied on information contained in the January 28, 2002 submission.

The Department examined the information contained in the December 20, 2001 and January 28, 2002 submissions, and determined that they contained information “important to certain issues in the proceeding, and relate[d] to an ongoing exchange of expert advice on a technical matter.”⁵⁶ Therefore, in a February 20, 2002 letter, the Department decided to exercise its discretion, and request that this information be placed on the administrative record. In placing this information on the administrative record, Commerce also gave all interested parties an opportunity to comment on the information:

To ensure a complete record, we are asking parties who wish to submit information that clarifies, corrects or rebuts this new factual information to do so within 10 days, *i.e.*, on or before March 4, 2002. See section 351.301(c). Alternatively, parties will be allowed to comment on the new factual information in their rebuttal briefs.

P. R. 752, the Department’s March 20, 2002 New Factual Information Letter, p. 2.

In sum, Commerce reasonably exercised its regulatory discretion to place information on the administrative record after the time period for interested parties to submit new factual information had passed. In doing so, Commerce set aside a time period to allow all interested parties an opportunity to comment on the information placed on the record through the February 20, 2002 letter, and even submit rebuttal information. Commerce, therefore, honored the

⁵⁴ P. R. 692, Petitioners’ January 28, 2002 Submission, pp. 1-3.

⁵⁵ P. R. 725, Petitioners’ February 14, 2002 Submission.

⁵⁶ P. R. 752, the Department’s March 20, 2002 New Factual Information Letter, p. 1.

statutory requirement that interested parties be given an opportunity to comment on the factual information submitted during an investigation. Accordingly, Commerce's decision to place this information on the administrative record was fully in accordance with the statutory and regulatory requirements.

The GOC argues that Commerce managed the record in an uneven fashion, accepting information submitted late by the petitioners, but rejecting information offered by the respondents during verification. First, as demonstrated below, verification is meant to be a "spot-check" of the respondents' submissions, and generally not an opportunity to present new information. Moreover, the issues addressed by the December 20, 2001 letter and the petitioners' January 28, 2002 submission were not subject to verification. These submissions addressed the conversion factor and the benchmark issues. It was not information in the possession and control of the respondents which required a "spot-check." The Department, therefore, acted fully in accordance with the statutory and regulatory procedures.

2. Commerce Properly Accepted Arguments in the Petitioners' Case Brief Proposing a New Methodology for Calculating Timber Prices from Western Washington When the Petitioners Based Their Methodology on Information Already Contained on the Administrative Record

On February 22, 2002, the petitioners argued in their case brief that the Department should engage in a "regression analysis" of data submitted by the Washington Department of Natural Resources in order to determine species-specific prices for timber from western Washington.⁵⁷ The Department used Washington as the benchmark for British Columbia. The

⁵⁷ P. R. 767, Petitioners' Case Brief, Appendix A.

petitioners set forth the actual regression analysis in Appendix A to their case brief.⁵⁸ The Department accepted the petitioners' case brief, and did not strike any portion of the petitioners' case brief, although the GOC requested that the Department do so. The GOC now contends that the Department should have rejected this regression analysis, arguing that it was new factual information.

Parties to an investigation are free to argue to the Department in their case brief that the Department should adopt a different methodology than that used in the Preliminary Determination. Here, the petitioners presented a "regression analysis" in Appendix A of their case brief, and used it in their arguments.⁵⁹ As the GOC acknowledges in its Joint Brief, the petitioners merely suggested to the Department "*new methodological approaches*" to data already contained in the record.⁶⁰ This regression analysis was not itself new factual information. Therefore, the deadline for the submission of new factual information simply does not apply. Moreover, by presenting this regression analysis in the case brief, the petitioners placed the respondents on notice of an alternative methodology available to Commerce. The respondents had the opportunity to comment on this alternative methodology through their rebuttal briefs. Accordingly, the Department acted consistently with the statute and regulations in accepting an argument in the petitioners' case brief to use a different methodology for calculating timber prices from western Washington based on evidence already contained in the administrative record.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ GOC Joint Brief, at K-11 (emphasis added).

3. The Department Properly Declined to Consider Factual Information Submitted Beyond the Regulatory Deadline, and Not Requested by the Department

The Department properly declined to consider new factual information the petitioners submitted in response to a memorandum from the Department that only requested comments on actions taken by Department officials in an effort to resolve conflicting information submitted by the parties. The GOC argues that the Department should have returned this submission to the petitioners, and taken it off the administrative record. The GOC, however, fails to allege any prejudice as a result of Commerce's actions.

Specifically, the Department noted that the parties placed conflicting information on the record concerning whether pulpwood was used in states such as Michigan and Minnesota to produce lumber. Therefore, on March 12, 2002, James Terpstra, the Program Manager in this investigation, made telephone calls to the Minnesota Department of Natural Resources and the Michigan Department of Natural Resources inquiring into this issue. Mr. Terpstra summarized these telephone conversations in memorandum dated March 13, 2002 and placed on the administrative record information faxed to the Department as a result of the telephone calls.⁶¹ Moreover, Mr. Terpstra provided a copy of this memorandum to the interested parties by electronic mail and facsimile on March 13, 2002.⁶² Through this memorandum, Mr. Terpstra also noted that he "asked parties to submit any comments on this information to the Department by no later than Monday, March 8, 2002 at 10:00 a.m. and to hand serve copies of any

⁶¹ P. R. 825, March 13, 2002 Pulpwood Memorandum, p. 1.

⁶² Id.

submissions on the other parties.”⁶³

On March 18, 2002, the petitioners submitted a letter which included affidavits concerning the use of pulpwood in lumber production.⁶⁴ These additional affidavits not only commented upon the information contained in the March 13, 2002 memorandum, but contained new factual information on the use of pulpwood in the production of lumber.

During a disclosure conference on April 3, 2002, the Department informed the GOC that it had disregarded the petitioners’ March 18, 2002 submission. The GOC admits this, both in an April 11, 2002 letter to the Department,⁶⁵ and in its Joint Brief submitted this Panel.⁶⁶

Pursuant to 19 C.F.R. § 351.302(d)(1), the Department will “not consider or retain in the official record of the proceeding” untimely filed factual information. The regulations require the Department to return such information to the submitted, with an explanation stating the reasons for the return.⁶⁷ That did not occur in this instance. Nonetheless, when the Department strays from its procedural requirements, the party contesting the Department’s determination must show how the Department’s actions caused it prejudice.⁶⁸

The GOC has shown no prejudice with respect to the Department’s actions concerning

⁶³ Id.

⁶⁴ P. R. 850, Petitioners’ Pulpwood Comments.

⁶⁵ P. R. 888, GOC’s April 11, 2002 Submission, p. 2.

⁶⁶ GOC Joint Brief, at K-12, n. 12.

⁶⁷ 19 C.F.R. § 351.302(d)(2).

⁶⁸ See Nippon Steel Corp., 118 F.Supp.2d at 1376-77.

the information submitted by the petitioners through their March 18, 2002 letter.⁶⁹ The Department clearly indicated that it did not consider this new information. There was no need, therefore, for the GOC, or any other respondent, to submit comments or new evidence in response to the petitioners' March 18, 2002 submission. Accordingly, the GOC has asserted no grounds to justify a reversal of the Department's determination.

4. The Canadian Parties Failed to Demonstrate Any Prejudice From Commerce's Conduct in this Investigation

As demonstrated above, the Department adhered to, and even exceeded in one instance, the statutory and regulatory procedural requirements with regard to each of the individual complaints the GOC asserts. Nonetheless, even if Commerce violated the procedural requirements of the statute or regulations, a party challenging the Department's determination must show prejudice resulted from that violation.⁷⁰ The GOC has shown none. Indeed, the GOC makes no allegation that the Department's actions to place this information on the administrative record precluded any respondent from commenting on the information or arguing that the

⁶⁹ The GOO argues that because the Department states in its Issues and Decision Memorandum, at 100, that "[t]he record . . . shows that in Minnesota the softwood timber used in the production of lumber by some producers includes sawlogs and bolts," that this necessarily shows that the Department did rely on the affidavits submitted by the petitioner on March 18, 2002. Ontario Brief, at 111, n. 256. The GOO fails to acknowledge that the March 13, 2002 memorandum indicated that the Timber Sales Program Supervisor for the Minnesota Department of Natural Resources informed the Department that one lumber producer, Potlach Corp., purchased only bolts, and two others, Rajala Timber Co. and Hadstrom Lumber Company, purchased both bolts and sawlogs. P. R. 825, March 13, 2002 Pulpwood Memorandum, p. 1. Thus, the information to which the Department referred in its Issues and Decision Memorandum came from the March 13, 2002 memorandum, not the March 18, 2002 submission which the Department disregarded.

⁷⁰ See Nippon Steel Corp., 118 F.Supp.2d at 1376-77.

information was in some way flawed.⁷¹ The respondents only argue that Commerce did not directly respond to their motions to strike this information. In this regard, the Court of International Trade has held that Commerce need not explain every instance where it deviates from its procedural norms, so long as that deviation does not substantially prejudice the parties' rights.⁷² Indeed, in that case, the court held that Commerce's decision to relax its procedural requirements is not reviewable.⁷³ In sum, the Department adhered to its statutory and regulatory procedures, gave all parties sufficient opportunity to comment on factual information placed on the record, and made its determination based solely on the information on the record. Accordingly, the Department's determination should be affirmed.

5. Commerce Properly Changed the Benchmark for Alberta and Saskatchewan from Montana Based on the Arguments of those Provinces

The Department used Montana as the benchmark for Alberta and Saskatchewan in the Preliminary Determination.⁷⁴ The Department stated that it chose states that border Canada to use a benchmarks because "the timber in Canada is comparable to that in the northern border states of the United States with respect to quality, species, terrain, availability, and

⁷¹ In one instance, the GOO complains that Department officials did not accept during verification the GOO's written argument concerning a January 7, 2002 submission by the petitioners. However, the GOO admits that this information was subsequently placed on the record when it complied with the Department's regulations and made a formal filing on January 17, 2002. See Ontario Br. at 118-19, 119 n. 276. It is hard to see what prejudice befell the GOO where it exercised its right to respond to the January 7, 2002 submission, and placed its arguments on the record.

⁷² Taiyuan Heavy Machinery, 23 C.I.T. at 703-04.

⁷³ Id.

⁷⁴ 66 Fed. Reg. at 43207, 43210.

marketability.”⁷⁵ The GOA and GOS, however, challenged the use of Montana as the appropriate benchmark in their case briefs before the Department.⁷⁶ Specifically, the GOA argued that substantial differences existed with respect to the species of trees located in Montana and Alberta, and the rights purchased by timber harvesters in Montana when compared to Alberta.⁷⁷ The GOS argued that timber harvested on public lands in Montana is not available for export, the forests in Montana and Saskatchewan are 300 miles apart, and differences exist with respect to the species, forest types and growing conditions between Montana and Alberta.⁷⁸ The Department agreed with the GOA and GOS, and therefore rejected Montana as the appropriate benchmark for these provinces, using Minnesota instead.⁷⁹ Specifically, spruce, pine and fir account for 99.99 percent of Alberta’s species mix, and 99.89 percent of Saskatchewan’s species mix. Spruce, pine and fir account for only 32 percent of the species mix in Montana.⁸⁰ Now, the GOC, GOA and GOS all object to the Department’s change from Montana as the benchmark, alleging insufficient notice.

The GOC, GOA and GOS all had sufficient notice that the Department was considering an alternative to Montana as the benchmark for Alberta and Saskatchewan, because the GOA and the GOS themselves argued for this change. As stated above, parties to the investigation

⁷⁵ 66 Fed. Reg. at 43197.

⁷⁶ See P. R. 772, Alberta Case Brief, pp. 16-19; P. R. 772, Saskatchewan Case Brief, pp 14-22.

⁷⁷ See P. R. 772, Alberta Case Brief, pp. 16-19.

⁷⁸ See P. R. 772, Saskatchewan Case Brief, pp 14-22.

⁷⁹ Issues and Decision Memorandum, at 112, 138-39.

⁸⁰ Id.

need only be given notice that the Department is considering alternatives to those announced in the preliminary determination.⁸¹ Here, the parties were reasonably on notice that Commerce was considering alternatives to Montana because the parties themselves put the use of Montana at issue. The GOC, GOA and GOS cannot now claim surprise when the Department considered the GOA's and GOS's arguments, and agreed that Montana was not the appropriate benchmark.

Additionally, the GOC, GOA and GOS all had notice of the alternatives to Montana available to the Department, because all of the relevant information was on the record. Specifically, in the Preliminary Determination, the Department announced that it considered the timber quality, species of trees, terrain, the availability of timber, and the marketability of the timber in choosing the benchmarks.⁸² Moreover, the Department used Minnesota as the benchmark for Manitoba in the Preliminary Determination.⁸³ Therefore, the factors the Department used in determining which states to use as benchmarks, and information concerning timber in the state of Minnesota was already on the record.

The respondents themselves argued for alternatives to Montana as the benchmark. The GOS argued for the use of Alaska.⁸⁴ The GOA, however, chose not to offer any alternative benchmark, instead arguing for the use of allegedly private sales in Alberta.⁸⁵ Nonetheless, having themselves placed the issue of which state would serve as the appropriate benchmark in

⁸¹ See Peer Bearing, 182 F.Supp.2d at 1301-02.

⁸² 66 Fed. Reg. at 43197.

⁸³ 66 Fed. Reg. at 43205.

⁸⁴ P. R. 772, Saskatchewan Case Brief, pp. 25-27.

⁸⁵ P. R. 772, Alberta Case Brief, pp. 32-29.

play for the final determination, the GOA and GOS cannot now claim insufficient notice when information concerning the criteria used to choose a benchmark and concerning the forest in Minnesota were already on the record. Accordingly, the Department acted fully in compliance with the statutory and regulatory procedures.

6. The Department's Decision to Use Washington State Data as a Benchmark for the British Columbia Stumpage Program Was Made in Accordance with the Statutory and Regulatory Procedures

The Department followed statutory and regulatory procedures in using Washington state as the benchmark for British Columbia because it used information contained in the administrative record, and available for the interested parties to comment upon. By statute, the Department's decision must be based on information contained in the administrative record.⁸⁶ Additionally, interested parties must be given an opportunity to comment on the information submitted to the Department.⁸⁷

As the benchmark prices, Commerce used prices from public auctions from the Washington Department of Natural Resources ("WDNR"). The respondents, however, argued in their case brief that the Department could not use the WDNR data, because Washington state banned the exportation of logs harvested from WDNR land.⁸⁸ Whether the logs from WDNR lands themselves were available to Canadian sawmills was not the relevant issue. Rather, the Department merely used the prices from WDNR auctions as a reflection of the price of timber in general in Washington.

⁸⁶ 19 U.S.C. § 1516a(b)(1)(B).

⁸⁷ 19 U.S.C. § 1677m(g).

⁸⁸ Issues and Decision Memorandum, at 77.

The Department explained in the Preliminary Determination that it was not the location of the good itself that was relevant, but the availability of the price for that good.⁸⁹ In the United States, the majority of forests producing softwood lumber are privately owned.⁹⁰ “Thus, the stumpage prices in the United States, unlike those in Canada, are set by market forces.”⁹¹ Moreover, because the timber cut from public lands constitutes a minority of sales, the Department stated that it was reasonable to conclude that the price for timber cut on public lands would be driven by the prices for timber cut on private lands.⁹²

In the Final Determination, the Department demonstrated that prices from the WDNR were a good measure of the prices in the Washington timber market in general. The Department did so by comparing the WDNR prices to an average unit value for timber derived from data obtained from the Washington Department of Revenue (“WDOR”).⁹³

The GOC contends that the Department did not place these calculations on the record. However, both the raw WDOR data, and the average unit values were already contained in the record. Specifically, the petitioners submitted both the WDOR data, and the average unit values from that data in Exhibit IV A-7 of the petition.⁹⁴ The Department merely took this data, and compared it the to WDNR data, which was also already on the record. This involved no new

⁸⁹ 66 Fed. Reg. at 43197.

⁹⁰ 66 Fed. Reg. at 41396.

⁹¹ Id.

⁹² Id.

⁹³ Issues and Decision Memorandum, at 81.

⁹⁴ P. R. 1, Petition, Exhibit IV A-7.

methodology. Rather, the Department merely used data that was on the record (WDOR data), and corroborated the data it used as the benchmark (WDNR data). Because the administrative record contained both sets of data, the GOC had the ability to make this same comparison. Therefore, because the GOC had notice that the Department was going to use the WDNR data, and an opportunity to comment on the reliability of that data, the Department followed the statutory and regulatory procedures.

F. COMMERCE CONDUCTED VERIFICATIONS IN ACCORDANCE WITH ALL REQUIREMENTS OF LAW

In this investigation, Commerce calculated the subsidy rate based on aggregate data on the use of the subsidies provided. To obtain this aggregate data, Commerce submitted questionnaires to the GOC, and the governments of the provinces subject to this investigation. Commerce also agreed that it was practicable to consider a limited number of company exclusion requests. To verify the data used in this investigation, therefore, Commerce tested the accuracy and completeness of the information submitted by the GOC, Alberta, British Columbia, Ontario, Quebec, and the companies requesting exclusion from the investigation.⁹⁵

The GOC submitted data obtained from Statistics Canada (StatCan), an agency of the Canadian Government, and the Pacific Forestry Center (“PFC”). The Department, therefore, tested the accuracy and completeness of the GOC’s submissions, and inquired into the methodologies used by both StatCan and the PFC. The GOC argues that the Department should have accepted new information presented by both StatCan and PFC officials during verification.

⁹⁵ P. R. 730 PFC Verification Report; P. R. 731, GOQ Verification Report; P. R. 732, GOC Verification Report; P. R. 733, GOO Verification Report; P. R. 736, GOA Verification Report; P. R. 737, GBC Verification Report; P. R. 826, Company Exclusion Verification Report.

As outlined below, the Department acted consistently with the statute, regulations, and its practice.

Pursuant to 19 U.S.C. § 1677m(i)(1), Commerce must verify all information it relies upon in a final countervailing duty determination. As Commerce stated when it issued the verification outline to the GOC, “The purpose of our verification is to examine and corroborate information your agency provided in its responses to our questionnaires for this investigation.”⁹⁶ The statute does not define what procedures Commerce must use in verification, leaving it to Commerce’s discretion to determine how it will conduct verification on a case-by-case basis.⁹⁷

“Verification is an audit process that selectively tests the accuracy and completeness of a respondent’s submissions.”⁹⁸ “[V]erification is not intended to constitute a comprehensive examination of all relevant sources.”⁹⁹ As a process similar to an audit, verification “entails selective examination rather than testing of an entire universe.”¹⁰⁰

Commerce has no subpoena power, and therefore must rely on information voluntarily submitted by the parties in order to conduct its countervailing duty analysis.¹⁰¹ Interested parties,

⁹⁶ P. R. 652, GOC Verification Agenda, Attachment 1, p. 3.

⁹⁷ Micron Tech. v. United States, 117 F.3d 1368, 1396 (Fed. Cir. 1997).

⁹⁸ Floral Trading Council v. United States, 822 F. Supp. 766, 771 (Ct. Int’l Trade 1993) (citation omitted). See also Monsanto Co. v. United States, 698 F.Supp. 275, 281 (Ct. Int’l Trade 1988); SAA at 813.

⁹⁹ Inland Steel Indus. v. United States, 967 F.Supp. 1338, 1369 (Ct. Int’l Trade 1997).

¹⁰⁰ Bomont Indus. v. United States, 733 F.Supp. 1505, 1508 (Ct. Int’l Trade 1990).

¹⁰¹ Commerce’s only tool to persuade parties to cooperate in an antidumping or countervailing duty proceeding is the potential use of facts available, and the possible application of an adverse inference in selecting facts available. See Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984).

however, have an incentive to submit only information beneficial to them, or inaccurate information. Verification, therefore, acts as a check on interested parties to ensure that they are participating in the countervailing duty process in good faith.

Because Commerce acts as the investigating authority, it has control over the verification agenda. Commerce cannot relinquish its role as the factfinder to the very parties whose information is being verified.¹⁰² To do so would destroy the very purpose of verification, which is to test the accuracy and completeness of the information submitted by the interested parties.¹⁰³ Commerce, therefore, “has considerable latitude in picking and choosing which items it will examine in detail.”¹⁰⁴

Verification is not intended to be an opportunity for a respondent to submit new factual information to the Department.¹⁰⁵ For that reason, the Department requires interested parties to

¹⁰² See NTN Bearing Corp. of America v. United States, 186 F.Supp.2d 1257, 1296 (Ct. Int’l Trade 2002).

¹⁰³ See Micron Tech., 117 F.3d at 1396; Monsanto Co., 698 F.Supp. at 281; Floral Trading Council, 822 F. Supp. at 771.

¹⁰⁴ PMC Specialties Group, Inc. v. United States, 20 C.I.T. 1130, 1134 (1996).

¹⁰⁵ While conducting the verification of the GOO’s submissions, Department officials emphasized that verification was not an opportunity for the GOO to present new information:

We also stated clearly that verification was not a forum for presenting new information or arguments. On occasion, the officials or counsel attempted to present new information in written form as part of exhibit packages and make arguments regarding information on the record that was collected by the Department from the United States government agencies or U.S. state government agencies. Whenever such an attempt was made, we declined to accept the written information and did not entertain the arguments. We also informed the officials and counsel that we would not include the information or address the arguments in the verification report.

P. R. 733, GOO Verification Report, p. 1.

submit factual information “seven days before the date on which the verification of any person is scheduled to commence”¹⁰⁶

Commerce officials have the discretion to request additional information during a verification.¹⁰⁷ In this case, and consistent with its practice, Commerce instructed StatCan, “If you found *minor errors* in your response while preparing for verification, please provide revised worksheets with the corrections and explanations as to the nature of any corrections.”¹⁰⁸

However, with the exception of providing minor corrections, respondents are not entitled, either by regulation or by statute, to provide the Department with new information or make arguments during verification.

1. Commerce, the Authority Conducting the Investigation, Determines What Information It Will Verify

The GOC submitted information obtained from StatCan on shipments of lumber from sawmills throughout Canada. StatCan based its response on a 1997 Annual Survey of Manufacturers (“ASM”), a Monthly Survey of Manufacturers (“MSM”), and a Monthly Survey of Sawmills and Planning Mills (“MSS”). Commerce, therefore, conducted a verification of StatCan, where it examined how StatCan derived the volume and value of the lumber shipments.¹⁰⁹ This included an overview of the ASM, MSM and MSS, how StatCan conducted these surveys, how StatCan chose which companies would respond to the surveys, and how

¹⁰⁶ 19 C.F.R. § 351.301(b)(1).

¹⁰⁷ See SAA at 868.

¹⁰⁸ P. R. 652, GOC Verification Agenda, Attachment 1, p. 3 (emphasis added).

¹⁰⁹ P. R. 652, GOC Verification Agenda, Attachment 1, p. 3.

StatCan derived the information it submitted in its questionnaire responses.¹¹⁰

During the investigation, the Department considered the issue of the value and volume of certain remanufactured lumber products within the scope of the investigation. The Department had two choices on the record that it could use to value the remanufactured products. The Department could use information from Exhibit 36 of the GOC's December 17, 2001 questionnaire response to estimate an appropriate value, or the Department could use information the GOC obtained from the Pacific Forestry Center ("PFC").

The Department specifically examined these two sources during verification. With respect to Exhibit 36, the Department verified that StatCan, for certain provinces, deducted from the value of shipments from all wood producers the value of shipments from sawmills.¹¹¹ The Department believed that this was a close approximation of the value of shipments of remanufactured products within the scope of the investigation.¹¹² While this data only included some provinces, the Department could use that data to calculate a percentage value of the remanufactured products, as compared to the total value of lumber shipments, for those provinces, and apply that ratio to the total value of softwood lumber shipments, thereby creating a reasonable estimate of the value of remanufactured products.¹¹³

In verifying the information from the PFC, the Department addressed how the PFC collected the information, reviewed hard copies of survey responses, explored how data was

¹¹⁰ P. R. 732, GOC Verification Report, pp. 2-12.

¹¹¹ Id. at 11.

¹¹² Issues and Decision Memorandum, at 25.

¹¹³ Id.

transferred from the survey responses to an electronic database, and examined how PFC calculated its shipment values.¹¹⁴ As a result of the PFC verification, the Department found several flaws in the methodology used in collecting and calculating the data, which rendered this source unreliable.

First, Commerce determined that in calculating the total value of the remanufactured shipments, PFC included the total value of shipment reported by companies identified as producing remanufactured products, despite the fact that “these companies produced both in scope and out of scope merchandise”¹¹⁵ Moreover, PFC knew what percentage of shipments from these companies were of in scope and out of scope merchandise, but did not revise its figures to account for this.¹¹⁶ Second, PFC included in the total value of shipments a value for kiln drying, which is a service, not a product.¹¹⁷ Third, PFC increased the total value of shipments by including in that number the total value of sales by companies for which subject merchandise represented less than half of their production.¹¹⁸ These flaws in the data all inflated the value of the remanufactured products.

Moreover, the 1999 value for shipments of remanufactured products was merely a projection. However, Commerce officials could not evaluate this projection at verification

¹¹⁴ P. R. 730, PFC Verification Report, pp. 1-8.

¹¹⁵ Id. at 5-6.

¹¹⁶ Id.

¹¹⁷ Id. at 6.

¹¹⁸ Id. at 6-7.

because revenue data was missing from questionnaire responses.¹¹⁹ Therefore, Commerce could not establish the reasonableness of the methodology PFC used.

The GOC now alleges that it attempted to provide new evidence to Commerce officials, arguing that it attempted to show the infirmities of Exhibit 36, and that the estimate from the PFC data was reasonable.¹²⁰ The GOC's argument, however, fails to recognize that verification is not an opportunity to provide new information to the Department. Rather, because the Department attempts to conduct a "spot-check" on the evidence already submitted, the Department has the discretion to choose which evidence it will examine more closely.¹²¹ In this regard, the investigating authority cannot allow the party being investigated to usurp the Department's role as the factfinder.¹²² The Department informed the GOC that it would accept "minor corrections" to data already submitted.¹²³ However, the GOC does not allege that it attempted to submit a minor correction to its questionnaire responses. Instead, the GOC argues that it attempted to provide new data at verification, or make arguments concerning the data. The Department acted consistently with the statute and regulations by refusing to look at this new data. Moreover, the respondents had an opportunity to make their arguments in their case

¹¹⁹ P. R. 730, PFC Verification Report, p. 7.

¹²⁰ In contesting the manner in which the Department conducted verification, the GOC attempts to give this Panel unsworn testimony on how it perceived Commerce conducted verification. See Joint Brief, pp. K-18 - K-19. However, the Panel cannot base its determination on information not contained in the administrative record. See 19 U.S.C. § 1516a(b)(1)(B), and the Department's Motion to Strike.

¹²¹ See PMC Specialties Group, 20 C.I.T. at 1134.

¹²² See NTN Bearing, 186 F.Supp.2d at 1296.

¹²³ P. R. 652, Attachment 1, p. 3.

briefs.

Furthermore, merely because the Department refused to look at this evidence at verification, this did not preclude the GOC from submitting comments concerning the reliability of the data on the record. The Preamble to the Department's regulations states, "Parties are free to comment on verification reports and to make arguments concerning information in the reports up to and including the filing of case and rebuttal briefs" ¹²⁴ The GOC, therefore, was free to use information on the record to argue its position that Exhibit 36 did not provide a basis for a reasonable estimate of the remanufactured products. Indeed, the GOC did this in its case brief. Similarly, the GOC could have provided explanations concerning the reliability of the PFC data, and in fact did argue that this data was reliable in its case brief.

The GOC further alleges that the Department specifically requested information corroborating estimates of value-added remanufacturing in Alberta and Ontario in the verification outline, but rejected this information when offered by PFC officials. The verification outline itself, however, shows this allegation to be false. The Department did not ask for information on the remanufacturers in Alberta and Ontario. Rather, the Department announced that it was examining this issue with respect to *British Columbia*:

According to your calculations, the value added by B.C. remanufacturers account for 74 percent of sales value (1,365,341,729/1,839,047,800); this suggests that purchased input costs, that would include purchased lumber, account for 26 percent of the sales value. However, the B.C. report (page 16) states that, for the remanufactured products category, wood alone account for 60 percent of total cost. Be prepared to explain this large discrepancy. ¹²⁵

¹²⁴ 62 Fed. Reg. at 27332.

¹²⁵ P. R. 652, GOC Verification Agenda, Attachment 3, p. 6.

The Department has the discretion to select what information it will test when it conducts verification.¹²⁶ The Department specifically announced that it would test the value-added data with respect to *British Columbia, not Alberta and Ontario*. The Department, therefore, acted within its statutory and regulatory discretion by refusing to look at data concerning Alberta and Ontario when it specifically indicated that it would examine data concerning British Columbia.

2. The Department Addressed the Issue of “Residual” Products in Its Verification

The Department also considered the issue of whether to calculate the *ad valorem* subsidy rate by allocating the value of the timber provided through the stumpage programs over not just the value of the lumber produced, but also the value of certain co-products and residual products. In order to include the value of co-products and residual products in this calculation, however, these products had to result from the processing of the logs provided to the sawmills.¹²⁷ Ultimately, the Department decided not to include the value of residual products in the calculation of the *ad valorem* subsidy rate, finding that the category included products that were not produced by sawmills.¹²⁸

The GOC alleges that the Department did not consider in its verification of StatCan the issue of whether products in the residual category were produced from logs that entered the sawmills. Contrary to this assertion, the verification report demonstrates that Commerce officials addressed this issue. The verification report notes that StatCan officials divided their totals of lumber shipments into four categories: (1) softwood lumber; (2) hardwood lumber; (3)

¹²⁶ PMC Specialties Group, 20 C.I.T. at 1134.

¹²⁷ See 19 C.F.R. § 351.525(b).

¹²⁸ Issues and Decision Memorandum, at 22.

co-products; and (4) residual products. “With respect to the residual products category, [StatCan] said that this category included all products that did not fit into the softwood, hardwood, or co-products category.”¹²⁹ StatCan provided a list of the residual products to the Department, which was included as Exhibit 13 to the StatCan Verification Report. From this list, the Department determined that “the residual category included such items as logs, pulpwood harvested by sawmills and sold to other manufacturers, and particular and wafer board.”¹³⁰ These were items “that are never processed by sawmills”¹³¹ Therefore, contrary to the GOC’s assertion, the Department examined at verification the issue of whether the residual category were produced by sawmills, and collected enough information to confirm that this category included products that were not produced by sawmills.

3. Commerce Inquired Into the Reliability of the Data From the Maine Forest Service, and Placed a Description of Its Efforts on the Record

The Department used data from the Maine Forest Service (“MFS”) when it calculated the benchmark for stumpage prices in Quebec. When using this data, Commerce assessed its reliability, and placed on the record a description of the efforts it took to inquire how this data was assembled:

We contacted officials from the MFS and asked them to provide the names and production levels of the four studmills in Maine that were in operation during the calendar year 2000 and the POI. The MFS officials explained that their confidentiality regulations prohibited them from divulging the production volumes of the four firms. However, MFS officials were able to identify the names of the four softwood studmills in operation during the POI. See the March 21, 2002, Memorandum to the file from the Team. Using the names provided by

¹²⁹ P. R. 732, GOC Verification Report, p. 8.

¹³⁰ Issues and Decision Memorandum, at 22.

¹³¹ Id.

the MFS, we traced the four softwood studmills to a sawmill production report for Maine that was previously placed on the record of this investigation. See the United States Department of Agriculture (USDA) publication, “Profile 2001: Softwood Sawmills in the United States and Canada” (USDA Report). . . .

In addition, we spoke with an MFS official regarding the data provided by the MFPC. The official confirmed that this data was based on a survey. Thus, because the information submitted by the MFPC is based on limited survey data rather than on the total production of studwood mills in Maine, we have opted not to rely on the MFPC data when deriving the percentage of studwood logs going to sawmills.¹³²

Both the GOC and GOQ, however, contend that the Department failed to verify the MFS data.

First, the Department acted in accordance with law when it used the publicly available MFS data. As stated above, verification is meant to test the accuracy and completeness of the information that is in the control of interested parties, therefore acting as a check on interested parties to ensure that they are participating in the countervailing duty process in good faith.¹³³ A spot check is not necessary when Commerce uses publicly available information, such as that from the MFS. Since interested parties do not possess or control publicly available information, they do not have the opportunity to manipulate the data. Therefore, Commerce has no duty to verify this type of data.

Nevertheless, as discussed above, Commerce took the extra step of inquiring into the MFS data, and how it was collected. The Department recorded the results of this inquiry in a memorandum that was placed on the record, giving the parties the ability to assess the reliability of the information for themselves and make arguments based on the record. Moreover, Commerce used another record source, the USDA Report, to trace the information reported by

¹³² Issues and Decision Memorandum, at 61.

¹³³ See Floral Trading Council, 822 F. Supp. at 771; SAA at 813.

the MFS.

Interested parties have the opportunity to use information already on the record, or information from the public realm, to argue that there are inaccuracies in the data contained in the publicly available source. In this investigation, the petitioners took advantage of this opportunity, and disputed the accuracy of the MFS data. The respondents had the same ability to comment on the MFS data, but chose not to comment. Because the respondents had the opportunity to assess and comment on the reliability of this publicly available data, the Department acted fully in accordance with law.

G. THE DEPARTMENT EXERCISED ITS DISCRETION TO CONSIDER COMPANY EXCLUSION IN ACCORDANCE WITH THE STATUTORY AND REGULATORY PROCEDURES

The Department properly exercised its discretion under the regulations to consider company exclusion requests to the extent practicable.¹³⁴ After reviewing all of the information submitted, the Department determined that it was not practicable to consider all 351 exclusion requests. Rather, due to the complex issues involved and the burden on the Department's resource, the Department determined that it could review 30 requests. This exercise of discretion is in accordance with the statute and regulations, and supported by substantial evidence.

The Department announced in its Initiation Notice that if the Department proceeded in this investigation on an aggregate basis, it expected a large number of requests to be excluded from the investigation on the basis of zero or *de minimis* subsidization rates.¹³⁵ Specifically, the Department expected a large percentage of these requests from companies located in the

¹³⁴ 19 C.F.R. § 351.204(e)(4).

¹³⁵ 66 Fed. Reg. at 21335.

Maritime Provinces because over 75 percent of the timber harvested there were from private lands.¹³⁶ The Department, therefore, stated that it anticipated creating a system allowing it “to expeditiously process and rule on these exclusion requests without compromising the integrity of the CVD law, while, at the same time, ensuring fairness and transparency in the treatment of the exclusion requests.”¹³⁷

Commerce conducted this investigation on an aggregate basis under 19 U.S.C. § 1677f-1(e)(2)(B).¹³⁸ The GOC filed a proposal for processing exclusion requests on May 8, 2001, offering to have the GOC and provincial governments review and certify individual company exclusion requests.¹³⁹ The Department issued a letter to the GOC dated August 1, 2001, responding to the GOC’s proposal.¹⁴⁰ The Department noted that the proposal “would indeed somewhat facilitate our task.”¹⁴¹ However, the Department stated that the exclusion requests would require additional documentation, as set forth in 19 C.F.R. §351.204(e)(4).¹⁴² The Department set a deadline of August 31, 2001, for exclusion requests to be considered for the Final Determination.¹⁴³ The Department stated that it would consider applications received by

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ Section 777A(e)(2)(B) of the Tariff Act of 1930.

¹³⁹ P. R. 74, GOC’s May 8, 2001 Company Exclusion Submission, p. 5.

¹⁴⁰ P. R. 330, August 1, 2001 Company Exclusion Letter, p. 1.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id.

August 6, 2001 for the Preliminary Determination.

On August 2, 2001, the Department exempted companies from the Maritime Provinces from this investigation.¹⁴⁴ In a memorandum dated February 20, 2002, the Department summarized the exclusion request process that unfolded after August 2nd:

On August 8, 2001, the GOC submitted 95 company exclusion requests, grouped under six categories. After examining the applications and finding numerous deficiencies and discrepancies, we concluded that the group approach would not allow for a thorough analysis and proceeded to examine 17 individual company applications. In our preliminary determination, issued on August 9, we found that only Frontier Lumber of Watson Lake, Yukon Territories, qualified for an exclusion. On two occasions subsequent to the preliminary determination, we extended the final deadline for the submission of all company exclusion applications to the final deadline of October 29, 2001, to accommodate the GOC's request for additional preparation time.

On October 29, 2001, we received 335 requests from the GOC and 15 individual company requests. On October 30, 2001, November 23, 2001, the GOC submitted corrections and supplemental documents (including an application inadvertently omitted from the October 29, 2001, submission). On November 27, 2001, petitioners submitted objections. On December 6, 2001, petitioners filed additional comments. On December 14, 2001, the GOC submitted additional corrections and supplemental documents. On January 15, 2002, respondents filed a rebuttal to petitioners' December 6 comments.

P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, pp. 7-8 (footnotes omitted).

The Department determined that it was not practicable to review all 351 exclusion requests because of the complicated issues involved, such as cross-ownership and affiliation.¹⁴⁵ The Department decided to review a more manageable number of 30 exclusion requests from

¹⁴⁴ Amendment to the Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 40228, 40229 (August 2, 2001).

¹⁴⁵ P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, p. 3.

companies that sourced their logs entirely from the United States, the Maritime Provinces, and private Canadian sources.¹⁴⁶ For these 30 companies, the Department issued a short, supplemental questionnaire, addressing only issues involved in the exclusion process, such as: (1) total sales of subject merchandise; (2) sales of co-products; (3) exports to the United States; (4) the companies' organization chart; (5) the companies' financial statement for the POI; and (6) the source of the companies' logs.¹⁴⁷ The Department set a deadline of noon, February 26, 2002 for responses.¹⁴⁸ The Department sent a verification outline on February 22, 2002, and commenced verification of the exclusion requests on February 28, 2002.¹⁴⁹ Interested parties could comment in their case briefs and rebuttal briefs, which were due February 22, 2002 and March 1, 2002.¹⁵⁰ Two of the remaining 30 companies did not participate. Of the 28 companies Commerce verified, Commerce excluded 20 from the investigation.¹⁵¹

1. Commerce Conducted a Company Exclusion Process that Was Practicable Under the Regulations

The Department's regulations specifically grant Commerce the discretion to consider a request to be excluded from an investigation, when it is practicable to do so:

Where the Secretary conducts a countervailing duty investigation on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and

¹⁴⁶ Id. at 3-4.

¹⁴⁷ P. R. 748, Company Exclusion Supplemental Questionnaire; P. R. 749, Company Exclusion Supplemental Questionnaire.

¹⁴⁸ P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, p. 8.

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ Final Determination, 67 Fed. Reg. at 15548.

investigate requests for exclusion *to the extent practicable*.¹⁵²

A determination of whether the consideration of exclusion requests is practicable necessarily involves the consideration of the complexity of the issues, and Department's available resources.

The Department considered whether it had the available resources to consider all of the exclusion requests submitted. Based on the overwhelming number of requests made, the issues that those requests raised, and the Department's available resources, the Department determined that it could not consider every exclusion request submitted:

We have given careful consideration to the grouping system proposed by the GOC, as well as to the individual company requests, totaling 351 companies. We examined the criteria established for each of the groupings, as well as the completeness and the accuracy of the accompanying documentation. We have concluded that, given the requirements of the countervailing duty law and the Department's limited resources, it is not practicable to consider the exclusion requests of all 351 companies. This would involve not only the 351 individual company applications but also the countless other cross-owned and affiliated companies associated with the applicants. While we appreciate the GOC's simplification efforts, and the extensive documentation provided, the sheer number of groups, the large number of companies included in several of those groups, the even larger number of associated cross-owned and affiliated companies, and the criteria proposed by the GOC for the Department to determine that individual companies received no net countervailable subsidy, would render the Department's task impossible.

P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, p. 3.

Commerce, however, decided to accommodate the respondents, and devise a manner in which it could proceed with a more manageable number of exclusion requests:

Instead we have sought ways to limit the universe of applicants to a much more manageable number. The goal of the Department is to examine the maximum number of requests that does not impose an extraordinary administrative burden. The company exclusion requests that rely exclusively on the source of the logs or lumber constitute a manageable group of companies. Companies that produce

¹⁵² 19 C.F.R. § 351.204(e)(4) (emphasis added).

lumber from logs harvested in the Maritime Provinces, the United States, or on private lands in Canada, are unlikely to benefit to any significant extent from federal or provincial stumpage programs (which represent the bulk of the subsidies found in this investigation). The sourcing concept is simple, purely factual, and given to relatively straightforward analysis and verification. We are familiar with this process from Lumber III, and there is a history of excluding many of these companies from prior investigations and agreements. Consequently, we recommend examining applications of companies who claim to have obtained their logs from the three sources listed above during the period of investigation.

We will review 30 applications (see Attachment B). This number includes the 22 companies of Groups 1 and 2 of the GOC submission (17 border mills and 5 primary mills sourced entirely from U.S., Maritime, or private Canadian sources). In addition, we will review Beaubois Coaticook, Inc and Scierie La Patrie, who claim to have sourced their logs 100 percent from the United States or from private Canadian lands. We will also review six additional companies (Baredeaux et Cedres, Clermond Hamel, Mobilier Rustique, Produits Forestiers Dube, Scierie Alexandre Lemay, and Scierie Nord-Sud) who claim to have obtained their logs primarily from U.S., Maritime, or private Canadian sources.

P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, pp. 3-4.

Commerce explained why it was not practicable to review the remaining 321 companies:

We recommend not considering the remaining 321 companies for exclusion. Most of these companies rely not on the sourcing of the logs, but on the nature of the transactions pursuant to which the logs or lumber were obtained as the basis for the exclusion. These groups include producers and exporters that obtain most if not all of their logs and lumber from potentially subsidized mills throughout Canada, but which allegedly received no net countervailable subsidy because their purchases were made in arm's-length transactions. The groups that rely on specific transactions to determine the net countervailable subsidy employ criteria involving issues that would require extensive investigation and analysis, or fact patterns that might require difficult company-specific verifications. For example, issues involving affiliation, cross-ownership, and arm's-length transactions require a complex factual analysis, legal analysis, and many judgment calls. These, as well as other concerns pointed out below, are tasks beyond the scope of the limited exercise envisioned under section 351.204(e)(4) for consideration of company exclusions in an aggregate case.

P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, p. 4. Commerce

elaborated on the complications involved in analyzing certain issues raised by these additional exclusion requests, such as cross-ownership and transactions between affiliated companies. Commerce explained, “Cross-ownership is a determination that the Department makes on a case-by-case basis, relying on the specific facts of the case and arguments presented by all parties.”¹⁵³ Similarly, the test to determine whether transactions between affiliated companies were made at arm’s length “involves the analysis of individual transactions to determine whether the average price paid to affiliates is at least nearly as high as the average price paid to non-affiliates.”¹⁵⁴

Moreover, while the Department acknowledged that the GOC made efforts to streamline the administrative process required by the exclusion requests, Commerce noted that problems still existed with respect to some of the information submitted:

Finally, with regard to the completeness and accuracy of the accompanying documentation for all of the groups, in spite of the effort invested by the GOC, we still found inaccuracies and deficiencies. In some instances, the information provided by the companies was different from that provided in the government certification (for instance, for Busque Laflamme, Inc., the company and the Government of Quebec provided conflicting information on benefits received under one of the programs). In other instances, government certifications were missing (for example, Canex International Lumber Sales Ltd. did not provide a certification for provincial stumpage). In still other instances, several companies (for example, Industries Maibec, Inc. and Bois Daaquam, Inc.) did not provide a company certification for all owned entities.

P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, p. 6.

Commerce’s determination that it could not proceed with all 351 exclusion requests was based on an analysis of the complexity of the issues involved, the quality of the information already submitted, and the strain that the process would have on the Department’s available

¹⁵³ P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, p. 5.

¹⁵⁴ Id.

resources. Thus, in exercising its discretion, Commerce thoroughly and rationally analyzed whether the exclusion request process would be practicable, in accordance with the regulation.¹⁵⁵ This determination that the consideration of all 351 exclusion requests was not practicable is an evidentiary issue. It is supported by substantial evidence on the record, and as such must be affirmed by this Panel.

The GOC alleges that the Department engaged in an “unreasonable delay” of four months before reviewing the company exclusion requests. The GOC further argues that this delay rendered the process impracticable, not the process itself. The record clearly indicates that the Department engaged in no delay in considering the company exclusion requests. The GOC submitted over 300 exclusion requests on October 29, 2001.¹⁵⁶ The GOC further submitted corrections and supplemental documents on October 30th and November 23rd.¹⁵⁷ The petitioners submitted comments November 27th and December 6th, followed by additional submissions by the GOC on December 14th.¹⁵⁸ Moreover, the respondents filed rebuttal comments to the petitioners’ comments on January 15, 2002.¹⁵⁹ The Department made its recommendation on how to proceed with the exclusion requests on February 20, 2002. From October 29, 2001 through February 20, 2002, the Department digested the huge amount of information submitted in the more than 300 exclusion requests, as well as all of the comments by

¹⁵⁵ See 19 C.F.R. § 351.204(e)(4).

¹⁵⁶ Prop. R. 31, October 29, 2001 Company Exclusion Requests.

¹⁵⁷ P. R. 750, March 20, 2002 Company Exclusion Decision Memorandum, pp. 7-8.

¹⁵⁸ Id.

¹⁵⁹ Id.

interested parties. As demonstrated above, the Department considered the complex issues raised by the requests, the quality of the information submitted, and the Department's available resources. Therefore, the Department's decision that consideration of all 351 requests was not practicable is supported by substantial evidence on the record, and is in accordance with law.

2. Commerce's Conduct of the Verification of the Company Exclusion Requests Adhered to the Statutory and Regulatory Requirements

The GOC argues that the Department did not give the 30 companies Commerce selected for consideration of their exclusion requests enough time to participate in verification.¹⁶⁰ The Court of International Trade has held that a party contesting the time limits set for verification must show that if Commerce had afforded them more time verification would have proceeded differently.¹⁶¹ The GOC fails to make any such showing here.

These 30 companies already submitted their applications for exclusions on October 29, 2001, almost four months prior to the February 20, 2002 memorandum outlining the remaining process. These companies had already collected the data to make their exclusion requests, and

¹⁶⁰ The GOC argues that February 25, 2002 was a legal holiday "[i]n some parts of Canada." GOC Joint Brief, at K-8. The GOC fails to identify either the holiday, or the parts of Canada that honored the holiday. Interestingly, in its February 26, 2002 response to the Department's supplemental questionnaire, the GOC identified Friday February 22nd as a public holiday "in one of the Canadian jurisdictions concerned." Prop. R. 61, GOC February 26, 2002 Submission, p. 2. Again, the GOC failed to identify either the holiday or the jurisdiction concerned. Generally, calendars in the United States do not reflect all Canadian holidays, especially where those holidays are honored only in parts of Canada. Commerce officials, therefore, would have no way of knowing that a holiday in Canada fell within the time set for responding to the supplemental questionnaires. At any rate, because the deadline for making the final determination was March 21, 2002, the Department gave the Canadian companies as much time as was practicable, in light of the fact that the Department would then have to process that information and make up to 30 determinations on the exclusion requests in about one month.

¹⁶¹ See Fujian Machinery & Equipment Import & Export Corp. v. United States, 178 F.Supp.2d 1305, 1317 (Ct. Int'l Trade 2001).

even had the GOC and provincial governments review those requests.¹⁶² Commerce only issued *supplemental* questionnaires on February 20, 2002, not full questionnaires. These supplemental questionnaires merely sought some additional information or a clarification of information already contained on the record.¹⁶³ The Department sought information such as: (1) total sales of subject merchandise; (2) sales of co-products; (3) exports to the United States; (4) the companies' organization chart; (5) the companies' financial statement for the POI; and (6) the source of the companies' logs.¹⁶⁴ Many companies, such as Carrier & Begin, Inc., already supplied information such as total sales, and total volume of logs harvested from Crown lands.¹⁶⁵ Answering a few questions posed by the supplemental questionnaires in the time allotted, therefore, did not place a huge burden on these 30 companies.

Furthermore, the GOC makes no attempt to show how the verification would have proceeded differently had the Department given the companies more time to prepare. The GOC only makes a vague assertion that the schedule "deprived those affected the opportunity to present their information in a meaningful fashion"¹⁶⁶ The GOC makes no attempt to discuss what further steps the companies could have taken if given more time. The vague assertions the GOC makes, therefore, cannot meet the burden the GOC must establish pursuant to Fujian, 178

¹⁶² Prop. R. 31, October 29, 2001 Company Exclusion Requests.

¹⁶³ P. R. 748, Company Exclusion Supplemental Questionnaire, p. 1; P. R. 749, Company Exclusion Supplemental Questionnaire, p. 1.

¹⁶⁴ P. R. 748, Company Exclusion Supplemental Questionnaire, pp. 4-6; P. R. 749, Company Exclusion Supplemental Questionnaire, pp. 2-4.

¹⁶⁵ Prop. R. 31, October 29, 2001 Company Exclusion Requests, Volume II.

¹⁶⁶ GOC Joint Brief, at K-8.

H. THE DEPARTMENT OF COMMERCE APPROACHED THIS INVESTIGATION WITH COMPLETE IMPARTIALITY

The GOC quotes selectively from a statement made by the Under Secretary for International Trade, Grant Aldonas, before the Senate Finance Committee, and argues that these passages demonstrate that the Department's determination was prejudged. As further evidence of prejudgment, the GOC cites that fact that the Department's Issues and Decision Memorandum in the investigation was issued one business day after the Department disclosed the *ad valorem* subsidy rate.¹⁶⁷ As we explain below, the charge of bias is not merely false, but shamelessly trumped-up. The actual facts of these two matters are as follows.

On February 13, 2002, the Under Secretary for International Trade Administration appeared before the Senate Finance Committee to provide it with an update on the progress of the lumber investigations and negotiations. This was six months after Commerce issued its Preliminary Determination that lumber imports from Canada had received countervailable subsidies.¹⁶⁸ The Under Secretary delivered a short prepared statement, which we have annexed

¹⁶⁷ GOC Joint Brief, at K-21 - K-27.

¹⁶⁸ Pursuant to 19 U.S.C. § 1671(a), the administering authority determines whether a government provides a countervailable subsidy. The statute defines the "administering authority" as "the Secretary of Commerce, or any officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law." 19 U.S.C. § 1677(1). By regulation, "[t]he Secretary has delegated to the Assistant Secretary for Import Administration the authority to make determinations under title VII of the [Tariff Act of 1930] and this part." 19 C.F.R. § 351.102. Import Administration's sole mission is to administer the antidumping and countervailing duty laws. The Under Secretary for International Trade oversees the operations of Import Administration. The Under Secretary also oversees the U.S. and Foreign Commercial Service, Market Access and Compliance, and Trade Development.

a transcript to this submission,¹⁶⁹ and answered a few questions from the Committee.

The Under Secretary's testimony covered all of the main points of interest to the Committee: that he understood the need to vigorously enforce the U.S. trade laws that the Department is charged with enforcing;¹⁷⁰ that the current lumber investigation involved "allegations" of dumping and subsidies;¹⁷¹ that substantial resources had been committed to these investigations;¹⁷² that the Department would ensure that the investigations were conducted in "a fair, accurate, and transparent manner, providing all the interested parties with a fair opportunity to be heard . . .";¹⁷³ and that the Department was also trying to resolve the underlying problems that had led to the investigations through negotiations with the Canadian Government to reach an agreement that would provide a "level playing field" in the lumber industry.¹⁷⁴

Following his opening statement, the Under Secretary responded to a number of

¹⁶⁹ See Sectoral Trade Disputes: Lumber and Steel: Hearing Before the Senate Finance Committee, 107th Cong., 33-34 (February 13, 2002) (testimony of Under Secretary of International Trade Aldonas) ("Finance Committee Hearing Transcript"). Because the transcript of the Senate Finance Committee hearing is not part of the administrative record, the Department is reluctant to include it in the appendix to its brief. However, because it is publicly available and the GOC has cited only isolated portions of the Under Secretary's statements out of context, the Department feels compelled to submit the entire transcript of the hearings in the appendix. The Under Secretary also submitted a fuller written version of his statement, which we have also attached. Testimony of Under Secretary Grant D. Aldonas, Sectoral Trade Disputes on Lumber and Steel: Keeping the Bargain on Trade, Senate Finance Committee, *available at* <http://finance.senate.gov/hearings/testimony/021302gatest.pdf>, p. 4 (February 13, 2002) ("Aldonas Prepared Written Statement") (emphasis added).

¹⁷⁰ Finance Committee Hearing Transcript, at 31-33.

¹⁷¹ Id. at 33.

¹⁷² Id.

¹⁷³ Id. at 33-34.

¹⁷⁴ Id. at 34.

questions from the Committee. These questions concerned: the potential for settling the investigations through suspension agreements;¹⁷⁵ the possibility that Canada would request WTO dispute settlement proceedings and the trend in such proceedings for the panels to impose additional obligations upon the United States;¹⁷⁶ the consistency of Department's investigation up to that date with U.S. law, the United States' WTO obligations, and NAFTA;¹⁷⁷ the application of AD measures to U.S. exports;¹⁷⁸ the effect of the privatization of subsidized steel companies upon those subsidies;¹⁷⁹ and the steel safeguard and the OECD talks on excess capacity in the steel industry.¹⁸⁰

That was all. No one asked the Under Secretary to approach the lumber investigations in anything but a fair and impartial manner, and nothing the Under Secretary said gave the slightest indication that the Department would take anything other than a fair and impartial approach. In fact, the Under Secretary made a point of emphasizing that: “[w]e’re continuing to work hard to make sure that these cases are conducted in a fair, accurate and transparent manner, providing all interested parties with the opportunity to provide their comments for the record and the Department’s consideration.”¹⁸¹

¹⁷⁵ Finance Committee Hearing Transcript, at 46-47.

¹⁷⁶ Id. at 48-49.

¹⁷⁷ Id. at 49.

¹⁷⁸ Id. at 52-54.

¹⁷⁹ Finance Committee Hearing Transcript, at 58-60.

¹⁸⁰ Id. at 60-69.

¹⁸¹ Aldonas Prepared Written Statement, at 5.

The GOC's selective rendering of the Under Secretary's routine testimony is highly distortive. For example, the GOC says that the Under Secretary highlighted concerns over the "market distorting effect of Canadian lumber subsidies."¹⁸² First, the Under Secretary referred to "how long *our industry* has raised concerns regarding the market-distorting effects of Canadian lumber subsidies."¹⁸³ Thus, his statement does not imply that *the Department* had reached a final determination that there was market distortion. Second, market distortion is not relevant to Commerce's analysis. Commerce determines whether a government or public entity provides a financial contribution that confers a benefit and is specific.¹⁸⁴ Whether a subsidy has caused a market distortion is a matter considered by the ITC when it makes its determination concerning material injury.¹⁸⁵ As this statement does not relate to the issues before the Department of Commerce, it could not indicate that the Under Secretary had an "irrevocably closed"¹⁸⁶ mind about whether a countervailable subsidy existed. Third, given the decades-long history of the lumber dispute and the ongoing negotiations over this topic, such a general statement would hardly raise any concerns even if made by the a Commissioner of the International Trade Commission on his or her own behalf.

Similarly, the Under Secretary's statement that he would not accept any agreement with Canada that did not provide a "level playing field" refers to the nature of any negotiated

¹⁸² GOC Joint Brief, at K-22.

¹⁸³ Finance Committee Hearing Transcript, at p. 32 (emphasis added).

¹⁸⁴ 19 U.S.C. § 1677(5).

¹⁸⁵ See 19 U.S.C. § 1677(7).

¹⁸⁶ NEC, 151 F.3d at 1373.

agreement with the GOC similar to the previous agreement. It does not indicate a pre-judgement of any level of dumping or subsidization in the ongoing investigations.¹⁸⁷

Finally, Canada alleges that the Under Secretary “openly agreed” with Senator Baucus that the U.S. case against Canada was “pretty clear”¹⁸⁸ In fact, the Under Secretary agreed with Senator Baucus that it was “pretty clear” that the best outcome of the investigation would be a “negotiated solution to achieve free market reform.”¹⁸⁹

These three comments, shamelessly taken out of context and deliberately distorted, constitute the GOC’s entire case of prejudgement against the Under Secretary. From them, the GOC concludes that “the Department’s final determination should have come as no surprise.” In fact, these careful and circumspect remarks, especially in the context of the Under Secretary’s complete statement, do not constitute even a scintilla of evidence that the Department was biased.

The other prong of the GOC’s bias charge is that Commerce issued the Federal Register notice and issues memorandum explaining its final determination one business day after it issued the determination itself. According to the GOC, this demonstrates that the Department simply made up the numbers in the final determination issued on Friday, and then reverse-engineered a rationale over the weekend that yielded this result. Consequently, the Department’s entire issues memorandum constitutes a post-hoc rationalization that cannot be used to support the result announced on Friday.

¹⁸⁷ Finance Committee Hearing Transcript, at 34-35; GOC Joint Brief, at K-24.

¹⁸⁸ GOC Joint Brief, at K-24.

¹⁸⁹ Finance Committee Hearing Transcript, at 45-47.

The actual facts of this nefarious conspiracy are as follows. Inevitably, as the deadline for issuing the final determination approached,¹⁹⁰ much last-minute tinkering and scrubbing remained. This is always the case, of course, but the sheer volume and complexity of the lumber case made it far worse than usual. In the end, the Department resorted to an extraordinary measure to meet the deadline - - it made the final determination (incorporating all of the smaller decisions necessary to produce the final rate) on Friday, March 22, 2002,¹⁹¹ but used the following weekend to resolve a few final details, edit and proofread the Federal Register notice and accompanying decision memorandum. These documents were released on Monday, March 25, 2002, one business day after the determination itself.

The GOC's fantastic speculation of bias must be dismissed for several reasons. First, merely being late is not evidence of a conspiracy. Second, the obvious explanation - - that the Department utilized the weekend to put into final form a highly complex determination memorialized in a detailed, 160-page document - - is not only plausible, but compelling, as the

¹⁹⁰ The statute requires the Department to explain the basis for its countervailing duty determination, and address the interested parties' relevant arguments. 19 U.S.C. § 1677f(i)(3). The Department accomplishes this through its Issues and Decision Memorandum, which it adopts through the Federal Register notice of its Final Determination. The statute sets a deadline for the Department to make its final determination, providing:

Within 75 days after the date of the preliminary determination under section 1671b(b) of this title, the administering authority shall make a final determination of whether or not a countervailable subsidy is being provided with respect to the subject merchandise

19 U.S.C. § 1671d(a)(1). The statute does not establish a deadline for the publication of the Final Determination. See 19 U.S.C. §§ 1671d(d), 1677f(i).

¹⁹¹ Indeed, it has long been the Department's practice to release its decision on noon the next business day following the statutory deadline.

Panel will have occasion to observe when it attempts to put its decision in this case into final form. Third, the GOC's theory - - that Commerce reverse-engineered the decision over the weekend to support an arbitrary number determined in advance- - ignores the good faith with which Government officials are presumed to operate. Fourth, the GOC's theory attributes to the Department officials involved superhuman abilities to reverse-engineer results. A countervailing duty rate involves hundreds of calculations, each of which requires careful thought and must be explained in the final notice.¹⁹² The effort required to reverse-engineer these calculations to yield a pre-ordained number, and explain these arbitrary decisions so as to match up with the argument on the record would be fantastic. Perhaps Commerce should be flattered that the GOC of Canada is willing to attribute to the Department's staff the superhuman abilities that would be required to perform such a feat in a weekend. The fact is that, as a practical matter, it simply couldn't be done.

There is no legal standard for a charge of bias that these baseless accusations could meet. Nevertheless, we explain below why they fall vastly short of meeting the legal standards that, in fact, apply.

1. This Panel Lacks Jurisdiction to Hear a Claim that the Under Secretary for International Trade Prejudged This Case

In challenging the statements made by Under Secretary Aldonas, the GOC raises an issue that this Panel lacks jurisdiction to hear.¹⁹³ Specifically, Article 1904(2) of NAFTA restricts this

¹⁹² 19 U.S.C. § 1677f(i)(3).

¹⁹³ The Department does not argue that because the GOC has raised a constitutional issue that it has given up its right to a NAFTA binational panel review altogether. Rather, the Department merely argues that the GOC cannot raise the constitutional issue before this Panel.

Panel's authority to examining "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." NAFTA does not include within the definition of countervailing duty law the U.S. Constitution. Therefore, NAFTA does not grant panels the authority to consider constitutional issues. In fact, pursuant to 19 U.S.C. §1516a(g)(4)(B), a constitutional issue "arising under any law of the United States as enacted or applied," "shall be assigned to a 3-judge panel of the United States Court of International Trade."

Whether a decision maker possesses such a bias so as to deprive a party of the due process requirement of a fair tribunal is a constitutional issue.¹⁹⁴ Therefore, this Panel lacks the jurisdiction to consider this issue.

Moreover, the U.S. Court of Appeals for the Federal Circuit has recognized, the court's jurisdiction for such a claim rests under its residual jurisdictional authority at 28 U.S.C. § 1581(i).¹⁹⁵ This is as opposed to jurisdiction under 28 U.S.C. § 1581(c), which grants the court authority to review Commerce's antidumping and countervailing duty determination based entirely on the administrative record. By contrast, a claim of prejudgment would require evidence contained outside of the administrative record. This is evident by the fact that the Canadian parties have chosen to cite to the transcript of a hearing before the Senate Finance Committee in an attempt to prove its claim. This transcript was not made part of the

¹⁹⁴ See Withrow v. Larkin, 421 U.S. 35, 46-47 (1975); Gibson v. Berryhill, 411 U.S. 564, 578 (1973).

¹⁹⁵ See NEC, 151 F.3d at 1368.

administrative record of this proceeding. As detailed in Article 1904(2) of NAFTA, and 19 U.S.C. § 1516a(b), the Panel is constrained to making a decision based solely on the administrative record. Accordingly, the Panel cannot consider the GOC's claim of prejudgment.

2. Statements Made by the Under Secretary for International Trade to the Senate Finance Committee Demonstrated Commerce's Commitment to Affording All Parties Their Procedural Rights Under the Statue and Regulations

Administrative decision makers are presumed to act with the highest degree of honesty and integrity.¹⁹⁶ The seminal case on whether Commerce engaged in prejudgment is NEC.¹⁹⁷ In NEC, the University Corporation for Atmospheric Research ("UCAR") solicited bids to buy supercomputers. UCAR was funded in part by the National Science Foundation, an agency of the U.S. Government, which required evidence that a bid by NEC did not involve dumping. The Department of Commerce decided, on its own, to look into the matter and do an antidumping analysis of NEC's bid.¹⁹⁸ Engaging in its standard antidumping methodology, Commerce estimated that the NEC bid would result in an antidumping margin of between 163.38% and 280%.¹⁹⁹ Commerce officials then met with staff members from the House Ways and Means Committee, explaining Commerce's antidumping analysis.²⁰⁰ Acting upon a petition filed by a

¹⁹⁶ Withrow, 421 U.S. at 47; NEC, 151 F.3d at 1373.

¹⁹⁷ The GOC's brief virtually ignores the case most relevant to an allegation that the Department has engaged in prejudgment, NEC. This case was decided by the U.S. Court of Appeals for the Federal Circuit, the only U.S. Court of Appeals to review antidumping and countervailing duty determination, and is therefore binding precedent for this Panel.

¹⁹⁸ NEC, 151 F.3d at 1364.

¹⁹⁹ Id. at 1365.

²⁰⁰ Id.

domestic party, Commerce then initiated an antidumping investigation.²⁰¹ NEC subsequently filed a lawsuit with the CIT, to enjoin Commerce from proceeding with the investigation. NEC argued that based on these facts, Commerce could not act as a fair and neutral decision maker.²⁰² After a three day trial, the CIT held that NEC had not met its heavy burden of demonstrating prejudice.²⁰³

The judgment of the CIT was affirmed by the U.S. Court of Appeals for the Federal Circuit. First, the Federal Circuit noted that “the blend of investigative and adjudicative functions sometimes found in modern administrative agencies requires that a pragmatic approach be taken to what qualifies as an ‘impartial’ decision maker.”²⁰⁴ The court continued:

We would be blinding ourselves to the reality of the administrative process that Congress has created were we to hold that the mere fact that a decision maker has been involved in the development of the case, either through a field investigation or a public hearing, or indeed has taken, preliminarily, a public position on the case, is enough to place the entire process under a constitutional cloud from which it cannot be shielded.

151 F.3d at 1372-73.

The Federal Circuit then discussed the standard a party must meet in order to demonstrate an unconstitutional bias on the part of an administrative decision maker:

NEC can prevail on its claim of prejudice only if it can establish that the decision maker is “not ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’” Hortonville [Joint School Dist. No. 1 v. Hortonville Education Ass’n, 426 U.S. 482,] 493 (quoting [United States v. Morgan, 313 U.S. [409,] 421 [(1941)]]. This standard is met when the challenger

²⁰¹ Id. at 1366.

²⁰² 151 F.3d at 1366-67.

²⁰³ Id. at 1367.

²⁰⁴ Id. at 1371.

demonstrates, for example, that the decision maker’s mind is “irrevocably closed” on a disputed issue. [Federal Trade Comm’n v. Cement Inst., 333 U.S. [683,] 701 [(1947)].²⁰⁵

Under the law, administrators are presumed to act “with the highest level of integrity and honesty.”²⁰⁶ Moreover, “the administrative process must have the flexibility necessary to accomplish its mission.”²⁰⁷ Therefore, the Federal Circuit was “reluctant to circumvent the normal administrative procedure absent a showing that the decision maker’s mind is ‘irrevocably closed.’”²⁰⁸

The Federal Circuit then discussed the procedural aspects of the antidumping process which reduce the risk of an improper bias impinging on a party’s due process rights. First, the investigation is bifurcated, with Commerce determining whether dumping exists, and the International Trade Commission (“ITC”) determining whether material injury, or the threat thereof, exists.²⁰⁹ Moreover, “the investigation within Commerce proceeds in two stages – a preliminary determination and a final determination.”²¹⁰ The court continued:

We are particularly reluctant to hold Commerce to the stringent prejudgment standard advocated by NEC in light of the two stages of an investigation. Because Commerce must publish its preliminary results, it must take an initial public position on the disputed issues in the investigation. However, because interested parties are given the opportunity to comment on those results, and because Commerce is required to respond to them, it is not

²⁰⁵ NEC, 151 F.3d at 1373.

²⁰⁶ Id. See also Withrow, 421 U.S. at 47.

²⁰⁷ NEC, 151 F.3d at 1373.

²⁰⁸ Id.

²⁰⁹ NEC, 151 F.3d at 1373.

²¹⁰ Id.

uncommon for Commerce to modify its position between the preliminary determination and the final determination.

151 F.3d at 1373 (footnote omitted).

The Federal Circuit's reasoning applies with equal force to a countervailing duty investigation. Like an antidumping investigation, the process is bifurcated, with Commerce determining whether a countervailable subsidy exists, and the ITC determining whether there is material injury, or a threat thereof. Also, a countervailing duty investigation also proceeds in two stages: a preliminary determination and a final determination. Just like the antidumping investigation, parties have the opportunity to provide comments after the preliminary determination in an effort to persuade Commerce to change its position.

There is a significant difference between the Department's conduct in NEC, and the conduct alleged here. In NEC, Commerce, in its role as investigator, engaged in an antidumping analysis before a petition had even been filed. The Federal Circuit declined to find this constituted the prejudgment in the investigation. Here, Under Secretary Aldonas' statements relate to the investigation only insofar as they concern the Department's duty to conduct the investigation in a fair and impartial manner. Moreover, he made these statements to the Senate Finance Committee six months after Commerce had issued its Preliminary Determination.

Moreover, while the softwood lumber investigations were still proceeding, both Canada and the United States participated in negotiations in an attempt to reach an agreement that would resolve the dispute. As outlined above, officials within the Department of Commerce played a role in those negotiations. Before the Senate Finance Committee, Under Secretary Aldons merely enunciated the well-known negotiating position of the United States. Specifically, the United States sought a "level playing field" that addressed "real reforms" in the Canadian

subsidization practices so as to provide relief to the U.S. producers of softwood lumber from Canada's market distorting practices.²¹¹ Again, none of this has any impact whatsoever on Commerce's mission to determine whether Canada had been providing a countervailable subsidy.

The case law confirms that both the Under Secretary and the Senate Finance Committee acted appropriately. Congress may not interfere with an agency's adjudicatory process.²¹² In The Pillsbury Co. v. United States, 354 F.2d 952 (5th Cir. 1966), for example, the Chairman of the Federal Trade Commission appeared before the Senate Subcommittee on Antitrust and Monopoly. Before the subcommittee, the Chairman "met a barrage of questions," where senators "forcefully expressed their own opinions" concerning the application of the law on specific issues in the pending case before the Commission.²¹³ The court concluded that this type of questioning constituted "an improper intrusion into the adjudicatory process of the Commission" which required some of the members of the commission to disqualify themselves from the case.²¹⁴

The Senate Finance Committee committed no such intrusion in this case - - the Committee Members did not question the Under Secretary specifically about the case. Moreover, while senators did make opening statements before hearing the Under Secretary, none

²¹¹ Finance Committee Hearing Transcript, at 34-35 (testimony of Under Secretary Aldonas).

²¹² See ATX, Inc. v. United States, 41 F.3d 1522, 1527-28 (D.C. Cir. 1994); The Pillsbury Co. v. United States, 354 F.2d 952, 963 (5th Cir. 1966).

²¹³ 354 F.2d at 955-56.

²¹⁴ Id. at 963.

of the senators offered a specific opinion on how the countervailing duty law should be applied in the lumber case.²¹⁵ Therefore, nothing occurred at the hearing which would rise to the level of congressional interference with the lumber investigations.

3. The Respondents Suffered no Prejudice From the Department's Delay in Issuing Its Issues and Decision Memorandum

The GOC has not even alleged that it was prejudiced by not having the full explanation for the Department's determination to read over a single weekend. In fact, there was no harm. The issuance of the Issues and Decision Memorandum one business day after the announcement of the countervailing duty rate did not affect the respondents' rights in any way.²¹⁶

²¹⁵ Only Senator Max Baucus even addressed the lumber dispute in his opening statements. Senator Baucus, however, did not offer an opinion on any specific issue in the case. His only reference to the enforcement of the countervailing duty law was to describe the Department's actions as "sound." Sectoral Trade Disputes: Lumber and Steel: Hearing Before the Senate Finance Committee, 107th Cong. 4 (February 13, 2002) (statement of Senator Baucus).

²¹⁶ "It is settled that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period *and specifies a consequence for failure to comply with the provision*' (emphasis added)." Alberta Gas Chemicals, Inc. v. United States, 515 F.Supp. 780, 785 (Ct. Int'l Trade 1987). See also Nakajima All Co. v. United States, 691 F.Supp. 358, 362 (Ct. Int'l Trade 1988); Philipp Bros., Inc. v. United States, 630 F.Supp. 1317, 1323 (Ct. Int'l Trade 1986). While 19 U.S.C. § 1671d(a)(1) uses the word "shall," it imposes no consequences for the failure to make the determination within the specified time frame. It is, therefore, a directory time period, not a mandatory one. American Permac, Inc. v. United States, 191 F.3d 1380, 1382 (Fed. Cir. 1990); Canadian Fur Trappers Corp. v. United States, 884 F.2d 563, 566 (Fed. Cir. 1989). Indeed, where Commerce published a countervailing duty order eight days after receiving notice from the ITC, rather than seven as prescribed by 19 U.S.C. § 1673e(a) (1994), the Court of International Trade held the statutory deadline to be directory. Guangxi Gitic Import & Export Corp. v. United States, 955 F.Supp. 1477, 1479 n. 4 (Ct. Int'l Trade 1997).

In addition, the time to file a challenge to a final determination runs from the date of its publication in the Federal Register. 19 U.S.C. § 1516a(a)(1). Publication occurred on April 2, 2002, a week after the release of the Decision Memorandum. Therefore, even though the Issues and Decision Memorandum was issued one business day after the final determination was made,

4. The Panel Should Accord No Weight Whatsoever to the GOC's Baseless Charge of Bias

In sum, the GOC has alleged that Commerce secretly conducted a biased investigation, while going to great lengths to create the appearance that it was following its normal rules and procedures (which repeatedly have been found adequate to ensure due process by reviewing U.S. Courts). The “mosaic” from which this conspiracy emerges has two pieces. First, the Under Secretary appeared before the Senate Finance Committee and read a prepared statement which contains no hint that the investigation had been or would be conducted in a biased manner. Second, Commerce issued its 160-page decision memorandum one working day following the announcement of its final determination.

We have demonstrated that this charge is completely baseless, both as a matter of law and by the most exacting standard of propriety. Given its transparent lack of merit, it would appear that the GOC's strategy in bringing it was not to succeed on the merits, but to have the Panel apply a more expansive standard of review to some alleged “close call” in this litigation as a consolation prize. Any such action would be highly improper. No reviewing body should reward litigants in even the smallest way for attempting to tarnish, for tactical advantage, the reputation of civil servants whose character and actions have been beyond reproach. The appropriate course of action would be for the Panel to admonish the GOC for this irresponsible act, in order to remove any possible taint from the reputation of the Department officials concerned.

I. THE DEPARTMENT COMPLIED WITH THE STATUTORY

the respondents still had the Department's rationale well before the time began to run for the filing of an appeal.

REQUIREMENT TO PUBLISH THE BASIS FOR ITS DETERMINATION

Pursuant to 19 U.S.C. §1677f(i)(3)(A), the Department must publish the basis for its determination, and address relevant arguments made by interested parties. On March 25, 2002, the Department released to the interested parties a 164 page Issues and Decision Memorandum. In this memorandum, the Department addressed each of the interested parties relevant arguments, and gave its basis for reaching its determination. The Department explicitly adopted this Issues and Decision Memorandum in the Final Determination,²¹⁷ and published the memorandum on its web site.²¹⁸ By informing all interested parties of underlying findings of facts and conclusions of law upon which determination was based, the Department fulfilled its statutory obligation.

The GOM argues that the Department did not address its argument concerning the species mix in the forests of Minnesota compared to the forests of Manitoba. In the Issues and Decision Memorandum, the Department acknowledged this argument:

Respondents argue that although some species are found in both Minnesota and Manitoba, such as black spruce and jack pine, the relative proportions of these species differ significantly. They also argue that timber prices vary given different locations, species, and other factors. Respondents contend that Minnesota softwood timber sold from public lands is not comparable to Manitoba Crown softwood timber that is utilized by Manitoba sawmills. Respondents claim that Manitoba forests and comparison market forests differ in distribution of tree species, timber size, and harvesting and growing conditions from Minnesota.

Issues and Decision Memorandum, at 129.

Commerce addressed this argument, stating:

²¹⁷ 67 Fed. Reg. at 15545.

²¹⁸ <http://ia.ita.doc.gov/frn/summary/canada/02-7849-1.txt>.

In the Preliminary Determination, 66 FR at 43205, the Department used Minnesota public land saw timber prices to calculate the benchmark for measuring the adequacy of remuneration for the Crown timber utilized by Manitoba saw mills. No information that has been placed on the record since the Preliminary Determination warrants a change in this methodology. In fact, the information on the record indicates that the mix of Spruce-Pine species found in Manitoba is commercially comparable to the Spruce-Pine species found in Minnesota. See David Coz, Jack Lutz, and William McKillop, “Examining the Market Value of Public Softwood Sawtimber in Canada,” at 15-25 (July 27, 2001) app. To Letter from Dewey Ballantine LLP to Department of Commerce (July 27, 2001).

Issues and Decision Memorandum, at 129.

Contrary to the GOM’s assertion, the Department addressed its argument, and explained the basis for its determination. Accordingly, the Department adhered to the requirements of 19 U.S.C. § 1677f(i)(3)(A).

J. THE PANEL SHOULD AFFIRM COMMERCE’S DETERMINATION

In conclusion, the Department adhered to all of the statutory and regulatory procedures. At times, such as with the scope issues, the Department went beyond the statutory and regulatory requirements, and gave all interested parties an additional opportunity to comment. The Department conducted verification in accordance with law, doing a “spot-check” on the respondents’ submissions. With the company exclusion requests, the Department exercised its regulatory discretion, and determined that based on the complexity of the issues, the quality of information submitted and the strain of Department resources that it was impracticable to consider all 351 requests. At times, the Department exercised its discretion to request information be placed on the record. When the Department did so, it observed the statutory requirement that all parties be given an opportunity to comment on that information. The GOC can point to nothing that impugns the integrity of Commerce officials. There is no basis for this

Panel either to vacate the order, or to refuse to give Commerce the deference it is due under the law. This Panel must affirm that the Department acted consistently with the statutory and regulatory procedures.