26 April 1989

CANADA/JAPAN: TARIFF ON IMPORTS OF SPRUCE, PINE, FIR (SPF) DIMENSION LUMBER

Report of the Panel adopted on 19 July 1989
(L/6470 - 36S/167)

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I. INTRODUCTION

1.1 On 8-9 October 1987 and 4-5 March 1988, Canada and Japan held consultations pursuant to Article XXIII:1 on Japan's tariff treatment of SPF dimension lumber imported from Canada. In a communication, circulated on 11 March 1988, Canada requested the GATT Council to establish a Panel under GATT Article XXIII:2 to examine the conformity with Article I:1 of the application of a tariff of 8 per cent on imports of spruce-pine-fir (SPF) dimension lumber by the Government of Japan. The Council, on 22 March 1988, agreed to establish a panel (C/M/218).

1.2 The Panel's terms of reference and composition were announced on 16 June 1988 by the Chairman of the Council as follows:

Terms of reference

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Canada in document L/6315 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII".

Panel Composition

Chairman: Mr. Pierre Pescatore,

Members: Mr. Alejandro de la Peña,
Prof. Richard Senti,

1.3 The Chairman of the Council also stated that the two parties were in agreement that the agreed terms of reference did not preclude the Panel from addressing either the question of the definition of "dimension lumber", referred to in the Canadian complaint, or the question of the relevance of the Japanese tariff classification to the issue (C/M/222).

1.4 The Panel met with the parties on 22 July and on 22 November 1988. The Panel also heard representatives of the EEC and of New Zealand, both of which had expressed, in Council, their interest in this case (C/M/218). Finland, which had likewise spoken in Council on this issue, has informed the Panel of its continuing interest.

1.5 For the conduct of its work, the Panel was supplied by Canada, Japan, the EEC and New Zealand with written submissions, replying inter alia to written questions by the Panel. At the Panel's request, Canada and Japan arranged for their delegations to the second meeting to be accompanied by technical experts.

1.6 The Panel submitted the Panel Report to the parties to the dispute on 5 April 1989.

II. FACTUAL ASPECTS

A. Definition of, and Information relating to, "Dimension Lumber" (supplied by Canada - paragraphs 2.1 through 2.12)

2.1 Canada explained that while lumber was generally thought of as a raw material, or a semi-finished product, that is further manufactured to produce a wide range of goods, dimension lumber is different. It is a highly standardized, finished product that leaves the manufacturing plant in its final form. It is not further manufactured before being used in its intended end-use of platform-frame construction. Dimension lumber is a building product. As such, it is more akin to a steel girder used in construction than it is to other forms of lumber.

2.2 Dimension lumber is produced from a number of species of trees, the two most common groupings for this use being the SPF and Hemlock-Fir (Hem-Fir), although other species can be and are used. Trees of different species tend to grow in stands of mixed species, many of which have similar properties. It is usually not practical, nor necessary, to separate logs by individual species before manufacture, so species groups were developed to accommodate these mixed growths. All the species within a group are harvested, processed, graded and marketed together. An individual species cannot be classified in more than one species group.

2.3 The lumber industry in North America comprises thousands of sawmills. The most common product of virtually all of these mills is dimension lumber. In fact many of these mills are designed with the sole objective of producing the single product of dimension lumber which is completely interchangeable in construction and competes freely in the marketplace. The manufacturing and lumber grading systems are designed to ensure that the lumber is produced to the same sizes and grades, regardless of mill or species of lumber. It is not uncommon, nor is it a problem, to find dimension lumber of different species, from different mills, being used on the same job-site in North America and in Japan.

2.4 The definition of dimension lumber has been highly standardized in North America. The basic requirements are established by the Canadian Standards Association (Standard 0141-1970) and the US Department of Commerce National Bureau of Standards (Voluntary Product Standard PS 20-70). These standards are exactly the same in both countries in their application to dimension lumber.

2.5 There exist a number of rule-writing agencies for general lumber standards in North America. These sometimes overlap and establish slightly different rules for grading the same type of lumber. However, this is not true for dimension lumber. The National Grading Rule is mandatory, and applies without exception to all dimension lumber produced in North America.

2.6 The NLGA defines dimension lumber as follows:

> For purposes of the National Grading Rule for Dimension Lumber, "dimension" is limited to surfaced softwood lumber of nominal thickness from 2 through 4 inches; and which is designed for use as framing members such as joists, planks, rafters, studs and small timbers.

2.7 Following from this definition, according to Canada, dimension lumber can be identified, and distinguished from all other forms of lumber through a combination of three elements: size, surfacing and appearance, and lumber grade. The assignment of a "dimension lumber"-type grade automatically defines the product as dimension lumber and distinguishes it from all other types. Dimension lumber that enters Japan is normally regraded, regardless of the North American grade that has been applied, to ensure conformity with the standards established by the Japanese Agricultural Standard for Structural Lumber for Wood Frame Construction, hereafter referred to as the JAS 600. A JAS stamp must be

applied before the lumber can be used generally in Japan for platform-frame construction. The JAS 600 grades are unique to dimension lumber in Japan and distinguish it from all other types of imported and domestic lumber.

2.8 The dimension lumber used in construction is almost exclusively 2 inches nominally in thickness (1.5 inches or 38mm actual) by five standard widths: 4, 6, 8, 10, 12 inches nominally (respectively 89, 140, 184, 235, 286mm actual). (The lumber is thus commonly referred to as a "2 by 4" (2 x 4) or a "2 by 6" etc.; in the Japanese regulations these correspond to the size codes of 204, 206, etc.) These North American standards were adopted without change in the JAS 600 lumber grading rules in Japan.

Treatment of Dimension Lumber in Japan and "JAS 600"

2.9 Canada explained in this respect that the laws and regulations established by the Government of Japan to regulate the grading of dimension lumber and its use in platform-frame construction treat dimension lumber as a single, manufactured product with no limitations on the use of any particular species.

2.10 The Building Standard Law is the national building code of Japan and is complemented by technical elaborations in the Enforcement Order of the Law. These set the overall framework of laws and regulations for construction in Japan, but with respect to wooden buildings they deal only with the traditional post-and-beam method of construction. When the 2 x 4 building system was introduced to Japan, new and separate regulations had to be established. These are the Technical Standards for Ensuring Safety of Wood Frame Construction.

2.11 The JAS 600 establishes the standards for grading of dimension lumber in Japan. The grades are based on natural characteristics such as the size of the knots, holes, discoloration, wane, fissures, growth rings, etc... The grading system is based entirely on the physical properties of an individual piece of lumber, with no discrimination whatsoever on a species basis. Lumber of any species can be graded to any particular level. The lumber-grading decision is made solely on the physical characteristics of the piece at hand, totally independent of species. This reflected perfectly the system used in North America, where the National Grading Rule applies equally to all species. The principle, in fact, was not new to Japan as the grading of the various forms of lumber used in the traditional post-and-beam method of construction is also based on physical properties, not species.

2.12 The fact that the grading of dimension lumber in Japan, as in North America, was neutral with respect to species is the basis for the interchangeability of species of dimension lumber in construction. Since the rules on lumber grading form an integral part of the building code of Japan, the clear, practical effect of this species-neutrality was that a 2 x 4 house in Japan could be made entirely from the SPF species, or entirely from Hemlock-Fir, or any combination of these and other species groups. This, in fact, is the case in Japan where, for instance, virtually all 2 x 4 houses in Hokkaido are being built exclusively with SPF dimension lumber.

B. History of Japanese Tariff Evolution and Structure of actual HS Heading 4407.10

2.13 Japan explained that up until June 1961 the relevant tariff position for processed, planed lumber in its tariff schedule had been 1709-2-C, providing for a duty of 15 per cent. In June 1961 Japan started to apply the (Brussels/CCCN) Customs Cooperation Council Nomenclature. The CCCN description for "planed and other processed lumber (processed wood)" was 4413, or 4413-2 in the Japanese tariff, the "-2" standing for coniferous lumber, dutiable at 15 per cent.

2.14 Effective 1 April 1962, Japan's CCCN based tariff for processed coniferous wood under position

4413 was redefined on a species basis and divided into two sub-headings, one of which, "4413-3", devoted to specifically listed, and dimension-wise defined, coniferous woods, namely those of:

> genus Pinus, genus Abies (other than California red fir, grand fir, noble fir and Pacific silver fir), genus Picea (other than Sitka spruce) and genus Larix, not more than 160mm in thickness.
>
> Another sub-heading covered "other" woods, namely those of other coniferous species.

2.15 During the Kennedy Round (1964-67) and the Tokyo Round (1973-79) Japan did not grant tariff concessions on any of these tariff positions and Japan, consequently, had no obligation under Article II with regard to the absolute level of these tariffs. As a signatory of the Harmonized Commodity Description and Coding System (HS) Convention, Japan applied, as of 1 January 1988, a HS-based tariff schedule. The HS tariff heading of relevance in the context of the case brought by Canada was 4407, defined under the HS as "Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm." In accordance with the HS rules and prescriptions, heading 4407 was divided into seven six-digit sub-headings; one of the seven sub-headings, 4407.10, being specifically dedicated to coniferous woods.

2.16 Position 4407.10 in the Japanese Tariff comprised, in addition to the main sub-heading position, seven separate tariff lines (nineteen statistical codes) distinguishing tariff treatment by (i) degree of processing, as follows: (a) planed or sanded; (b) not planed or sanded; by (ii) lumber size, as follows: (a) more than 6mm, up to and including 160mm in thickness, and (b) thickness more than 160mm (considered to be mainly a raw material, for resplitting), and (iii) by genera and/or species.

2.17 "Dimension Lumber", as defined by Canada, in terms of (i) size, (ii) surface treatment (e.g. "planed") and (iii) genera and species (e.g. coniferous) would, generally, be subject to an unbound zero rate unless it fell into one of the tariff numbers and descriptions that follow:

HS 4407.10-110	Pine (Pinus), Spruce (Picea)[1], or Fir (Abies)[1]
HS 4407.10-210	Larch (Larix)

Planed or sanded lumber of these genera were subject to the general rate of 10 per cent, reduced to a temporary rate of 8 per cent.

2.18 Genera and species of planed or sanded lumber, 160 mm or less in thickness, covered by sub-positions HS 4407.10-310 (incense cedar, a position bound at "0" for this species, mainly used for pencil making) and 4407.10-320 of "other coniferous trees" would be duty free. Among the "other coniferous trees" category were: hemlock and other genus Tsuga, Douglas-fir and other genus Pseudotsuga, white cedar, yellow cedar, and other genus chamaecyparis, western red cedar, redwood and agathis and, out of the Picea genus; Sitka spruce, and, out of the genus Abies, California red fir, grand fir, noble fir, Pacific silver/Amabilis fir.

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[1]with the exceptions noted in 2.18 below.

C. Data on Coniferous Forest Resource Distribution, Lumber Production in North America and Imports, presented by Japan

2.19 Japan explained that pine was distributed naturally throughout much of the Northern Hemisphere and was also artificially cultivated in a number of countries in the Southern Hemisphere. Fir was likewise widely distributed in the Northern Hemisphere, north of Central America and North Africa, which constituted the southern distribution boundary. The spruce genus existed most plentifully in East Asia, north of the Southern Himalayas, and was also distributed in Central Asia, Europe and North America. Other kinds of softwoods imported in large quantities into Japan were those of the genus Tsuga (such as hemlock), genus Pseudotsuga (such as Douglas fir), and genus Chamaecyparis (such as yellow cedar), which were distributed in both North America and East Asia.

2.20 Japan provided in this respect some geographic charts, showing that genera and species referred to in the Japanese Tariff are grown in the whole of the Northwestern part of the American Continent. However, two species, i.e. California Red fir and noble fir, appear to have their natural stand almost exclusively on the territory of the United States. Grand firs appear to have their natural stand mainly in the United States and some in Canada. On the other hand, Pacific silver fir and Sitka spruce appear to have their natural stand mainly in Canada. Hemlocks appears to have its natural stand both in Canada and in the United States. Japan also provided statistical trade data, it being understood that the trade figures shown on pages 10 and 11 relate to planed lumber generally and not specifically to dimension lumber.

Coniferous Species, Standing-Volume Inventory Data

Volume, in million cubic metres,
and percentage share in total

Genera/Species	Canada[1] (1981) Volume	% share	United States[2] (1977) Volume	% share
Pin/Fir/Spruce	11,872	76.0	7,541	58.5
Douglas-fir	614	3.9	2,648	20.5
Hemlock	1,224	7.9	1,641	12.7
Cedar	784	5.0	323	2.5
Other "softwood"	1,076	6.9	753	5.8
Total[3]	15,570	100.0	12,906	100.0

[1]Gross merchantable volume of stocked, productive, non-reserved forest
[2]Net volume of growing stock on commercial timberland
[3]e.g., fifteen thousand five hundred and seventy million cubic metres and twelve thousand nine hundred and six million cubic metres respectively

Sources cited by Japan: Bonnor, G.M., Canada's Forest Inventory, 1981; Canadian Forestry Service, 1982; and US Forest Service; Forest Statistics of the United States, 1982

Softwood Lumber Production/Shipments[1] by Species
- in million cubic meters
and percentage share in total -

	Canada (1982) Volume	percentage share	United States (1985) Volume	percentage share
Pine/Fir/Spruce	25.23	73.3	42.49	54.9
Douglas-fir/Larch	2.24	6.5	16.55	21.4
Hem-fir	4.40	12.7	7.46	9.7
Cedar	2.47	7.2	2.11	2.7
Other "softwood"	0.20	0.6	8.76	11.3
"Softwood' Total	34.54	100.0	77.36	100,0

[1]For Canada: mill shipments; for US: production; data presented by Japan; all figures rounded.

Sources cited: Canadian Forestry Service Statistics, published in 1985; United States - International Trade Commission, 1986

Imports of Planed Lumber into Japan[1]
(Main suppliers, in order of importance)
-in cubic metres-

	of SPF (+ larch)		Other coniferous	
1963	666		339	
1964	499		360	
1965	1	(UK)	640	(CAN, US, PTW, DEU)
1966	3	(UK, DEU)	155	(KRR, PTW, THA, US)
1967	156	(US, USSR)	1458	(CAN, IND, US, CHN)
1968	0	(US, ALA)	1398	(CAN, CHN, US, CGO)
1969	74	(US, CHN, DEU)	1783	(US, CAN, CHN)
1970	361	(HKG, CAN, US, DEU)	1024	(CAN, CHN, US)
1971	4	(DEU, UK)	5816	(US, CAN, CHN)
1972	0		14882	(US, CAN, PTW)
1973	767	(CAN, PTW, US, FIN)	79180	(US, CAN, PTW, KRR)
1974	1468	(CAN, KRR, PTW, US)	247648	(US, CAN, PTW, KRR)
1975	9072	(CAN, PTW, US, SWD)	335890	(US, CAN, PTW, PNG)
1976	17345	(CAN, SWD, KRR, PTW)	360484	(US, CAN, PNG, KRR)
1977	23003	(CAN, US, SWD, FIN)	374454	(US, CAN, PNG, KRR)
1978	35580	(CAN, US, NZL, SWD)	347325	(US, CAN, PNG, PTW)
1979	50446	(CAN, US, NZL, SAF)	707666	(US, CAN, PNG, NZL)
1980	76584	(CAN, US, NZL, SWD)	747451	(US, CAN, PNG, NZL)
1981	65282	(CAN, US, NZL, SWD)	611523	(US, CAN, PNG, KRR)
1982	84645	(CAN, US, NZL, DK)	874346	(US, CAN, PHL, PNG)
1983	164545	(CAN, US, CHL, DK)	938887	(US, CAN, KRR, IND)
1984	158815	(CAN, US, CHL, NZL)	939022	(US, CAN, KRR, IND)
1985	192677	(CAN, US, CHL, NZL)	1123737	(US, CAN, KRR, PHL)
1986	233512	(CAN, CHL, US, NZL)	1477030	(US, CAN, KRR, PHL)
1987	424116	(CAN, CHL, US, KRR)	2190456	(US, CAN, KRR, IND)

Country Name abbreviations::

DEU = FR Germany; ALA = Australia; CAN = Canada; CHN = China; CGO = Congo;
FIN = Finland; HKG = Hong Kong; KRR = Korea, Rep. ; PTW = Taiwan;
SWD = Sweden; NZL = New Zealand; DK = Denmark; CHL = Chile; IND = India;
IDN = Indonesia; PNG = Papua New Guinea; PHL = Philippines; SAF = South Africa

[1]Data presented by Japan.

Source: Japan Ministry of Finance.

Japan's Imports of Planed Softwood Lumber from Canada
by Duty-Category[1]

Year	Subject to duty	Duty-free	Total	Percentage share of dutiable imports
	in cubic meters			
1965	-	329	29	0
1966	-		-	-
1967	-	1.090	1.090	0
1968	-	1.178	1.178	0
1969	-	346	346	0
1970	52	523	575	9
1971	-	125	125	0
1972	-	1.127	1.127	0
1973	560	29.673	30.233	2
1974	1.336	37.604	38.940	3
1975	8.889	45.930	54.819	16
1976	16.981	88.528	105.509	16
1977	21.892	128.305	150.197	15
1978	33.231	147.527	180.758	18
1979	45.066	318.355	363.421	12
1980	71.130	337.904	409.034	17
1981	55.034	257.159	312.193	18
1982	76.177	327.696	403.873	19
1983	146.326	360.066	506.392	29
1984	150.720	413.509	564.229	27
1985	181.157	462.921	644.078	28
1986	187.966	482.305	670.271	28
1987	348.438	793.624	1.142.062	31

[1]Data presented by Japan.

Source: Japan Ministry of Finance

2.21 On the basis of indications provided by Japan, the Panel was able to establish an analytical tabulation of the Japanese Tariff, showing separately types of lumber, including dimension lumber, submitted, on import, respectively, to a duty of 10 per cent (temporary 8 per cent) and types of lumber imported free-of-duty.

Analytical Tabulation of Japanese Tariff

Genera	Species
Duty of 8% (temporary) [10% general]	
Pinus/Pine	
Abies/Fir - 4 species excepted	
Picea/Spruce - 1 specie excepted	
Larix/Larch	
Duty free (general)	
Chamaecyparis/Cedar	
Tsuga/Hemlock	
Pseudotsuga/Douglas Fir	
"Other Coniferous"	
	Ex Genus Abies:
	*California Red Fir
	* Grand Fir
	** Pacific Silver Fir
	Ex Genus Picea:
	** Sitka Spruce

Note: The species marked * have their natural stand exclusively, or mainly, on the territory of the United States of America. The species marked ** have their natural stand mainly on the territory of Canada. All other genera and species mentioned are grown on the whole western part of the North American Continent, including Canada, and also in other areas of the World.

2.22 Canada provided the following statistical data regarding recent imports of dimension lumber into Japan.

JAPAN'S IMPORTS OF DIMENSION LUMBER (MILLION BOARD FEET)

1987	From Canada	From United States
SPF, dutiable	200	negligible
Hem-Fir, duty free		
- Kiln Dried	44	100
- Green	32	negligible

Source cited: British Columbia Council of Forest Industries

III. MAIN ARGUMENTS OF THE PARTIES

A. Canada's Case

3.1 Canada, in requesting Council to establish a Panel, explained, in document L/6315, (extract):

"The Government of Canada considers that the eight per cent tariff applied to imports of SPF dimension lumber [Japanese tariff number 4407.10.110] is not in conformity with the provision of Article I:1 of the General Agreement concerning the equal treatment of like products. It is Canada's view that dimension lumber made from SPF and dimension lumber made from other species of wood are like products under the meaning of Article I:1. The latter enter Japan with zero duty.

"The Government of Canada further considers that the higher tariff applied to SPF dimension lumber acts to nullify and impair benefits accruing to Canada under the General Agreement".. ...

3.2 Canada stated that Article I:1 of the GATT imposes an obligation on contracting parties to provide equal tariff treatment, immediately and unconditionally, to "like-products", regardless of national origin. The Japanese duty treatment of SPF dimension lumber has had, and continued to have, a negative impact on Canadian exports. Canada had helped to create in Japan the platform-frame construction method, which is based on dimension lumber. However, Canada has become increasingly concerned with the discriminatory effect of the tariff on SPF dimension lumber which inhibits the ability of Canadian SFP suppliers to reap full benefit from the market which they have been largely responsible for creating.

3.3 Bilateral consultations between Canada and Japan had been held over a period of more than ten years, at all levels, but the Canadian demand for equal treatment of all species of dimension lumber had not been met. While Canada continued to remain open to a bilateral resolution of the matter, in a way which would result in the removal of the discrimination in the duty for dimension lumber, Canada had seen no other way than to turn to Article XXIII procedures.

3.4 Canada's lumber reserves, and consequently its greatest opportunities for increased production and sales of dimension lumber, were based on SPF, with limited possibilities for growth in production of dimension lumber from Hem-Fir and other species (cf. the tabulations on pages 8 and 9). Due to geographical growing patterns, and the long periods required to grow trees to harvestable size, there was little Canada could do to reorient dimension lumber production to duty-free species over the next fifty to one hundred years, if ever. Although dimension lumber imported into Japan from North America could come from any area of Canada, or the United States, cost considerations had led to most supplies originating in either the western States of the United States, or in the Province of British Columbia (B.C.), in Canada. SPF species were, overwhelmingly, the primary species of

dimension lumber produced in B.C., while the production in the western USA tended to be concentrated in the "other" species' groups. Canadian exports to Japan of dimension lumber of SPF species accounted for 73 per cent of total dimension lumber exports to that country. United States' exports of dimension lumber to Japan were virtually all (kiln-dried) Hem-Fir, with minimal exports of SPF. Shipments of dimension lumber to Japan from other contracting parties were negligible. Canadian exports of SPF dimension lumber were in direct competition with United States exports.

3.5 Impairment to Canadian interests through tariff discrimination in Japan resulted both from lost market share (due to the price sensitivity of the market) and the additional duties attached to SPF lumber imports. The Canadian industry had estimated that, in the period 1974 to 1987 inclusive, lost sales, due to lost market share, amounted to some $90 million (Canadian), while the duty paid over the same period was approximately $26 million. The industry estimated that, if Japan were to continue to apply a discriminatory tariff to SPF dimension lumber, Canadian industry would suffer a further $335 million shortfall from lost sales, and would pay an additional $55 million in duties over the next five years.

3.6 Canada considered that, in law and in practice, dimension lumber of any species was treated in Japan as a single product. The only anomaly, the only deviation from the pattern, was the tariff discrimination that applied to certain species of dimension lumber. In Canada's view, this was treatment to like products and it represented a prima facie nullification and impairment of rights accruing to Canada under the General Agreement. Canada therefore requested that the Panel:

(a) "find that SPF dimension lumber is a "like-product" to other species of dimension lumber, such as Hem-Fir, Douglas Fir, and others;

(b) "conclude that maintaining a difference in the tariff rate applied to SPF dimension lumber and that applied to dimension lumber of other species groups is, therefore, inconsistent with Japan's obligations under Article I:1 of the General Agreement; and

(c) "recommend to the Council that Japan be asked to remove any discrimination between the tariff on SPF dimension lumber and the tariff on other species of dimension lumber."

Precedents relied upon by Canada

3.7 Canada pointed out that it was aware that the drafting history of Article I:1 of the General Agreement did not offer a definition, or adequate classification, of what should be considered "like products" within the sense of Article I. Canada was also aware that a number of GATT Panels had examined the like product concept in Article I and Article III. While each case had to be examined on its own merits, precedents of previous Panel cases would be useful in the appreciation of the present case. Among cases reviewed by Canada were: (a) the Chile-Australia Working Party on Subsidy on Ammonium Sulphate (BISD Vol.II); (b) the USA-EEC Panel on Measure on Animal Feed Proteins (BISD/25S); (c) The Canada-EEC Panel on Beef Imports (BISD/28S); (d) the Brazil-Spain Panel on Tariff Treatment of Unroasted Coffee (BISD/28S); and (e) the EEC-Japan Panel on Customs Duties, Taxes and Labelling Practices on Imported Wines and Beverages (L/6216).

3.8 Canada considered that there was, in particular, a direct parallel between the Coffee Panel case and the case at hand. Both cases involved products with natural origins, subject to unbound tariffs. In both cases the products in question were exported by the complaining contracting party, as well as by other contracting parties. In both the Coffee Panel and the present case the product attracting the higher tariff rate was the one which constituted the larger share of exports of the complaining party. Additionally, in both cases the tariff sub-divisions which created the discrimination had been unilaterally determined by the importing contracting party. More specifically, the Coffee Panel had examined a case where Spain applied a higher tariff rate to imports of unwashed Arabica and Robusta coffees than it did to other groups of coffee. Brazil had complained that this constituted discrimination between "like products", in contravention of Spain's obligations under Article I:1 of the GATT.

3.9 Canada recalled that Spain had argued that the imposition of different tariffs to the various types of coffee was fully compatible with Spain's GATT obligations, since the tariff classification was applied according to the nature of the products and was independent of the country of origin. A very similar situation was found in the present case. Japan claimed that, since exports of a specific type of dimension lumber were treated the same for tariff purposes, regardless of country of origin, Article I:1 was not relevant. Canada noted in this connection that the Coffee Panel had ruled on products being exported from Brazil only, and had made no direct reference to the exports of third countries and, further, that the Panel's judgement was made on a product-, not on a country-basis. In Canada's view the results of the Coffee Panel confirmed that there is in GATT Article I:1 an obligation to provide equal tariff treatment to like products. Canada considered therefore that the conclusions of the Coffee Panel applied equally to the present case and that the same obligations apply to Japan, namely that Japan must not discriminate between "like products" in the application of duties. In Canada's view the focus of the SPF Dimension Lumber Panel should be on whether the products in question are like products within the meaning of Article I:1.

B. "Dimension Lumber" and Japanese Tariff Classification

3.10 Canada pointed out that "dimension lumber" was in use in the United States, Canada, Japan, the United Kingdom, the Netherlands, France and the Republic of Korea. Out of these countries, Japan was the only country which had a tariff system that effectively discriminated among species of dimension lumber. While the cited countries treated dimension lumber as part of a larger category of sawn lumber which, in turn, might be further categorized by species and/or degree of processing, unlike in Japan, there existed no species-based tariff discrimination. If the survey of tariff treatment were to be broadened to still other countries, like Norway, Sweden, Finland, Switzerland, Australia and New Zealand, it could be shown that in these markets as well, dimension lumber would face no discrimination on a species basis, but would have a single tariff applied to it. Even in the Japanese tariff, SPF and all other species of dimension lumber were classified in the same general tariff sub-heading (HS 4407.10) and had the same unbound status.

3.11 Japan explained that in the Japanese Tariff "dimension lumber" is not separately identified, or referred to, as a customs- or statistical code-entity. While Japan saw no particular difficulty in recognizing that "dimension lumber", whether it be of SPF, hemlock, or any other coniferous species, might be a product manufactured by reliance on highly sophisticated technology, in its view, it remained a half-finished wood product, in no way different from planed lumber. Product attributes such as size, nominal measurements, strength evaluation, planing on four sides and stamps notwithstanding, Japan considered that "dimension lumber" was not truly distinguishable from planed lumber generally. While, admittedly, in North America "dimension lumber" might be produced to some extent without separating logs by individual tree species, this practice could not be considered to constitute a sufficient basis for giving all dimension lumber a universal status, or to qualify it for coverage under a single tariff line in the, not infrequent, cases where tariffs were sub-categorized by species.

3.12 As Japan saw it, dimension lumber was a categorization defined with an emphasis on end-use. In Japan's view, tariff classifications could, in general, not be made according to end-uses. Canada had proposed that "dimension lumber" could be a possible tariff classification, defined by (i) reference to rating certificates, based on North American standards and (ii) identification on the basis of JAS 600. Utilizing rating certificates based on the North American standards as a tariff classification criterion raised the danger of country- or area discrimination and would thus not be appropriate. As "dimension lumber" was used in Japan not only for platform-frame construction, it would not be possible for Customs, even with reference to JAS 600, to distinguish between "dimension lumber" and imports of lumber for end-uses other than 2 x 4 construction.

3.13 Japan explained that, "dimension lumber" was not a universal, clearly defined product and, as of now, there was not a single country, or market, which had established in its import tariff classification, or schedule, a specific item for dimension lumber; nor did the Harmonized System recognize, or identify, 'dimension lumber' as an independent item. In its written submission Japan had demonstrated that the range of sizes considered by Canada to be 'dimension lumber' had changed over time in North America, that the term was not understood in the same way in the trade-literature, that it was interpreted differently in North America, New Zealand and in Australia, that the interpretation in Japan was not the same and was, moreover, in evolution, even with reference to the JAS 600.

3.14 Japan pointed out that different lumber species were marketed separately, one from the other, and not in mixtures, not only in Japan but in North America as well, where Douglas-fir, hemlock, ponderosa pine, Engelman spruce (included in SPF), etc. were all traded separately. While the use of dimension lumber was spreading in Japan, the consumers' general perception remained that dimension lumber was only a particular form of planed lumber.

3.15 Canada did not agree with Japan's contention that the tariff classification system limited Japan's ability to treat dimension lumber as a "like product". Dimension lumber was not a raw material, nor a semi-finished product, but a highly standardized, finished product that left the manufacturing plant in its final form. Apart from eventual length-cutting, it was not further manufactured before being used in its intended end-use, platform-frame construction. Dimension lumber was graded in accordance with mandatory rules and definitions, which were standardized and the same throughout North America, and which, in essence, had also been adopted by Japan. The production and grading of dimension lumber was intentionally designed to produce a unique product of standard sizes and grades, regardless of the sawmill or the tree species involved. This standardization was the basis of the interchangeability of all forms of dimension lumber in construction. Through a combination of sizing, surfacing and appearance, and lumber grades, dimension lumber could easily be distinguished from all other types of lumber. The issue before the Panel should not be confused by broadening the scope of the Panel's examination beyond 'dimension lumber' to planed lumber generally. Canada's complaint was limited to the specific product known in North America, and also in Japan, as "dimension lumber". Canada did not contend that different lumber species per se should be considered "like products", regardless of the product-form they might take.

3.16 Canada stated that references by Japan to the difficulties they expected in regard to identifying dimension lumber as a separate product were not supported by actual practice in the Japanese housing industry and lumber trade. Thus, since twelve years there existed a "Japan 2 x 4 Association" (with some 740 members, throughout Japan) dedicated to the promotion of the 2 x 4 platform-frame construction method. Further examples that the Japanese industry and government recognize dimension lumber as a distinct product are the existence of the JAS 600 (issued by the Ministry of Agriculture, Forestry and Fisheries) and the booklet entitled "Dimension lumber and JAS", issued by the "2 x 4 Lumber JAS Council". As regards past changes in the definition of "dimension lumber", the facts of the case were that in Canada and in the United States, the actual sizes, as opposed to the nominal sizes, did change in 1970, but sizes had not changed since. The Japanese size standards for dimension lumber were established by the JAS in 1974, based on the Canadian and US sizes. In any event, it would be the Japanese standards, as defined by JAS 600, that exporters would have to meet if they wished to have their product used in Japan for platform-frame construction.

3.17 In Canada's opinion, the fact that dimension lumber was a fully manufactured product was of fundamental importance in examining the question of "likeness" of dimension lumber of different species. No tariff classification system could ever provide separate identification and separate listings for every single product that could be traded or imported. Nor would it be expected that all products within a single tariff line were, necessarily, "like products". This, however, could not be taken as a proof that a particular product could not be so identified, nor that its treatment could not be judged in the light of GATT obligations. The fact that a particular product was not specifically mentioned in the HS nomenclature did not mean that it did not exist, nor that it could not be defined or identified. The question of whether a product could be singled out, and discussed, as an independent item, had to be addressed on the basis of the characteristics of the product itself.

3.18 Canada also could not accept the contention that a distinction in the tariff for dimension lumber would be unworkable in terms of customs enforcement. In many cases customs officers already had to rely on documentation, not visual inspection, when classifying goods for tariff purposes. To some extent this was already the case for imports of dimension lumber. For example, a customs officer had to know what species of lumber he was dealing with, to determine whether, or not, the 8 per cent tariff was to be applied. To do so, the officer had to rely on the statements in the accompanying documentation, because in many cases even experienced lumber experts had difficulty in distinguishing between species of lumber. If Japan were to introduce a size-code-definition for dimension lumber, based on the JAS 600, compliance with that code could be certified in accompanying documents for purposes of tariff classification.

3.19 Japan reasoned that the argument, that Customs could determine compliance by reference to JAS 600 and by certification, was an indication that compliance might be difficult. In this context it was relevant to bear in mind that the JAS 600 had been changed several times in the past, and might be changed again in future. The JAS 600 rules had in no way been designed with the purpose of setting customs-enforcement criteria, but had been designed to ensure the safety of platform-frame constructions. Moreover, planing, one of the definitional elements of dimension lumber, was not a mandatory JAS 600 requirement. Even if Japan were to assume, for the purpose of the examination, that 'dimension lumber' could be clearly defined, dimension lumber of SPF and dimension lumber of other species would, in its view, still be different products, in practical terms, physical origins, -characteristics, end-uses, consumer perception, etc. and would, hence, not be 'like products' in the sense of Article I:1.

3.20 Furthermore, Japan feared that if sub-classifications of the type envisaged by Canada were to be generally accepted, sub-classifications could be used to undermine negotiated tariff concessions. For example, if an interested contracting party had negotiated a tariff concession on planed lumber of Douglas-fir, but there had been no concession on SPF planed lumber, a potential complainant could try to "sub-classify" planed lumber, claiming that, while different species of planed lumber were not claimed to be "like", different species of the sub-category "dimension lumber", were like, in order to gain an unbargained-for-concession on SPF "dimension lumber", or, in other words, part of SPF planed lumber. In the next phase, the same country, or a third country, could claim that different pieces of SPF planed lumber, "dimension" and "non-dimension", are "like". Thus, the concession would be totally undermined, and the claimant would get, in effect, the concession without negotiations for SPF planed lumber as a whole. Tariff concessions, however, should be, and had been negotiated, and concessions, distinguished by species, had been exchanged, and upheld, in successive GATT tariff negotiations.

C. Reasons for Specifications in Japanese Tariff

3.21 Japan explained that tariff rates had been set for each item reflecting the item's special characteristics, including import-needs and the protection of related domestic industries. Thus, in 1962, when Japan was entering a phase of rapid economic growth, domestic resources of Japanese cedars (sugi) and cypresses (hinoki) had largely been depleted as sources of building materials in the wake of postwar economic recovery. Since there existed a huge domestic demand for such lumber, lumber prices had soared. In that situation, Japan liberalized its forest-products-trade (which had been regulated since the end of World War II for foreign exchange control purposes) with the intention of promoting imports of lumber so as to meet domestic demand not satisfied by domestic resources. Japan decided to reduce import duties depending on the particular situation of each species and, consequently, introduced species distinctions, in its tariff schedule. Lumber of species in high demand, and for which no protection was felt to be required, mainly Douglas fir and hemlock (as substitutes, respectively, for "sugi" and "hinoki"), benefited from the introduction of a zero duty. Likewise, red cedar, considered to be a substitute for Japanese cedar as appearance lumber, was made duty-free. The previously generally applicable import duty rate of 15 per cent was reduced to 10 per cent for pine-, fir-, spruce-and larch-species lumber. A duty of 10 per cent for these species' lumber was retained because the relevant domestic industries were in need of protection and limited domestic demand reduced the need for imports. The duty reductions effected at that time were not the result of any negotiations, but constituted unilateral action by Japan, reflecting the domestic lumber supply and demand situation.

3.22 Japan explained that, as regards species distinctions in the tariff, Japan had proposed, at the time of the HS elaboration, that the relevant HS sub-headings for coniferous woods, namely 4403.2 and 4407.1, be sub-divided, at the two-dash description level, into the following sub-divisions: - - of white cedar and other wood of the genus Chamaecyparis; - - of hemlock and other wood of the genus Tsuga; - - of Douglas fir and other wood of the genus Pseudotsuga; - - of Radiata Pine and other wood of the genus Pinus; - - of spruces and other wood of the genus Picea or of wood of the genus Abies.

3.23 Also at that stage of the HS elaboration, Canada had suggested the creation of certain two-dash level sub-positions for coniferous woods, based on species distinctions. The United States Administration, on the other hand, had been of the view that two-dash level distinctions in headings 4403 and 4407 should not be introduced since, the United States pointed out, the composition of the trade would vary significantly among countries and geographic areas, as "shipments of certain species often are mixed, as in Hem-Fir (hemlock-fir) shipments". Consequently, the United States, (quote): "felt that each country can create the necessary detail at the national level" (Reference: Customs Cooperation Council document 24.199, of 26 April 1978).

3.24 As Japan saw it, pine-fir-spruce, when compared with other species, were inferior in terms of lumber quality. The fir and spruce genera had insufficient decay resistance and pine lumber usually had large knots and its grain was not straight. When these lumber species were to be employed in building and other purposes their uses were limited.

3.25 Spruce-pine-fir (SPF) grow naturally, or are planted, in the northern parts of Japan, or in the long mountain range areas with low soil productivity. Due to the fact that these tree species are inferior in timber quality, and are moreover inconveniently located, the related forestry and wood- industries experienced low profitability and were in need of protection. Fostering other tree species, or implanting alternative industries, in the areas where SPF species were growing, was difficult. Compared to pine-fir-spruce, the situation and prospects for other coniferous species were markedly different. Among other coniferous trees the major species growing in Japan were "hinoki" (Japanese cypress, Chamaecyparis obtusa) and "sugi" (Cryptomeria japonica). Both of these were strongly in demand for house construction purposes. Major imported species of other coniferous trees were hemlock and Douglas-fir. These species had superior strength and other physical characteristics and were used as

building-components requiring strength. Imports of such species were regarded as substitutes for sugi and hinoki. Domestic resources of sugi and hinoki were insufficient to meet a sustained high level of demand, with the result that the price level for such lumber was high and that the forestry and wood-industry activities related to sugi and hinoki enjoyed high profitability. To meet market-demand it was necessary to promote the importation of hemlock and Douglas-fir.

3.26 Within the genera Abies and Picea, certain independent species were exempt from duty: namely,

(i) in the Abies group: California red fir (Abies magnifica), grand fir (Abies grandis), noble fir (Abies procela) and Pacific silver fir/amabilis fir (Abies amabilis).

These species grow, and were mixed, somewhat, with hemlock, in fellings and in lumber, constituting the "Hem-Fir alliance of species" in Canada and in the United States. In order to facilitate customs clearance for hemlock lumber, which had to be imported in large quantities, these species had been specified in the Tariff as exempted species overall. Japan explained that California red fir and noble fir species grew only on the territory of the United States. Grand fir grew mainly on US territory, but there were also stands in Canada; lumber production from these species was thought to be quite limited. For Pacific silver fir/Amabilis fir the largest stands were in Canada, but there were also stands in the United States. Neither of these four species was traded in significant volume as a separate species, but mainly jointly with hemlock. Japan stated that, without this exception, any small portion of mixed fir in hemlock would have to be reported separately for customs clearance, and thus would cause much difficulty for the importation of hemlock. In the lumber grading rules in Canada and the United States these four exempted species were treated collectively as "Hem-Fir"; trade in these species was minor, or negligible. There was thus no intent of discriminatory treatment nor, in Japan's view, was there any consequence to that effect.

(ii) in the Picea group: Sitka spruce (Picea sitchensis).

Japan explained that Sitka spruce was also called "Alaska Hinoki" and was used in Japan for general building purposes, as well as for musical instruments, as a high-grade lumber. Sitka spruce was clearly distinguished from lumber of other spruce-species for circulation and consumption, and, in Canada, it had separate rating-rules and separately prescribed stress ratings. It was also distinguished separately in Canadian trade statistics. Sitka spruce was significantly different from other spruce lumber. The lumber was specified in the Tariff as a duty-free item because (a) Japan had no substitute domestic resources and needed to import it, and (b) because there was no competing domestic industry. Sitka spruce stands were found in the Western coastal regions of North America, stretching all the way from Alaska through northern California, with most of the stands situated on Canadian territory. According to Japan, about 70 per cent of its Sitka spruce imports originated in Canada and, again, there was no discriminatory aspect in the import tariff treatment.

Practice of Other Countries

3.27 Japan stated that not only was Japan's tariff classification in accordance with internationally agreed rules, the distinction by species that was made in the Tariff was not at all unusual. Australia applied a 2 per cent tariff to lumber of redwood and red cedar, and a 5 per cent tariff to other coniferous species; Argentina presently applied a 28 per cent tariff on spruce and Douglas-fir and a 34 per cent tariff on other pines and larch. At the time when Japan first established the tariff differential based on species, softwood lumber tariffs in Finland, Canada and the United States had varied by species, including those on "planed" lumber. Many countries, for example Canada, New Zealand, the United States, Switzerland, the EEC and Finland, even though they did not currently apply different tariff rates, continued to sub-classify tariffs on 'softwood lumber' by species. Many countries did apply different rates, based on their own, unique classifications, to different species of hardwood lumber and other wood-products. For example, Canada applied different tariffs to oak and to other species of flooring. In Japan's view it seemed evident that contracting parties had always understood the GATT to permit species-specific tariffs.

3.28 Canada stated that it was not asking Japan to reclassify its Tariff, or to introduce into its tariff classification end-use criteria, but Canada could not accept that the Japanese Tariff might not be modified so as to accommodate "dimension lumber", if that were taken to be the solution. Japanese tariff classification practice in HS Chapter 44 showed considerable flexibility and precision in creating tariff definitions based on lumber sizes. Canada did not deny that a contracting party has the right to structure its tariff as it wishes (subject, however, to its international obligations), and to create as many sub-divisions as it wishes, whether it be for statistical or other valid reasons, but the "like product" obligation was paramount and superseded any classification structure. Similarly, contracting parties were free to protect domestic industries as they saw fit, but only in ways compatible with their GATT obligations, and tariff discrimination among like products was not consistent with the obligations of Article I.

D. "Like Products" Issue

General Observations

3.29 Canada explained that, in putting forward its case, it had borne in mind that the drafting history of Article I of the General Agreement suggested that the question of "like products" be examined on a case-by-case basis. Canada had reviewed the criteria used in previous Panel cases assessing "likeness". These criteria included: (a) practices of other contracting parties; (b) the physical origin and properties of the products; (c) treatment of the products in internal regulations by the importing country; and (d) the "end-use" of the product.

3.30 Canada considered that the obligation of Article I to accord equal treatment immediately and unconditionally applied both to "like products", as well as to the countries from which the like products originate. It was Canada's position that dimension lumber is a "like product", regardless of the species from which it is manufactured and Article I required equal tariff treatment.

3.31 Japan, pointing to the text of GATT Article I:1 itself, and to documents dealing with the drafting history and interpretation of the "like products" concept (UN -: EPCT/C/II/65, page 2; EPCT/C. II/PV.12, page 7 (1946); EPCT/C.II/36, page 8 (1946); E/Conf. 2/C.III/SR.5, page 4 (1947); GATT/CP/4/39, paragraph 8; IC/SR.9, page 2 (1953); and GATT:BISD 25S, pages 49-53 and BISD 28S, pages 92-98), stated that, in its view, Article I:1 was not intended to seek out an ideal tariff classification, but that, in cases of doubt, or disputes, concerning "like products", past deliberations had focused on whether, or not, most-favoured-nation treatment was extended to the products concerned, irrespective of countries of origin, and the tariff classification of the country in question had been

examined to see if it was discriminatory. At the same time, the classification system of the country concerned was respected and, as Japan saw it, past Panel deliberations had resulted in judgments that two products were not "like products" if there were any practical differences between the products examined. Japan felt that attempts to determine likeness in an a priori manner, without adequate attention to tariff classification, would cause confusion in existing tariff classification systems and also in the context of tariff negotiations.

3.32 With reference to the latter two points, Japan feared that any moves to introduce tariff sub-classifications based on "end-use" criteria, would have the result that negotiators, when considering a concession-request on a given tariff position, would have to examine for "likeness", with the product covered by the requested position, all other products covered under any other tariff position, and, if there existed such "like" products, the negotiators would then have to decide whether, or not, they would be in a position, and willing, to grant the concession, bearing in mind reciprocity obligations and other relevant desiderata and requirements.

3.33 Canada explained that it could not accept that specific tariff classifications set out by the importing country should determine whether products were like or not. Acceptance of that position would imply a system whereby products which were not covered by the same tariff line could not be considered "like products". Applying the same logic, such an interpretation would also imply that goods covered by a single tariff line would be presumed to be like goods. The fact that goods were covered by a single tariff line most likely implied not more than that there was some sort of relationship amongst them. It would be no more logical to assume that goods covered under the same tariff line were "like products" than that goods under different tariff lines were not. This could be amply demonstrated, but it was also obvious from the case at hand, for example by reference to Japan's recent tariff reclassification of larch dimension lumber. Canada also could not accept assertions to the effect that separate classification for dimension lumber might threaten the stability of the tariff classification system, or that discussions regarding sub-divided items could impair the functioning of the entire tariff negotiation system in use based on tariff numbers. The greater danger, by far, to the trading system, in Canada's view, would be the acceptance of the Japanese argument that the tariff classification system should determine the "likeness" of products. This would provide countries with a means to avoid their Article I obligation with respect to like products, while leaving the affected exporting countries with no recourse.

3.34 Japan clarified in this connection that its stand was not that products classified in different tariff positions could not be "like" within the meaning of GATT. Obviously, different tariff classifications could be compared with a view to determining whether, or not, the products affected were like products within the meaning of GATT. Japan's position was that planed lumber, including dimension lumber, from SPF species, was not like planed lumber from other softwood species, in terms of product origin and -characteristics. In other words, it was not Japan's position that inclusion in different tariff classifications was a sufficient condition for "unlikeness", but that "likeness" under Article I:1 should be examined on the basis of tariff classifications. What was unacceptable to Japan was the "sub-classification" of Japan's Tariff, attempted by Canada, and the comparison for likeness of some of the products in different Japanese tariff classifications, chosen by the complainant.

3.35 As Japan understood the situation, Canada admitted that SPF planed lumber generally, and planed lumber of other coniferous species generally, were not like products. Yet, Canada was attempting to build a case by establishing within existing sub-positions of the Japanese Tariff sub-groups of goods with a degree of similarity (the so-called "dimension lumber"), so as to find allegedly "like products" that receive different tariff treatment, thereby forcing Japan into a concession that had not been negotiated. There was no precedent in GATT proceedings for such compulsory sub-classification. If a complainant in a GATT proceeding could engage in the type of sub-classification attempted by Canada, many nations' tariff schedules would be found to be rife with Article I violations. For example, various forms and shapes of silver, copper and aluminium would, it might be assumed, be considered as not

being "like" products within the meaning of Article I:1. Consequently, contracting parties would be fully justified in applying different tariff rates to these products. If, however, tariff schedules could be sub-classified through GATT proceedings, a complainant might assert that silver-, copper- and aluminium wire, all of which conduct electricity (although with different levels of conductivity), must be treated the same for tariff purposes. Other examples could be imagined; for instance, while plywood and waferboard were not "like products", and Canada maintained different duty-rates on these products, a complainant might assert that plywood and waferboard used in the limited context of subflooring were "like" products. The fact that Canada applies a different tariff rate to oak flooring and other wood flooring might also be considered a GATT violation.

3.36 Canada explained that it was not attempting to create the "like product" obligation in Article I:1; it already existed. That obligation clearly referred to products, and more recent panel rulings had given less weight to tariff classification and greater consideration to other criteria. Support of the claim that the placement of a product in a tariff line should predominate over the actual characteristics of the product would create a dangerous precedent. While tariff classification was a criterion that had been examined by panels in relation to the "like product" concept in Article I, and in Article III, Canada considered that tariff classification was only one criterion, out of many, and that it should not be considered a definitive test. Similarly, while tariff classification practices of other countries was a criterion to be examined in reaching a judgment on whether or not products were "like", this was not synonymous with accepting the tariff classification system of a given country as a determinant of likeness, or otherwise.

Relationship between Articles I and III in regard to the "like product" concept

3.37 Canada felt that in several of the past "like product" cases, the respective panels, and notably the Animal Feed Proteins Panel and the Alcoholic Beverages Panel, had considered the interpretation of the "like product concept" to be the same in both Articles. Therefore, in Canada's view, just as Article III of GATT imposed an obligation concerning the competitive conditions between imported and domestic products inside the market, so the like-product concept of Article I imposed an obligation concerning the competitive conditions between like products at the border. In the Canadian view the duty on SPF dimension lumber was an example of "tariff specialization". The duty applied to SPF dimension lumber was in stark contrast to the equal treatment of dimension lumber of all other species in the Japanese Tariff, and the equal treatment of all species (including SPF) in the internal laws and regulations of Japan. Canada recognized that, in general, equal treatment under domestic regulations would not necessarily imply that equal tariff treatment should be accorded, but, in this case, the equal treatment applied to dimension lumber was another part of the overall picture of dimension lumber being considered a single product, regardless of species. In addition, in this case, internal regulations governed end-use, which is a criterion in assessing likeness.

3.38 As a general principle, Canada supported the view that exceptions to GATT obligations should be narrowly construed, while the obligations themselves should be more broadly interpreted, to protect the rights of contracting parties. Canada stated that Articles I and III set out obligations intended to be trade-creating. Thus, in that context, a narrow definition of like products would not be appropriate. The concept itself would have to allow for a degree of difference while maintaining the sense of likeness.

3.39 Japan considered that the meaning of the "like products" concept stipulated in Article I and that of Article III were not the same. The objective of the "like products" obligation in Article I stipulated most-favoured-nation treatment, while in Article III the objective and the proviso related to national treatment. Japan considered that if the terms of reference of the Panel were to cover also Article III, there would be reason for referring to internal regulations, but they would be irrelevant with respect to the classification of "like products" within the meaning of Article I:1. Japan pointed out that in Japan's internal regulations dimension lumber had been recognized as comprising different products, based on species. It had also to be borne in mind that internal regulations had been established not so much on

the basis of economic factors, as in the case of tariffs, but with regard to other objectives, such as safety. In other words, the purposes of such domestic regulations were completely different from the most-favoured nation principle in Article I:1, which obliged a country to provide equal treatment at the national border, irrespective of national origin. Japan could not accept the argument that the same tariff rate must necessarily be applied to products which are given equal treatment under domestic regulations. Japan also pointed out that Japan's laws and regulations, in fact, distinguished between different species in a number of ways.

Criteria for assessing "likeness" considered by the parties

3.40 Canada explained that "dimension lumber", of whatever species, had the same physical origin. More specifically , all dimension lumber manufactured in North America and imported into Japan was softwood of the order Coniferales, and virtually all of it was of the family Pinaceae. It was at the genus and species level that the Japanese tariff discriminated among dimension lumber. Thus, the tariff of 8 per cent applied to the genus Pinus, but only to certain species of the genera Abies and Picea; other species of these groups were exempt and entered duty-free. In Canada's view, it would be misleading to search further for differences in physical origin by references to "genera", since genera distinctions were not as clear-cut as might be assumed. Species from the genus Abies were found in both the SPF and the Hem-Fir groups (the latter duty-free), despite being very closely related biologically. Canada felt that the distinctions in Japan's Tariff were based more on geography than on biology.

3.41 As regards physical properties, Canada observed that Japan had contended that differences in strength between lumber of different species' groups dictated different end-uses in construction, including in platform -frame construction. Following that line of reasoning, one might speculate that the different strength-ratings of Douglas-Fir and Hem-Fir lumber had motivated their exemption from duty, as compared with SPF. Yet, certain dimension lumber which had lower "strength" than SPF, was also duty-free. Canada also doubted that possible differences in domestic availability of different lumber species could explain the species' differentiation in tariff treatment. Generally speaking, there existed a shortage of virtually all species of lumber in Japan. Approximately 60 per cent of Japan's total coniferous wood consumption was met through imports. Each year Japan imported large volumes of pine-, larch- and white-fir logs from the USSR, and hemlock-and Douglas-fir logs from the United States. Japan's domestic supply of silver-fir, white-fir and Japanese-larch derived from plantation forests was limited and, basically, it was not manufactured into dimension lumber, nor did it compete with the SPF dimension lumber required by Japan. Canada's case before the Panel dealt with dimension lumber, of which the domestic production, in any of the species, was negligible in Japan. Canada did not wish to suggest that there existed no differences in the physical characteristics of lumber of different species, for instance, in respect of such elements as colour, weight/density, handling and processing characteristics, resistance to decay, tendencies to warp, or shrink and, perhaps, still other elements. Certain differences in physical properties being acknowledged, it was, however, important, in any assessment of likeness, to take into account not only such observable differences, but to asses the importance of observed differences, the practical significance of which might be minor.

3.42 Japan, on the other hand, held the view that the differences were significant in practice, not minor, and that, because of these differences, the demand for SPF was limited and the available resources excessive. With regard to the import of SPF logs, Japan pointed out that imports of logs had a different impact on its processing industry in low income regions. Japan, therefore, felt that the issue was not directly relevant.

3.43 Canada explained that, after review of the physical properties of various species, including specific gravity, decay resistance, treatability, nail-holding capability, allowable stress and of the span-tables, it was clear that there was a random mixture of differences in physical properties among species. The mixture and relationship between the various species changed, depending on the actual

characteristics being measured. In the opinion of the Canadian expert there was no justification for the Japanese contention that SPF lumber is of inferior quality. Although there might occur specific circumstances in which a larger size of SPF dimension lumber might have to be used in place of hem-fir, exactly the same circumstances could arise in comparing dimension lumber made from Douglas-fir to that made of hem-fir. These were limitations on the size of lumber, not the species per se, and could easily be accommodated at the design state. Any differences that might exist for platform-frame construction uses between dimension lumber of different species were minor, so that, in practice, different species' of dimension lumbers were completely interchangeable.

3.44 Canada did not deny that minor differences exist as between different coniferous wood species, but it considered that the differences were not such as to deny a finding of "like product". The Coffee Panel, as well as the Alcoholic Beverages Panel, had examined the question of "like products" and had compared products which had differences in physical characteristics. In both cases the Panels had determined that the minor differences in physical characteristics were not sufficient reason to allow for different tariff treatment. Canada considered that the physical differences between SPF dimension lumber and other species of dimension lumber were akin to the differences between types of coffee, or between vodka and shochu, which had been found by the respective Panels to be insignificant in determining likeness.

3.45 Japan recognized that criteria concerning physical origin and physical properties were of importance in examining whether or not a tariff classification was arbitrary and, thereby, could constitute a case of discriminatory treatment. Japan believed, however, that it was universally accepted that spruce-pine-fir (SPF) lumber and "hemlock lumber" (hemlock used, in short, for non-SPF lumber) had different physical characteristics and properties. Canada, in fact, had not claimed that lumber of SPF, as such, and lumber of hemlock, as such, were like products. The situation should not be any different when the respective lumber was planed. Canada's contention was that "dimension lumber" of SPF was not a like product to SPF lumber, nor was dimension lumber of hemlock "like" to hemlock lumber. On the other hand, SPF dimension lumber and hemlock dimension lumber, Canada claimed, were like products.

3.46 Japan explained that it considered that specific gravity and hardness were important in determining lumber usage. According to Japan, (western) hemlock had a specific gravity almost one-fifth higher than SPF (Engelman spruce) and a hardness 60 per cent higher; Douglas-fir had a hardness rating about 85 per cent higher. Compared with lodgepole Pine (in the SPF group) hardness ratings for (western) hemlock were 20 per cent higher and for Douglas-fir 40 per cent higher. In terms of allowable stress loads, Douglas-fir lumber had a rating almost 50 per cent higher than SPF lumber of the same size and grade. As a result of their different cell-structure, Douglas-fir and hemlock provided greater shear-resistance and nail-holding capacity (e.g. fewer nails required) than SPF lumber, and had also better natural decay resistance. Hemlock was also better suited to industrial preservative treatment than SPF lumber. The test data collected by Japan showed that there were significant differences in physical properties between species, not just "organoleptic" differences, or minor differences in strength. As regards the point made by Canada, that some non-SPF softwoods had lower stress coefficients than those for SPF, Japan stated that it would be mistaken to assume that Japan's tariff rate differentials had been established on the basis of differences in stress coefficients. Japan, in setting its tariff classification and -rates, had also to take into account domestic circumstances, such as the need for imports and for the protection of domestic forestry-products industries.

3.47 Japan believed that it was generally recognized that in the construction industry the strength characteristics of lumber, including "dimension lumber", were very important, both in design and in actual construction. General practice in Japan was that, in platform-frame construction, SPF "dimension lumber", because of its lower strength, was used in structural members that were perpendicular to the ground, whereas (high strength) Hem-Fir dimension lumber was used for horizontal structural members. Ground sills were constructed from "non SPF" lumber. In traditional (post-and-beam) construction in

Japan, SPF-type lumber was used for roof rafters (requiring little strength), while "non-SPF" lumber was used for (roof) purlins.

3.48 Japan reasoned that the attempted analogy to the Coffee Panel was not appropriate since there were significant differences in the respective facts and circumstances. In the Coffee Panel case, Brazil's coffee, unlike coffee from other countries, was "almost entirely" subject to a higher duty. In the lumber case, Canada exported large quantities of lumber to Japan duty-free. Spain was the only country the Coffee Panel found to operate duty-rate differentiation among types of unroasted coffee. In the lumber case Japan was not the only country which distinguishes in tariff classification, and tariff-rate treatment, between wood and lumber by species. In the Coffee Panel case there had been no attempt by the complainant to create "like products" by introducing tariff sub-classifications of its own making into the tariff schedule of the importing country and, unlike in the Coffee Panel case, differences between lumber species were not just minor, or organoleptic, but properties of, and end-uses for, wood of different species were significantly different.

3.49 Canada, referring notably to the Coffee Panel and the Alcoholic Beverages Panel, stated that the end-use criterion would be influential in the determination of likeness. It was not required that the products be dedicated to a single end-use, but they had to have a similar relationship to the defined end-uses, hence the references in the Alcoholic Beverages Panel to end-uses that were "substantially identical" and "virtually identical". The intended end-use of dimension lumber was the construction of a 2X4 type building, in fact, the end-uses of all species of dimension lumber in construction were not "substantially/virtually identical", they were exactly the same. There was, admittedly, a minor, subsidiary end-use for dimension lumber in Japan, for export packaging. Japan contented that Hem-fir was the preferred dimension lumber for such packaging uses, but this was due solely to market-and price considerations (SPF being normally higher priced, and the 8 per cent duty on SPF was no help in that respect).

3.50 With reference to the end-use criterion, Japan considered that Canada's argument concerning the "likeness" of SPF dimension lumber and dimension lumber of other species amounted to saying that different species of dimension lumber, if length, size, weight, etc. were ignored, were totally interchangeable in construction. Japan did not consider this to be an acceptable position, or, otherwise, all materials for platform-frame buildings should be considered like products. In Japan's view, lumber in house construction, including also, to some extent, different hardwoods, had a number of uses that varied significantly by species. In any event this was the practice in Japan. If a building was designed to be built with a given species of lumber, the use of a different species could force a complete redesign of plans, with repercussions on the volume of lumber required and, perhaps, construction-time, -effort and -cost. Canada contended that the intended end-use of dimension lumber was for platform-frame construction. Japan noted that although this might be the intent, it was not necessarily the practice. In wooden box construction for export packaging there was considerable reliance on higher-strength Hem-fir lumber, including "dimension lumber", making it possible to construct smaller-sized boxes, or crating, thus permitting cost-savings in ocean-transport. In addition, Hem-fir lumber was also being used in traditional housing, civil engineering, and other uses.

3.51 With regard to the use of imported dimension lumber in Japan, Japan, on the basis of a study done for the purpose of this case, explained that such lumber had a variety of uses, namely: in post-and-beam housing construction, about 34 per cent; platform-frame housing, 52 per cent; packaging, 10 per cent; and in other uses, such as laminated lumber and civil engineering, 4 per cent. Canada observed that it could not accept the figures cited. In Canada's view the listed percentage figures could only have been calculated by using sizes of planed lumber that are not defined as dimension lumber in Canada, or in Japan.

3.52 Japan felt that consumers' perceptions, one of the criteria identified in past Panel cases, were also

of importance in any determination of "likeness", noting also that differences in consumers' perceptions were often reflected in marked price differentials. This was the case in respect of different lumber species, and was accompanied by different use- habits and trading-patterns, and this was widely recognized, including in trade publications and advertising copy. It was relevant to notice that in the United States and in Canada, where presently there was no longer a differentiation in tariff-rate treatment of different softwood lumbers, prices in the market for softwood lumber items differed significantly as between species and species-groups. Japan also recalled that Canada had argued, in a 1986 countervailing duty case between Canada and the United States, that softwood lumbers of different species were objectively different, on account of their different physical characteristics, because of consumer's perception, channels-of-trade and -use.

3.53 Canada, referring notably to the approach adopted by the Alcoholic Beverages Panel, thought that it was important to assess "likeness", as much as possible, on the basis of objective criteria, including, in particular, composition and manufacturing processes of the product, rather than consumption habits or price differences.

E. Interpretation of MFN Principle in Article I:1; "Country and Product Discrimination"

3.54 In reply to a question raised by the Panel on the interpretation of Article I:1, Canada stated, at the first Panel hearing, that: "In Article I.1, the first obligation, that no discrimination shall be made between contracting parties, and the second obligation, that no discrimination shall be made between "like products", are both stipulated. Although the Japanese tariff did not discriminate against Canada in terms of country-based discrimination, Japan nevertheless discriminated between like products ("dimension lumber" of SPF and that of other softwoods). Japan, therefore, did not meet its second obligation". Basically the same point was made by Canada in its second submission to the Panel, namely:

> "Canada accepts that Japan does not discriminate in the application of the tariff on SPF dimension lumber as between different countries of supply, this is not however, the basis of Canada's case. The key point in our case is that SPF and Hem-fir dimension lumber are in fact "like products" that are being treated differently in the Japanese tariff, and this constitutes a breach of the Article I.1 obligation".

Canada also maintained that the Article I obligation does not deal with tariff classifications and does not aim to impose any particular system for grouping of products, but, whatever the system used, it does impose an obligation to apply the same tariff treatment to like products. In this context, Canada drew attention to the conclusion of the Coffee Panel that "... whatever the (tariff) classification adopted, Article I:1 required that the same tariff treatment be applied to like products (paragraph 4.4)". Canada noted that Canadian exports of dimension lumber were mainly SPF, which was subject to duty, while most United States exports entered duty free. This gave preference to United States suppliers and discriminated against Canadian suppliers. This amounted to de facto discrimination between contracting parties.

3.55 Japan stated that it was convinced that the concept of "like products" provided in GATT clauses should not be construed independently of the context. As Japan understood it, the "like product" provision in Article I:1 was intended to prevent a contracting party from discriminating against any other contracting party",and not of determining which similar products were to be included in the same tariff classification, and thereby be accorded equal treatment, nor did Article I:1 aim at establishing the perfect tariff classification.

3.56 As Japan saw it, in all cases where the concept of "like product" under Article I.1 had been taken up in the past in the GATT, de facto or de jure discrimination between contracting parties had always been the criterion for judgment. Yet, in the present case, Canada seemed to argue that the Coffee Panel

case had somehow expanded the scope of coverage of Article I:1, to include discrimination among the products of one nation. In Japan's view the gravamen of Brazil's complaint had been that the differentiated tariff treatment by Spain in respect of unroasted coffee had the effect of discriminating against Brazil. Discrimination existed because Brazilian coffee, unlike coffee from other nations, was "almost entirely" subject to the higher tariff. In para. 4.10 of its report the Coffee Panel had stated that "the tariff regime as presently applied by Spain was discriminatory vis-à-vis unroasted coffee originating in Brazil". The Panels decision was not based simply on discrimination vis-à-vis unwashed Arabica beans. Without the finding of discrimination among countries there could have been no judgement on the violation of Article I:1.

3.57 Japan stated that the Inventories of Standing Timber, by species, in the United States and Canada, indicated that both countries had large resources of timber of species subject to duty in Japan and also large resources of species that would not be subject to duty. Japan considered it unlikely, just like Canada, that the species distribution of these forest resources would be subject to significant changes, even in the long-term. As regards production of softwood lumber of different species, both Canada and the United States produced substantial quantities of lumber that would be subject to duty in Japan and substantial quantities of lumber that would be duty-free. There was no intention, whatsoever, by Japan to discriminate. The species of lumber that were subject to duty when imported into Japan were produced in many countries, not just Canada. The United States, New Zealand, Chile, Norway, Sweden, the Federal Republic of Germany, Korea Rep. and the USSR, among others, exported lumber to Japan that was subject to the 8 per cent duty. While it was true that the proportion of planed softwood lumber imports subject to duties was higher for Canada than for the United States, the proportion of planed lumber imports from Canada that was dutiable was lower than that for many other supplying countries and, for several years, following the establishment of the tariff-rate differential, Canada had been the largest supplier of duty-free planed lumber.

3.58 Japan stated that its imports of planed softwood lumber from Canada had grown from 150 thousand cubic metres in 1977 to 1.14 million cubic metres in 1987. Imports from Canada of these same woods subject to duty over this 10 year period grew from 21.9 thousand cubic metres to 348.4 thousand cubic metres, while the woods admitted duty-free grew from 128.3 - to 793.6 thousand cubic metres. Data furnished to the Panel by Canada, indicated, in Japan's view, that Canadian SPF dimension lumber had not only not been deprived of its market by US Hem-Fir dimension lumber, but Canadian kiln-dried SPF dimension lumber had seen its market share increase, in a growing overall dimension lumber market. Canada held a share close to 3/4th of total estimated dimension lumber imports in 1987. While imports from Canada of kiln-dried SPF dimension lumber (despite, as Canada had explained, certain technical difficulties in regard to the economics of kiln-drying dimension lumber from old-growth SPF stands) had risen, both in terms of market share and total import volume, imports of green Hem-fir dimension lumber had fallen significantly. The observed shift in the pattern of imports was attributable, according to Japan, to changes in market preferences in favour of kiln-dried lumber. Imports of kiln-dried Hem-fir dimension lumber were also rising.

3.59 With reference, inter alia, to the explanations provided, Japan was convinced (i) that Article I of the GATT only addresses measures that discriminate among contracting parties and that Japan's lumber tariffs do not discriminate among countries, (ii) that the attempt by Canada to sub-classify Japan's Tariff Schedule for finding "like-products" was unprecedented and inappropriate and (iii) that, even if one were to accept Canada's other arguments, different species of "dimension lumber" are "not like" within the meaning of Article I.

3.60 Canada noted that the questions of trade performance and market-share were irrelevant to GATT obligations. For example, in the EC/Canada Liquor Boards Panel (L/6304), the Canadian measures were found to be inconsistent, despite the fact that EC exporters had 55 per cent of the Canadian market. Canada also drew on the result of the Canada/Japan Leather Panel (BISD 27S, page 118) and noted that

the motive of a contracting party for maintaining a discriminatory measure also was not relevant. A finding of non-conformity with Japan's GATT obligation constituted prima facie nullification and impairment.

IV. Submissions by Intervening Parties

A. EEC

4.1 The EEC explained that its interest related primarily to the general question of the interpretation of the notion of "like product" within the sense of Article I:1. In the EEC's view, "like products" could be interpreted: (i) to refer to products which are "like" in the economic sense, i.e. directly competitive or substitutable, or (ii) to refer to products which are "like" in the physical sense, taking essentially the tariff classification as the basis. The Community, for a number of reasons, was in favour of the second alternative.

4.2 The EEC recalled that the term "like product", or "like products", was used in a number of provisions of the General Agreement. The GATT drafting history confirmed that the term "like product" had different meaning in different contexts of the Draft Charter. Subsequent GATT practice indicated, as confirmed in the 1987 Alcoholic Beverages Panel report, that neither the General Agreement, nor the settlement of previous cases, gave any definition of such concept. The CONTRACTING PARTIES had, indeed, never developed a general definition of the term "like products". Past decisions on this question had been made on a case-by-case basis, after examining a number of relevant factors.

4.3 In the view of the Community, the term "like product" in Article I:1 had to be interpreted in the light of the objective of this fundamental provision of the General Agreement, i.e. to guarantee most-favoured-nation treatment. The objective was to avoid discrimination among other contracting parties, but not to avoid protective measures or a difference of treatment between imported and domestic products. It was, therefore, necessary to avoid an interpretation which would make the distinction between Article I and other provisions, such as Articles II, III and XI, unclear.

4.4 The importance of an interpretation of the notion of "like products" in Article I:1 which followed essentially the tariff classification became even more obvious in the light of the relationship between Articles I and II.

4.5 As it was recognized that Article I:1 applied in the same manner to consolidated and non-consolidated tariff positions, the interpretation of the notion of "like products" beyond a specific tariff position under which a concession had been granted could have the effect of extending the scope of the concession to products with respect to which it had not been negotiated. This would risk seriously putting into question the basis of negotiating tariff concessions, and would make it more difficult, if not impossible, to negotiate concessions for specific positions, or sub-positions, in areas where the same concessions were not envisaged with respect to directly competitive or substitutable products.

4.6 The Community was aware of the fact that a somewhat broader interpretation of the notion of "like products" had been accepted in the GATT in relation to Article III. However, even in the Article III context, it had been found that products should be considered as "like products" in view of their similar properties, end-uses and, usually, uniform classification in tariff nomenclatures. Moreover, Article I did not contain any reference to directly competitive or substitutable products as did the Note Ad Article III:2. In the context of Article III there existed good reason for a rule which was sufficiently wide to prevent any form of de facto discrimination against foreign products. On the contrary, in the

context of Article I:1 a wide interpretation of the notion of "like products" could make trade liberalization more, rather than less, difficult, and could thus run counter to the objectives of the General Agreement.

4.7 For the reasons outlined above, the Community's position was that, in the area of tariffs, the erga omnes application of a tariff based on a specific tariff classification should be presumed to be in conformity with the MFN principle, unless the classification was demonstrated to be arbitrary in a manner which amounted to a de facto discrimination among foreign products from different sources. The Community, therefore, considered that it would be appropriate to accept, in principle, tariff classifications as providing the basis for the definition of "like products" for the purpose of Article I.

4.8 Commenting on the Community's submission, Canada explained that it was not claiming "likeness" between dimension lumber of different species on the basis of the concept of "directly competitive or substitutable products". In fact, Canada's approach in the present case related to the physical properties and other characteristics of likeness, but, for reasons outlined earlier, did not consider that tariff classification provided a criterion sufficient by itself for the determination of "likeness", and Canada, in its presentation, had shown the arbitrariness of Japan's argument in this regard and the discriminatory effect on Canadian exports of SPF dimension lumber vis-à-vis shipments of other dimension lumber from other sources.

B. New Zealand

4.9 Referring to the wider background of the evolving GATT jurisprudence, New Zealand observed that the interpretation of "like products" had generally been construed in a way as to prevent, what the Alcoholic Beverages Panel had called, "tariff specialization", namely the elaboration of ever-more detailed tariff descriptions which would have the practical effect of discriminating against other third-country suppliers. While tariff classification had been, and would -no doubt - continue to be, regarded as one of a group of criteria to be considered in determining "like product" in the context of Article I:1, tariff classification should not be considered a necessary, still less a sufficient, condition for such a finding, because of the dangers of allowing widespread abuse of the MFN clause through "breaking out" a tariff line into numerous specialized and essentially arbitrary categories. In New Zealand's view, this was precisely what Japan had done in the case at hand, creating, by the selection of the lumber types set apart for privileged customs treatment, an "area preference", the advantage of which, as New Zealand explained, was mainly reserved to the United States, taking account of the natural stands of species concerned.

4.10 In New Zealand's view, "dimension lumber" made from softwoods should be seen, using the Coffee Panel terminology, as being a well-defined and single product in terms of its "end-use". In Australia and North America carpenters used dimension lumber of a whole range of softwoods species completely interchangeably. In Japan, although the effective tariff discrimination did not help, carpenters also used dimension lumber made from SPF.

4.11 New Zealand recognized that there are differences in the properties of SPF timbers, both with respect to the imported species and the Japanese softwoods used for dimension lumber. Indeed, even within the same log, from the same tree, there would be observable differences in properties. The fact of difference was thus a trivial observation in terms of the provisions of the General Agreement's treatment of "like products". The term did not mean "identical product"; what mattered, was the relative significance of such differences. And these, in the present case, were minor, and not important enough to withhold a judgement that the products were like products.

4.12 Strength-capacities were, of course, crucial to dimension lumber. But the requirement essential to protect Japanese consumers was met by Japanese building standards, not the Japanese tariff. The

product either met those standards set for strength properties, or it did not. If SPF dimension lumber was not as widely used at present in Japanese non-traditional construction as it could be, this suggested that the discrimination in the tariff treatment was tending to reinforce consumer preferences. As recent GATT secretariat work on tariff escalation had pointed out, even small differences in the tariff treatment could be a powerful disincentive to use the more highly dutiable product. The application by Japan of discriminatory duties on dimension lumber of the SPF species served as an area-preference. Both Canadian and New Zealand predominant timber exports of lumber were at a competitive disadvantage because of this discriminatory treatment.

4.13 The licensed Japanese carpenter constructing traditional post-and- beam houses had complete freedom in the selection of materials, framing methods, assembly and finishing methods. Species substitution was usually not a problem. On the other hand, tradition and custom were major factors acting against species other than those traditionally used. While this was a matter for market-education on the usages of species of "like woods", the ability to penetrate the market and provide such education was determined to a large degree by the competitiveness, in price, of the product. The discriminatory tariff applied to SPF and pinus radiata had a substantial initial inhibitory effect on entry into this particular market. The returns from outlays on market education would need to be potentially available before such outlays would take place. The discriminatory tariff was thus a substantial inhibiting factor to the marketing of Canadian and New Zealand timbers. The penalty tariff imposed on SPF and radiata dimensional lumber effectively gave the US a preferential supplier status.

4.14 With respect to the linkage between Article I:1 and Article II, New Zealand considered that a finding by the Panel that dimension lumber made from SPF was a "like product" would simply reinforce the critical relationship between the two Articles in a beneficial not harmful way. If the Panel agreed that the products are "like products", this would, of course, create an obligation to extend equivalent substantive tariff treatment to SPF dimension lumber as accorded-dimension lumber made from hemlock. It would not create an obligation to harmonize the classification of the tariff. Japan would continue to be free to classify softwoods imports how it wished, provided the imports of softwoods dimension lumber were introduced into the commerce of Japan at the same tariff rate.

4.15 The EEC, with reference to its own submission, explained why it could not agree with New Zealand's interpretation of the "like products" concept in Article I:1 and the way in which New Zealand considered it to interact with provisions of other Articles of the General Agreement, notably Articles II and III.

4.16 Japan recalled that, in refutation of the Canadian submission, they had explained that Japan did not claim that products in different tariff classifications could not be examined for "likeness", but that it was necessary to respect existing tariff classifications. Similarly, the question of likeness had to be considered in the appropriate GATT context, namely, in the present case, the respect of the MFN principle. Japan's species-based lumber tariffs were not intended to "specialize", with a view to eluding the like products obligations of Article I, but the tariffs had been determined in view of the needs for the protection of domestic lumber-related industries. Also, SPF lumber and lumber of other coniferous species were not "like" products in term of physical-origin and -properties. Regarding the limited use of radiata pine in housing-construction, attributed by New Zealand to the extra-cost element resulting from the imposition of a duty of 8 per cent, Japan felt that it was not so much the tariff, but builder's experience, which limited the use.

V. FINDINGS

5.1 Under its terms of reference established by the Council the Panel had to examine a complaint by Canada that the application of a tariff duty of 8 per cent on imports of spruce-pine-fir (SPF) dimension lumber by Japan is not in conformity with the provisions of Article I:1 of the General Agreement and nullifies and impairs benefits accruing to Canada under the General Agreement, SPF dimension lumber being a "like product" as compared to other types of dimension lumber entering Japan with zero duty.

5.2 The Panel noted that Heading No. 4407.10 of the Japanese Tariff was defined in conformity with the International Convention on the Harmonized Commodity Description and Coding System of 14 June 1983 (hereinafter called the Harmonized System) as follows:

4407 "Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm":

4407.10 "Coniferous"

5.3 The Panel further noted that the dispute before the Panel largely focused on the consistency with Article I:1 of the 8 per cent tariff imposed by Japan under sub-position 4407.10-110 of the Japanese Tariff:

4407.10-110 1. "Of Pinus spp., Abies spp. (other than California red fir, grand fir, noble fir and pacific silver fir) or Picea spp, (other than Sitka spruce), not more than 160mm in thickness,

(1) planed or sanded."

5.4 According to Canada, Article I:1 required Japan to accord also to SPF dimension lumber the advantage of the zero tariff granted by Japan, under sub-position 4407.10-320 of its Tariff, to planed and sanded lumber of "other" coniferous trees, including the genera cedar and other Chamaecyparis, hemlock (Tsuga), and douglas-fir (Pseudotsuga), and five species excluded from sub-position No. 4407.10-110.

5.5 The Panel noted that the tariff classification for 4407.10-110 had been established autonomously by Japan, without negotiation.

5.6 The terms of Article I:1, as far as they are relevant to the issue, read as follows:

General Most-Favoured Nation Treatment

"With respect to customs duties ... imposed on ... imports ... any advantage ... granted by any contracting party to any product originating in ... any other country ... shall be accorded ... to the like product originating in ... all other contracting parties."

5.7 In view of analysing the factual situation submitted to it under its terms of reference, the Panel had first to consider the legal framework in which the Canadian complaint had been raised. In substance, Canada complains of the fact that Japan had arranged its tariff classification in such a way that a considerable part of Canadian exports of SPF dimension lumber to Japan was submitted to a customs duty of 8 per cent, whereas other comparable types of dimension lumber enjoy the advantage of a zero-tariff duty. The Panel considered it impossible to appreciate fully the Canadian complaint if it had not in a preliminary way clarified the bearing of some principles of the GATT-system in relation to tariff structure and tariff classification.

5.8 The Panel noted in this respect that the General Agreement left wide discretion to the contracting parties in relation to the structure of national tariffs and the classification of goods in the framework of such structure (see the report of the Panel on Tariff Treatment of Unroasted Coffee, BISD 28S/102, at III, paragraph 4.4). The adoption of the Harmonized System, to which both Canada and Japan have adhered, had brought about a large measure of harmonization in the field of customs classification of goods, but this system did not entail any obligation as to the ultimate detail in the respective tariff classifications. Indeed, this nomenclature has been on purpose structured in such a way that it leaves room for further specifications.

5.9 The Panel was of the opinion that, under these conditions, a tariff classification going beyond the Harmonized System's structure is a legitimate means of adapting the tariff scheme to each contracting party's trade policy interests, comprising both its protection needs and its requirements for the purposes of tariff- and trade negotiations. It must however be borne in mind that such differentiations may lend themselves to abuse, insofar as they may serve to circumscribe tariff advantages in such a way that they are conducive to discrimination among like products originating in different contracting parties. A contracting party prejudiced by such action may request therefore that its own exports be treated as "like products" in spite of the fact that they might find themselves excluded by the differentiations retained in the importing country's tariff.

5.10 Tariff differentiation being basically a legitimate means of trade policy, a contracting party which claims to be prejudiced by such practice bears the burden of establishing that such tariff arrangement has been diverted from its normal purpose so as to become a means of discrimination in international trade. Such complaints have to be examined in considering simultaneously the internal protection interest involved in a given tariff specification, as well as its actual or potential influence on the pattern of imports from different extraneous sources. The Canadian complaint and the defence of Japan will have to be viewed in the light of these requirements.

5.11 "Dimension lumber" as understood by Canada is defined by its presentation in a standard form of measurements, quality-grading and finishing. It appears from the information provided by Canada that this type of lumber is largely used in platform-house construction in Canada as well as in the United States and that it has found also widespread use in Japan, as is testified by the existence of a Japanese technical standard known under the name of "JAS 600".

5.12 Japan objected to this claim on different grounds. Japan explained that dimension lumber was only one particular type of lumber among many other possible presentations and that house-building is only one of the many possible uses of this particular kind of lumber. From the legal point of view, Japan contended that the concept of "dimension lumber" is not used either in any internationally accepted tariff classification, or in the Japanese tariff classification. In accordance with the Harmonized System, position No. 4407.10 embraces all types of coniferous wood "sawn or chipped lengthwise ... exceeding 6mm". Apart from the thickness and the grade of finishing, customs treatment of lumber according to the Japanese Tariff was determined exclusively on the basis of a distinction established between certain biological genera or species. Dimension lumber was therefore not identified as a particular category in the framework of the Japanese tariff classification.

5.13 The Panel considered that the tariffs referred to by the General Agreement are, quite evidently, those of the individual contracting parties. This was inherent in the system of the Agreement and appeared also in the current practice of tariff negotiations, the subject matter of which were the national tariffs of the individual contracting parties. It followed that, if a claim of likeness was raised by a contracting party in relation to the tariff treatment of its goods on importation by some other contracting party, such a claim should be based on the classification of the latter, i.e. the importing country's tariff.

5.14 The Panel noted in this respect that "dimension lumber" as defined by Canada was a concept extraneous to the Japanese Tariff. It was a standard applied by the Canadian industry which appeared to have some equivalent in the United States and in Japan itself, but it could not be considered for that reason alone as a category for tariff classification purposes, nor did it belong to any internationally accepted customs classification. The Panel concluded therefore that reliance by Canada on the concept of dimension lumber was not an appropriate basis for establishing "likeness" of products under Article I:1 of the General Agreement.

5.15 At the same time, the Panel felt unable to examine the Canadian complaint in a broader context, as Canada had declared expressly that the issue before the Panel should not be confused by broadening the scope of the Panel's examination beyond 'dimension lumber' to planed lumber generally. Canada's complaint was limited to the specific product known in North America, and also in Japan, as dimension lumber. Canada did not contend that different lumber species per se should be considered like products, regardless of the product-form they might take (see para. 3.15 above). Thus there appeared to be no basis for examining the issue raised by Canada in the general context of the Japanese tariff classification.

5.16 In these circumstances the Panel was not in a position to pursue further the questions relating to the concept of "like products" in the framework of Article I:1 of the General Agreement.

VI. CONCLUSIONS

6.1 In the light of the considerations set out in Section V above, the Panel could not establish that the tariff treatment of Canadian dimension lumber applied by Japan under its tariff number 4407.10-110 was inconsistent with Article I:1 of the General Agreement.