UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS TO THE PARTIES

Business Confidential Information (BCI) Redacted in Double Brackets ("[[ ]]")
on pages 22, 27, 52, 54, 55, 57-59, 92, 98, 106, 131, 153, 155, and 164

April 3, 2019

TABLE OF REPORTS

Short Form	Full Citation
Argentina – Import Measures (AB)	Appellate Body Reports, *Measures Affecting the Importation of Goods,* WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
EC – Large Civil Aircraft (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
Japan – DRAMs (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Countervailing Measures (China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015
US – Countervailing Measures (China) (AB)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015

Short Form	Full Citation
US – Large Civil Aircraft (Second Complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Lead and Bismuth II (Panel)	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R
US – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016

TABLE OF EXHIBITS

Exhibit No.	Description
U.S. First Written Submission	
USA-001	Commerce, Benchmark Calculation Memorandum for the Preliminary Determination, Apr. 24, 2017 ("Preliminary Benchmark Memorandum")
USA-002	Commerce, Benchmark Calculation Memorandum for the Final Determination, Nov. 1, 2017 ("Final Benchmark Memorandum")
USA-003	Commerce, Final Determination Memorandum on Ontario Private Stumpage Market Distortion, Nov. 1, 2017 ("Ontario Market Memorandum")
USA-004	Definition of "appropriate" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 103
USA-005	Definition of "case" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 345
USA-006	Definition of "entrust" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 831
USA-007	Definition of "direct" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 679
USA-008	Definition of "would" from englishpage.com
USA-009	Explanation of Present Conditionals from englishpage.com
USA-010	Petitioners, "Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada," dated November 25, 2016, Exhibits 242-257.
USA-011	Government of Quebec Questionnaire Response, Exhibit QC-Other-15 (Investment program in forests subject to partial-cutting treatment) (March 15, 2017)
USA-012	JDIL Questionnaire Response, Exhibit SILV-01 (Standard Questions and Grant Appendices) (March 15, 2017)

Exhibit No.	Description
USA-013	19 C.F.R. § 351.504(a) ("Grants - Benefit") (Regulation: U.S. Department of Commerce)
USA-014	Response to First Supplemental Questionnaire to West Fraser (April 14, 2017)
USA-015	Definition of "forgo/forego" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1005, and definition of "revenue" from *ibid.*, Volume 2, p. 2579
USA-016	Exhibit GOC-CRA-ACCA-4 (March 14, 2017)
USA-017	Cartland, Michel, Depayre, Gérard, and Woznowski, Jan, "Is Something Going Wrong in the WTO Dispute Settlement?", *Journal of World Trade* 46, no. 5 (2012): 979-1016
USA-018	*Uncoated Groundwood Paper from Canada*, 83 Fed. Reg. 48,863 (Int'l Trade Comm'n Sept. 27, 2018)
USA-019	Petitioners, Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibits 3, 4, 5, 8, 11, 12, 13, 19 and 32 (March 27, 2017)
USA-020	Definition of "grant" from *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1131
U.S. Responses to the Panel's First Set of Questions	
USA-021	Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2)
USA-022	Government of New Brunswick Initial Questionnaire Response (March 13, 2017), Exhibit NB-STUMP-1 (Table 4)
USA-023	Government of Quebec Initial Questionnaire Response (March 13, 2017), Exhibit QC-STUMP-12
USA-024	Government of Alberta Initial Questionnaire Response (March 13, 2017), Exhibit AB-S-11
USA-025	Government of Quebec Initial Questionnaire Response (March 13, 2017), Exhibit QC-STUMP-5

Exhibit No.	Description
USA-026 (BCI)	Nova Scotia Verification Exhibit NS-VE-4
USA-027 (BCI)	Quebec Final Market Memorandum (November 1, 2017)
USA-028	Alberta Preliminary Market Memorandum (April 28, 2017) (Table 3)
USA-029	Alberta Final Market Memorandum (November 1, 2017)
USA-030	Government of Ontario Initial Questionnaire Response (March 14, 2017) Exhibit ON-TAB-5
USA-031 (BCI)	Government of Nova Scotia First Supplemental Questionnaire Response (April 3, 2017)
USA-032 (BCI)	Government of Nova Scotia First Supplemental Questionnaire Response (April 3, 2017), Exhibit NS-SUPP1 ("Statement of Work provided by Deloitte to Nova Scotia, in June 2016")
USA-033	Government of Ontario Initial Questionnaire Response (March 13, 2017), Exhibit ON-GEN-7-C
USA-034	Public Record Index
USA-035 (BCI)	Nova Scotia Initial Questionnaire Response (March 17, 2017), Exhibit NS-1 ("NS Aggregate Harvest")
USA-036 (BCI)	New Brunswick Market Memorandum (Table 1.1)
USA-037	Government of Alberta Verification Exhibit GOA-VE-11
USA-038	*Memorandum to Ronald K. Lorentzen from Gary Taverman subject Issues and Decision Memorandum for the Final Results of Expedited Review of the Countervailing Duty Order on Supercalendered Paper from Canada* (April 17, 2017) ("*SC Paper from Canada – Expedited Review*, Final I&D Memo")
USA-039	Government of New Brunswick Verification Exhibit NB-VE-1

Exhibit No.	Description
USA-040 (BCI)	Irving Initial Questionnaire Response (March 13, 2017), Exhibit Stump-02 ("Irving table stump-02.e")
USA-041	Government of New Brunswick Submission of New Factual Information, Exhibit NB-STUMP-14
USA-042 (BCI)	Government of Quebec Verification Minor Corrections (June 17, 2017), Exhibit QC-STUMP-MC-1 (revised table 4)
USA-043	Petitioner, Comments on Initial Questionnaire Responses (March 27, 2017) (public version) (excerpted, Vol. I, pp. 1-3) ("Petitioner Comments – Primary QNR Responses")
USA-044 (BCI)	Government of Quebec Initial Questionnaire Response at Exhibit QC-STUMP-9 (Table 18)
USA-045 (BCI)	Canfor Preliminary Calculation Memorandum (April 24, 2017)
USA-046 (BCI)	Resolute Preliminary Calculation Memorandum (April 24, 2017)
USA-047 (BCI)	West Fraser Preliminary Calculation Memorandum (April 24, 2017)
USA-048 (BCI)	Tolko Preliminary Calculation Memorandum (April 24, 2017)
USA-049 (BCI)	JDIL Preliminary Calculation Memorandum (April 24, 2017)
USA-050	Petition Exhibit 181: Ontario Crown Timber Charges for Forestry Companies
USA-051 (BCI)	Government of Nova Scotia Verification Exhibits: Exhibit NS-VE-8A, Exhibit NS-VE-8B, Exhibit NS-VE-8C, Exhibit NS-VE-8D, Exhibit NS-VE-8E, Exhibit NS-VE-8F, Exhibit NS-VE-9A, Exhibit NS-VE-9B, Exhibit NS-VE-9C, and Exhibit NS-VE-10.
USA-052	Petitioner Comments on Initial Questionnaire Responses (March, 27, 2017), Exhibit 26

Exhibit No.	Description
USA-053	Government of British Columbia Supplemental Questionnaire Response, Exhibit BC-SUPP3-12
USA-054 (BCI)	Government of British Columbia Verification Exhibit GBC VER-6 (revised BC-SUPP3-12)
USA-055 (BCI)	Canfor Corporation Verification Exhibit VE-3
USA-056	19 C.F.R. § 351.309(c)(2) ("Written Argument") (Regulation: U.S. Department of Commerce)
USA-057	Government of Quebec Initial Questionnaire Response (March 13, 2017), Exhibit QC-STUMP-20 ("Sustainable Forest Development Act")
USA-058	Tolko Pre-Preliminary Determination Comments (April 11, 2017)
USA-059	*Memorandum to The File subject Countervailing Duty Expedited Review: Supercalendered Paper from Canada re: Verification Report: Government of British Columbia* (November 18, 2016) ("*SC Paper from Canada – Expedited Review*, GBC Verification Report")
USA-060	"Timeline for Log Exports in British Columbia", Exhibit BC-VER-7, submitted by the Government of British Columbia in SC Paper from Canada – Expedited Review

1. To both parties: Consider a hypothetical situation where an interested party submits an expert report that (a) raises an issue that is potentially relevant to an investigation, (b) provides the pertinent data, and (c) performs an analysis and quantification of the impact of the issue.

i. In the event that the investigating authority rejects the report based on an alleged subjectivity of the expert author, should the investigating authority support the alleged subjectivity with concrete evidence? Should it suffice that the report was commissioned by an interested party and/or that it was solely produced for the purposes of the investigation?

ii. In the event that the report is rejected on the basis of the alleged subjectivity of the expert, may the investigating authority also reject the data underlying the report without evaluating the data?

iii. In the event that the authority may also disregard the data, may it also disregard the issue placed in contention without further interrogation?

Response:

1. The United States is responding to the three subparts of this question together. As the United States explained during the first substantive meeting, the term "expert report" in this context is not a defined term, and no special status should be accorded to information or argument by virtue of a party's characterization of the author or source of the information as an "expert", such as might be the case under Article 13.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") where a panel seeks to "consult experts to obtain their opinion on certain aspects of the matter."[1]

2. Article 13.2 of the DSU provides that:

> Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.[2]

[1] DSU, Art. 13.2.

[2] DSU, Art. 13.2 (underline added).

3. These provisions of the DSU contemplate that "a panel may request an advisory report in writing from an expert review group" with respect to "a factual issue concerning a scientific or other technical matter."[3] In that scenario, the qualifications (including any apparent or potential biases) would be subject to comment by the parties to the dispute,[4] and any resulting advisory report likely could be presumed to be neutral with regard to the outcome of the dispute. The "experts" appointed by a panel would advise the panel, not either of the disputing parties. Indeed, paragraph 1 of Appendix 4 of the DSU provides that "[e]xpert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel." And even in that context, a panel seeks from the experts "their opinion" on factual aspects of a matter, or "an advisory report" from an expert group.[5] That is, the ultimate responsibility for making findings of fact would remain with the panel. No expert "opinion" or "advisory report" is entitled to be treated as a finding of fact itself.

4. In contrast, when a litigant hires lawyers or consultants to advocate for its interests in an adversarial proceeding, those hired consultants have an interest in supporting the position of the litigant (their client) and obtaining an outcome in their client's favor. Therefore, the judgments, opinions, and arguments of such hired consultants, and their selection of particular facts upon which to draw their conclusions, should not be assumed to be impartial. In such circumstances, it may be critical to establish that the selection of the facts upon which the consultant chooses to rely is unbiased.[6]

5. Not all reports will have the same potential for bias. For example, a report may be commissioned to perform an audit, or to conduct empirical research, or for the collection of information in the ordinary course of business. Unlike reports commissioned for the purpose of obtaining a favorable outcome in an adversarial context, these other reports do not favor one side or the other, and the authors of the reports have no interest in the outcome of a particular adversarial proceeding.

6. The independent reports on the record of the softwood lumber countervailing duty investigation are the reports to which Canada most strenuously objects. For example, Canada argues (as New Brunswick argued in the underlying investigation) that the New Brunswick Auditor General report should be rejected because, in effect, New Brunswick did not like the outcome of that report – but the value of an audit is precisely the fact that the auditor may report observations that are unfavorable to the party that commissioned the audit. Canada also argues that the Spelter study should be rejected because it is not based on British Columbia logs – but

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[3] DSU, Art. 13.2.

[4] *See, e.g.*, DSU, Appendix 4, para. 3 (contemplating consultation with the parties on the appointment of members of an expert review group).

[5] DSU, Art. 13.2.

[6] *See infra*, U.S. Responses to Questions 95 and 98.

the value of the research is precisely that it was conducted independent of the interested parties. Likewise, Canada argues that the Deloitte survey should be rejected because it was commissioned by Nova Scotia – but, again, an important part of the value of the survey is that it was commissioned by Nova Scotia at arm's length in the ordinary course of business.

7. With respect to the Panel's questions about the underlying data and the issues placed in contention, the U.S. Department of Commerce ("USDOC") addressed these considerations when it addressed the respective reports on which the Canadian parties relied or specific arguments based upon those reports. The assessment varied depending on the context of the issue presented. In some instances, the USDOC explained that it could not confirm that the selection of the underlying data was unbiased.[7] In other instances, the USDOC explained that the underlying data did not relate to the relevant question under the applicable legal standard; for example, price data that would only be relevant if the USDOC had needed to resort to alternative benchmark methodologies.[8]

8. In all cases, however, the USDOC addressed the issues in contention, consistent with its approach to addressing all the issues raised by the parties in their written comments. In no case did the USDOC "reject" or ignore a report or data submitted with a report. As the United States has explained throughout the panel proceeding, and as further explained below in response to a number of the Panel's questions,[9] Canada's repeated characterization of the USDOC ignoring or rejecting these materials without discussion is unfounded. Any investigating authority should evaluate all information submitted by interested parties and determine, on a case-by-case basis, what evidentiary weight to give the information, and should explain the reasons for reaching the conclusions reached. That is precisely what the USDOC did in the countervailing duty investigation of softwood lumber from Canada that is at issue in this dispute.

1 THE USDOC'S USE OF NOVA SCOTIA PRIVATE MARKET STUMPAGE PRICES AS A STUMPAGE BENCHMARK

2. To the United States: At paragraph 748 of its first written submission, Canada states that:

> **Logs also do not typically move long distances between provinces. As a peninsula in the Atlantic Ocean, Nova Scotia is**

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[7] *See, e.g.*, *Memorandum to Gary Taverman from James Maeder Subject: Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination* (November 1, 2017) ("Lumber Final I&D Memo"), pp. 59-60 (Exhibit CAN-010) (discussing lack of site selection methodology in BC dual scale study). *See also infra*, U.S. Responses to Questions 95 and 98.

[8] *See, e.g.*, Lumber Final I&D Memo, pp. 49-50 (Exhibit CAN-010) (explaining that Alberta log data would only be relevant under tier-two approach, but is not relevant under tier-one approach). *See also infra*, U.S. Response to Question 35.

[9] *See, e.g.*, U.S. Responses to Questions 25, 37, 50, 57, 75, 77, 84, 88, 98, 104, 105, and 106.

physically removed from Alberta, Ontario, and Québec. In fact, Nova Scotia is well outside the 200 km range for economically transporting logs to Ontario and Québec, and more than 3,500 km away from the forests in Alberta.

Please respond to Canada's assertions, considering the United States' own assertion at paragraph 65 of its first written submission that the record "demonstrated that it is possible for standing timber to be sold across provincial borders (as indeed occurred in this investigation)". In addition, please indicate, pointing to record evidence, whether the USDOC assessed distance and transportation costs in order to ascertain whether it is commercially practicable for companies to treat Nova Scotia and the other provinces as the same market.

Response:

9. Canada's statement about transporting logs between Nova Scotia and Alberta at paragraph 748 of its first written submission misunderstands the relevant inquiry. Canada's statement about "long distances" also is contradicted by the arguments Canada makes elsewhere. For example, at the first substantive meeting, Canada referred to evidence that British Columbia "exports substantial volumes of logs overseas, primarily to China and Japan."[10]

10. The U.S. first written submission at paragraph 65 refers to the USDOC's statement that "it is possible for standing timber to be sold across provincial borders."[11] The USDOC made this statement in response to the Canadian parties' argument that stumpage in this investigation should be treated the way electricity was treated in a separate investigation involving supercalendered paper from Canada.[12] The USDOC explained that, unlike electricity, "the purchase and transport of standing timber within Canada is not dependent upon a single, limited, means . . . [like] dedicated power transmission corridors."[13] Canada has not identified any information to suggest that companies located outside of Nova Scotia cannot purchase standing timber in Nova Scotia. In addition, record evidence demonstrates substantial movement of logs across provincial and national borders.[14]

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[10] Kalt Report, p. 48 (Exhibit CAN-016) (BCI).

[11] Lumber Final I&D Memo, p. 108 (Exhibit CAN-010).

[12] *See* Lumber Final I&D Memo, p. 108 (citing *SC Paper from Canada* IDM, pp. 41-42, and 128-130) (Exhibit CAN-010).

[13] Lumber Final I&D Memo, p. 108 (Exhibit CAN-010).

[14] *See, e.g.*, Government of New Brunswick Verification Exhibit NB-VE-1 (showing significant imports from outside of New Brunswick) (Exhibit USA-039); J.D. Irving Initial Questionnaire Response, Exhibit STUMP-02.e ("Table 5" showing that Irving purchased logs from New Brunswick, Nova Scotia, Quebec, and Prince Edward

11. With respect to the second part of the Panel's question, Article 14(d) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") does not require the USDOC to ensure that the benchmark would be available to the respondent company in its commercial operations. Here, the USDOC simply was explaining the distinction between the analysis of electricity in a separate investigation and the analysis of stumpage in this investigation.[15] The USDOC did not suggest that Nova Scotia would be the commercial source of stumpage for companies across Canada. The point of the inquiry is whether stumpage purchased in Nova Scotia is comparable (and therefore may serve as a benchmark) to stumpage purchased elsewhere.

3. <u>To the United States</u>: At paragraph 770 of its first written submission, Canada states that:

> **[C]ommerce did not consider that where a Province sells multiple species of SPF at a single price, that price reflects the value of the basket of SPF that is available in that jurisdiction. Accordingly, the price for SPF in a province with a large proportion of species producing low-quality timber would not be the same as the price in a province where the species produce high-quality timber.**

Please respond to Canada's argument above.

<u>Response</u>:

12. Canada's statement at paragraph 770 of its first written submission is misleading. The USDOC relied upon the Canadian parties' own statement to the USDOC that "SPF lumber has sufficiently common characteristics to be treated interchangeably in the lumber market"[16] and that "trees from the SPF species basket are used interchangeably in the production of structural lumber."[17] The USDOC explained that, "[although] there are minor variations in the relative concentration of individual species across provinces, the standing timber in Nova Scotia, New Brunswick, Quebec, Ontario, and Alberta is harvested from similar forests and covers the same

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Island) (p. 43 of the PDF version of Exhibit USA-040 (BCI)); Government of New Brunswick Submission of New Factual Information, Exhibit NB-STUMP-14 (2014 and 2015 timber utilization spreadsheets showing significant cross border transactions) (Exhibit USA-041); Government of New Brunswick Submission of New Factual Information, Exhibit NB-STUMP-22 (showing significant cross border transactions) (Exhibit CAN-238).

[15] *See* Lumber Final I&D Memo, p. 108 (citing *SC Paper from Canada* IDM, pp. 41-42, and 128-130) (Exhibit CAN-010).

[16] Lumber Final I&D Memo, p. 110 (Exhibit CAN-010).

[17] *See* Nova Scotia Initial Questionnaire Response, p. 7 (Exhibit CAN-313).

core species group (SPF)."[18] The USDOC also explained that Canada's argument was unsubstantiated, and thus was merely an assertion "not supported by any record evidence that differences in quality or species prevalence precludes a comparison between the Nova Scotia benchmark and reported Crown stumpage in the other provinces."[19]

13. In contrast to Canada's mere assertion, the USDOC found that "record evidence indicates" that:

> The species included in the eastern SPF species basket, which grows in Nova Scotia, were also the primary and most commercially significant species reported in the species groupings for New Brunswick, Québec, Ontario, Manitoba, Saskatchewan, and a portion of Alberta.[FN659] The respondent firms' actual transactions, as verified by the Department, support our finding that SPF species continue to be the dominant species that grow in all the provinces east of British Columbia.[FN660][20]

14. The evidentiary basis for these findings is extensive, as can be seen in footnotes 659 and 660 of the final issues and decision memorandum. Footnote 659 indicates that, in making this statement, the USDOC first referred back to its explanation in the preliminary determination that:

> SPF species continue to be the dominant species that grow in the provinces that are east of British Columbia. . . . SPF species' share of the Crown-origin standing timber harvest volume is as follows: 94.8 percent for New Brunswick, 81.76 percent for Québec, 67.85 percent for Ontario, and 99.98 percent for Alberta.[FN302] Data supplied by the four mandatory respondents and the sole voluntary respondent also indicate that SPF species represent the majority of the companies' respective Crown timber harvest.[FN303][21]

15. As is apparent in footnotes 302 and 303 of the preliminary decision memorandum, these observations relied on the provincial questionnaire responses and the preliminary calculation memoranda for each of the mandatory respondent companies and the voluntary respondent,

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[18] Lumber Final I&D Memo, p. 110 (Exhibit CAN-010).

[19] Lumber Final I&D Memo, p. 110 (Exhibit CAN-010).

[20] Lumber Final I&D Memo, pp. 110-111 (Exhibit CAN-010) (citations omitted).

[21] *Memorandum to Ronald K. Lorentzen from Gary Taverman Subject: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (April 24, 2017) ("Lumber Preliminary Decision Memorandum"), pp. 44-45 (Exhibit CAN-008) (citations omitted).

which identify the species of Crown-origin standing timber acquired during the period of investigation:[22]

- Government of New Brunswick Initial Questionnaire Response at Exhibit NB-STUMP-1, Table 4 (Exhibit CAN-269 (BCI));
- Government of Quebec Initial Questionnaire Response (Exhibit CAN-170) at Exhibit QC-STUMP-12 (Exhibit USA-023);
- Government of Ontario Initial Questionnaire Response (March 13, 2017), pp. 4 and 19 (Exhibit CAN-155) and Exhibit ON-STATS-1 (Exhibit CAN-165);
- Government of Alberta Initial Questionnaire Response (March 13, 2017) at Exhibit AB-S-11 (Exhibit CAN-314);
- Canfor Preliminary Calculation Memorandum (Exhibit USA-045 (BCI)) (identifying the species of Crown-origin standing timber Canfor acquired during the period of investigation);
- Resolute Preliminary Calculation Memorandum (Exhibit USA-046 (BCI)) (identifying the species of Crown-origin standing timber Resolute acquired during the period of investigation);
- West Fraser Preliminary Calculation Memorandum (Exhibit USA-047 (BCI)) (identifying the species of Crown-origin standing timber West Fraser acquired during the period of investigation);
- Tolko Preliminary Calculation Memorandum (Exhibit USA-048 (BCI)) (identifying the species of Crown-origin standing timber Tolko acquired during the period of investigation); and
- JDIL Preliminary Calculation Memorandum (Exhibit USA-049 (BCI)) (identifying the species of Crown-origin standing timber JDIL acquired during the period of investigation).

16. In addition to relying on these preliminary findings, the USDOC cited the following documents at footnotes 659 and 660 of the final issues and decision memorandum as a further part of the evidentiary basis for its ultimate findings:

[22] *See* Lumber Preliminary Decision Memorandum, pp. 44-45 (Exhibit CAN-008) (citations omitted).

- Government of Alberta Initial Questionnaire Response (March 13, 2017) at Exhibit ABIV-34 (Exhibit CAN-097) (showing timber dues rates set uniformly for "coniferous timber");

- Government of New Brunswick Initial Questionnaire Response (March 13, 2017) at Exhibit NBII-6 (Exhibit CAN-240 (BCI)) (showing Crown timber prices categorized as "SPF Sawlogs" and "SPF Studwood & Lathwood");

- Ontario Crown Timber Charges for Forestry Companies, Petition Exhibit 181 (Exhibit USA-050) (showing single price for category of "Spruce/Jack Pine/Scots Pine/Balsam Fir/Larch");

- Government of Quebec Initial Questionnaire Response, p. QC-S-37 (Exhibit CAN-170) (describing stumpage price equation for single category of Spruce, Pine, Fir, and Larch ("SPFL"));

- Government of Nova Scotia Verification Report at 8-9 (Exhibit CAN-318) and Government of Nova Scotia Verification Exhibits: Exhibit NS-VE-8A, Exhibit NS-VE-8B, Exhibit NS-VE-8C, Exhibit NS-VE-8D, Exhibit NS-VE-8E, Exhibit NS-VE-8F, Exhibit NS-VE-9A, Exhibit NS-VE-9B, Exhibit NS-VE-9C, and Exhibit NS-VE-10 (Exhibit USA-051 (BCI));

- Government of Ontario Initial Questionnaire Response (March 13, 2017) at 5 and 19 (Exhibit CAN-155); and

- Government of Canada et al. Common Issues Case Brief (July 27, 2017) at 38-42 and 70 (Exhibit CAN-311).

17. Canada's assertion that SPF quality might differ depending on the mix in a particular sale is immaterial. The overwhelming evidence shows that the forest mix is similar for Nova Scotia, Alberta, Ontario, Quebec, and New Brunswick; that SPF is the predominant species in each of these provinces; and that the common practice of these provinces is to treat the individual species as interchangeable under the basket label "SPF." And, as discussed in the U.S. responses to questions 6, 7, 8, 10, 12, 14, and 15, the same physical characteristics, quality, and growing conditions for SPF are found across these five provinces.

4. <u>To both parties</u>: At paragraph 8 of its third-party written submission, Brazil states, in relevant part, that:

> **Considering that the ultimate goal of the investigating authority is to discover what would be the market-driven price**

> **for a good or service in the market under scrutiny, preference should be given to benchmark prices resulting from the same or similar prevailing market conditions. Furthermore, in choosing benchmarks from other markets, investigating authorities are compelled to make all necessary adjustments regarding, for instance, "price, quality, availability, marketability and transportation of purchase or sale" in order to proceed to an accurate comparison.**

Please provide your views in regard to Brazil's statement.

Response:

18. A proper analysis of a claim under Article 14 of the SCM Agreement begins with the text of that provision. The reference in Article 14(d) to prevailing "market conditions" refers in the first place to market-determined prices, not simply the geographical location of the transactions at issue. As the Appellate Body has found, the relevant question for an investigating authority is "whether proposed benchmark prices are market determined such that they can be used to determine whether remuneration is less than adequate."[23] Brazil appears to support this understanding by referring to "what would be the market-driven price."[24] The primary benchmark, and "therefore the starting point of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision."[25]

19. The Appellate Body has been clear that "in-country prices [that] are market determined . . . would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)."[26] Where an investigating authority has selected as a benchmark a private, market-determined price for the good in question from within the country of provision, and has provided a reasoned and adequate explanation for its selection, the investigating authority's determination satisfies the terms of Article 14(d).

5. To both parties: At paragraph 12 of its third-party written submission, the European Union states that:

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[23] *US – Carbon Steel (India) (AB)*, para. 4.152.

[24] Third Party Submission of Brazil (December 14, 2018), para. 8.

[25] *US – Carbon Steel (India) (AB)*, para. 4.154 (italics in original). *See also US – Softwood Lumber IV (AB)*, para. 90.

[26] *US – Countervailing Measures (China) (AB)*, para. 4.46 (internal citations omitted).

> **In circumstances where the subsidising Member provides positive evidence that the relevant market for the benchmark determination is regional, the EU considers that similar principles that would allow an investigative authority to use "out-of-country" benchmarks would also permit an authority to use a regional price within the same country that is not distorted, instead of a regional price that is distorted. This is a logical consequence of the EU's position that there can be separate geographic markets and hence different benchmarks within the same country.**

Please provide your views on the European Union's statement above.

Response:

20. First, Article 14(d) of the SCM Agreement does not obligate Members to calculate the benefit amount by using prices from certain in-country localities and not others. Article 14(d) provides that the adequacy of remuneration should be determined "in relation to the prevailing market conditions" for the good in question "in the country of provision."[27] The language in Article 14(d) that speaks to the geographical scope of that provision is the phrase "in the country of provision." This reference is even further attenuated by the phrase "in relation to." This means is that, even if the term "market" (within the phrase "prevailing market conditions") is interpreted as relating to a particular geographical location, that location is the country of provision – not a particular "region."

21. The text of Article 14(d) does not require an analysis at the regional level. In theory, there may be no limit to the number of subdivisions that can be made within a market, *e.g.*, global, national, regional, hemispheric, local, etc. "In the country of provision", however, is the relevant delimitation in Article 14(d), and therefore the text of Article 14(d) reflects that an investigating authority has scope to consider the particular circumstances presented in an investigation in selecting an appropriate benchmark.[28] Where an investigating authority has selected as a benchmark a private, market-determined price for the good in question from within the country of provision, and has provided a reasoned and adequate explanation of the bases for its selection, the investigating authority's determination should be found to meet the requirements of Article 14(d).

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[27] SCM Agreement, Art. 14(d).

[28] *See* First Written Submission of the United States of America (November 30, 2018) ("U.S. First Written Submission"), para. 74.

22. Second, the Appellate Body has been clear that, although an investigating authority should first consider proposed in-country prices for the good in question, it would not be appropriate to rely on such prices if they are not market-determined, as a result of governmental intervention in the market.[29] Government intervention may distort in-country prices in a variety of ways – for example, by administratively setting the price, or through its participation as a buyer or seller. Likewise, where the government is the predominant supplier of a good, the government "may distort in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align."[30] In such circumstances, "the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular."[31]

23. To the extent that paragraph 12 of the EU third party submission suggests that there may be circumstances in which a government distorts prices in one region of a country and not others, the United States agrees that those prices may be rejected to avoid a circular or otherwise meaningless comparison.

6. <u>To the United States</u>: At page 110 of its final determination, the USDOC found, in relevant part, that:

> **We disagree with these arguments, addressed in turn below, and continue to find that though there are minor variations in the relative concentration of individual species across provinces, the standing timber in Nova Scotia, New Brunswick, Québec, Ontario, and Alberta is harvested from similar forests and covers the same core species group (SPF). Accordingly, we find that the transactions for private-origin standing timber in Nova Scotia are comparable to the other four provinces, and suitable as a benchmark. (footnotes omitted)**

Please identify, on the record of these proceedings, the evidentiary basis for the USDOC's finding.

<u>Response</u>:

24. The USDOC found that the SPF species group dominates standing timber in Nova Scotia, New Brunswick, Quebec, Ontario, and Alberta based on responses the provincial

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[29] *US – Carbon Steel (India) (AB)*, para. 4.155.

[30] *US – Carbon Steel (India) (AB)*, para. 4.155 (referring to *US – Softwood Lumber IV (AB)*, para. 90).

[31] *US – Softwood Lumber IV (AB)*, para. 93.

governments provided to the USDOC's questionnaires.[32] Nova Scotia reported that SPF is "by far the predominant group of trees harvested in Nova Scotia."[33] Accordingly, the USDOC found that "SPF are the primary species that are harvested on private lands in Nova Scotia."[34] The USDOC then evaluated the prevalence of SPF species in the other provinces. As discussed in the preliminary determination, the USDOC found that SPF represents:[35]

- 94.8 percent of the softwood harvest in New Brunswick, relying upon the Government of New Brunswick Initial Questionnaire Response (Exhibit CAN-240) at Exhibit NB-STUMP-1 at Table 4 (Exhibit USA-022);

- 81.76 percent of the softwood harvest in Quebec, relying upon the Government of Quebec's Initial Questionnaire Response (Exhibit CAN-170) at Exhibit QC-STUMP-12 (Exhibit USA-023);

- 67.85 percent of the softwood harvest in Ontario, relying upon the Government of Ontario's Initial Questionnaire Response at 4 and 19 (Exhibit CAN-155) and Exhibit ON-STATS-1 (Exhibit CAN-165); and

- 99.98 percent of the softwood harvest in Alberta, relying upon the Government of Alberta's Initial Questionnaire Response (Exhibit CAN-097) at Exhibit AB-S-11 (Exhibit USA-024).

25. The USDOC also found that SPF represented "the majority of the [investigated] companies' respective Crown timber harvest," as reflected in the data supplied to the USDOC by the investigated companies.[36] We note that this finding is addressed in further detail in the U.S. response to question 3, above.

26. The USDOC also found that standing timber in Nova Scotia was comparable in size to standing timber in New Brunswick, Quebec, Ontario, and Alberta, in terms of diameter at breast height ("DBH").[37] The USDOC's findings in this regard are explained at page 45 of the

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[32] *See supra*, U.S. Response to Question 3.

[33] Government of Nova Scotia Initial Questionnaire Response, p. 7 (Exhibit CAN-313).

[34] Lumber Preliminary Decision Memorandum, p. 44 (Exhibit CAN-008).

[35] Lumber Preliminary Decision Memorandum, p. 45 and footnote 302 (Exhibit CAN-008).

[36] Lumber Preliminary Decision Memorandum, p. 45 and footnote 302 (Exhibit CAN-008).

[37] *See* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 110-112 (Exhibit CAN-010).

preliminary decision memorandum and page 112 of the final issues and decision memorandum, and relied on the following evidentiary basis:[38]

- Government of Nova Scotia Initial Questionnaire Response at 8 (Exhibit CAN-313): Nova Scotia reported that the DBH for all softwood species on private land is 17.29 cm and 15.9 cm for SPF standing timber.

- Government of Alberta Initial Questionnaire Response, Exhibit AB-S-23 at 20 (Exhibit CAN-096): Alberta reported that the DBH of SPF standing timber species in Alberta ranges from 18.2 cm to 24.6 cm.

- Government of Ontario Initial Questionnaire Response, Exhibit ON-GEN-7-C at 3 (Exhibit USA-033): Ontario reported that the DBH of SPF logs destined to sawmills and pulpmills in 2015 was 15.32 cm.

- Government of Quebec Initial Questionnaire Response at 24 (Exhibit CAN-170): Quebec reported that the DBH of SPFL standing timber species ranges from 16 cm to 24 cm.

27. Based on this evidence, the USDOC found that the standing timber in Nova Scotia was comparable in size to standing timber in the other provinces. The USDOC also explained that Nova Scotia stumpage prices represent a conservative benchmark, insofar as the DBH reported by Nova Scotia was equal to or smaller than the DBH of timber in the other provinces.[39]

7. <u>To the United States</u>: At page 110 of its final determination, the USDOC found, in relevant part, that:

> **The species included in the eastern SPF species basket, which grows in Nova Scotia, were also the primary and most**

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[38] *See* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008); Lumber Final I&D Memo, p. 112 (Exhibit CAN-010). We note that, despite the USDOC's requests, New Brunswick did not provide information on the average DBH of the standing timber in that province. *See also* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008). However, the USDOC found that New Brunswick is contiguous with Nova Scotia and information on the record indicated that both provinces were part of the Acadian forest. *See* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008); *see also* Exhibit ON-ADEQ-2 (Exhibit CAN-149). Moreover, information on the record indicated that JDIL incorporates standing timber from both provinces into its sawmill operations. *See* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008).

[39] *See* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008).

> **commercially significant species reported in the species groupings for New Brunswick, Québec, Ontario, Manitoba, Saskatchewan, and a portion of Alberta. (footnotes omitted)**

Please identify, on the record of these proceedings, the evidentiary basis for the USDOC's finding.

Response:

28. The United States has identified the evidentiary basis for the USDOC's finding in the U.S. responses to questions 3 and 6.[40] The USDOC explained in the preliminary decision memorandum that SPF represents:[41]

- 94.8 percent of the softwood harvest in New Brunswick, based on information reported in the Government of New Brunswick Initial Questionnaire Response (Exhibit CAN-240) at Exhibit NB-STUMP-1 at Table 4 (Exhibit USA-022);

- 81.76 percent of the softwood harvest in Quebec, based on information reported in the Government of Quebec's Initial Questionnaire Response (Exhibit CAN-170) at Exhibit QC-STUMP-12 (Exhibit USA-023);

- 67.85 percent of the softwood harvest in Ontario, based on information reported in the Government of Ontario's Initial Questionnaire Response at 4 and 19 (Exhibit CAN-155) and Exhibit ON-STATS-1 (Exhibit CAN-165); and

- 99.98 percent of the softwood harvest in Alberta, based on information reported in the Government of Alberta's Initial

[40] We note that, although USDOC's statement also encompasses Manitoba and Saskatchewan, the USDOC did not make specific findings with regard to those provinces in this investigation, as no individually-examined company respondent purchased stumpage in those provinces, and stumpage prices from those provinces were not proposed as a benchmark. Rather, the USDOC's statement as it relates to those provinces derives from a prior lumber proceeding. *See* Lumber Final I&D Memo, p. 110, footnote 659 (Exhibit CAN-010) (citing preliminary determination, pp. 44-45); Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008) (observing that "[i]n the second administrative review of *Lumber IV*, the Department determined that . . . the species included in eastern SPF were also the primary and most commercially significant species reported in the species groupings for Québec, Ontario, Manitoba, Saskatchewan and a portion of Alberta.").

[41] Lumber Preliminary Decision Memorandum, p. 45 and footnote 302 (Exhibit CAN-008).

Questionnaire Response (Exhibit CAN-097) at Exhibit AB-S-11 (Exhibit USA-024).

29. The USDOC also found that SPF represented "the majority of the [investigated] companies' respective Crown timber harvest," as reflected in the data supplied by the investigated companies to USDOC:[42]

- Canfor Preliminary Calculation Memorandum (Exhibit USA-045 (BCI)) (identifying the species of Crown-origin standing timber Canfor acquired during the period of investigation);
- Resolute Preliminary Calculation Memorandum (Exhibit USA-046 (BCI)) (identifying the species of Crown-origin standing timber Resolute acquired during the period of investigation);
- West Fraser Preliminary Calculation Memorandum (Exhibit USA-047 (BCI)) (identifying the species of Crown-origin standing timber West Fraser acquired during the period of investigation);
- Tolko Preliminary Calculation Memorandum (Exhibit USA-048 (BCI)) (identifying the species of Crown-origin standing timber Tolko acquired during the period of investigation); and
- JDIL Preliminary Calculation Memorandum (Exhibit USA-049 (BCI)) (identifying the species of Crown-origin standing timber JDIL acquired during the period of investigation).

30. In addition to relying on these preliminary findings, the USDOC cited the following documents at footnotes 659 and 660 of the final issues and decision memorandum as a further part of the evidentiary basis for these findings:

- Government of Alberta Initial Questionnaire Response (March 13, 2017) at Exhibit ABIV-34 (Exhibit CAN-097) (showing timber dues rates set uniformly for "coniferous timber");
- Government of New Brunswick Initial Questionnaire Response (March 13, 2017) at Exhibit NBII-6 (Exhibit CAN-240 (BCI)) (showing Crown timber prices categorized as "SPF Sawlogs" and "SPF Studwood & Lathwood");

[42] Lumber Preliminary Decision Memorandum, p. 45 and footnote 302 (Exhibit CAN-008).

- Ontario Crown Timber Charges for Forestry Companies, Petition Exhibit 181 (Exhibit USA-050) (showing single price for category of "Spruce/Jack Pine/Scots Pine/Balsam Fir/Larch");

- Government of Quebec Initial Questionnaire Response, p. QC-S-37 (Exhibit CAN-170) (describing stumpage price equation for single category of Spruce, Pine, Fir, and Larch ("SPFL"));

- Government of Nova Scotia Verification Report at 8-9 (Exhibit CAN-318) and Government of Nova Scotia Verification Exhibits: Exhibit NS-VE-8A, Exhibit NS-VE-8B, Exhibit NS-VE-8C, Exhibit NS-VE-8D, Exhibit NS-VE-8E, Exhibit NS-VE-8F, Exhibit NS-VE-9A, Exhibit NS-VE-9B, Exhibit NS-VE-9C, and Exhibit NS-VE-10 (Exhibit USA-051 (BCI));

- Government of Ontario Initial Questionnaire Response (March 13, 2017) at 5 and 19 (Exhibit CAN-155); and

- Government of Canada et al. Common Issues Case Brief (July 27, 2017) at 38-42 and 70 (Exhibit CAN-311).

8. At page 111 of its final determination, the USDOC found, in relevant part, that:

> **The interchangeability of standing timber in the SPF species category is also reflected in the manner in which the provincial governments set their stumpage prices. For example, record evidence indicates that the GNB, GOQ, and GOO treat SPF timber as a single category for data collection and pricing purposes. In particular, in New Brunswick, Québec, Ontario, and Alberta, the provincial governments charge a single, "basket" price for Crown-origin standing timber that falls within the SPF species category. (footnotes omitted)**

i. <u>To the United States</u>: Please identify, on the record of these proceedings, the evidentiary basis for the USDOC's finding.

<u>Response</u>:

31. The United States has identified the evidentiary basis for the USDOC's finding in the U.S. responses to questions 3, 6, and 7. This evidence demonstrates that species within the SPF basket are treated interchangeably in the respective provinces. The USDOC relied, in particular, upon:

- Government of New Brunswick Initial Questionnaire Response (March 13, 2017) at Exhibit NBII-6 (showing Crown timber prices categorized as "SPF Sawlogs" and "SPF Studwood & Lathwood") and Exhibit NBII-9 (discussing calculation of SPF stumpage rates) (Exhibit CAN-240 (BCI));

- Government of Ontario Initial Questionnaire Response (March 13, 2017) at 4 and 19 (Exhibit CAN-155) and Exhibit ON-STATS-1 (Exhibit CAN-165);[43]

- Government of Quebec Initial Questionnaire Response, p. QC-S-37 (discussing single transposition equation "to establish stumpage for SPFL") and pp. QC-S-52-53 (discussing March 31, 2015 rates for SPFL collectively) (Exhibit CAN-170); and Exhibit QC-STUMP-5 (Exhibit USA-025) (reporting average prices for SPF for 2015-2016 fiscal year for each tariffing zone);

- Government of Alberta Initial Questionnaire Response (March 13, 2017) at Exhibit ABIV-34 (Exhibit CAN-097) (showing timber dues rates set uniformly for "coniferous timber") and Alberta Timber Management Regulation, Schedule 3 (Exhibit CAN-115) (setting Crown stumpage prices "for coniferous timber," including SPF, based on the price "for 1000 board feet of western spruce, pine and fir" during each of the preceding four weeks).

ii. <u>To both parties</u>: Pointing to the record, please provide the "basket" price for Crown-origin standing timber that falls within the SPF species category in New Brunswick, Québec, Ontario, Alberta and in Nova Scotia.

<u>Response</u>:

32. New Brunswick reported that for Crown-origin SPF sawlogs, the administered price was $28.49/m^3$ between January 2015 and March 2015, and $31.09/m^3$ between April 2015 and December 2015.[44]

33. Quebec reported that, although it sets a "basket" price for Crown-origin standing timber that falls within the SPF species category, that price depends on the tariffing zone in which the

[43] Additionally, as discussed in response to subpart (ii) of this question, Ontario's Crown pricing mechanism does not distinguish between SPF timber and many other non-SPF softwood species.

[44] *See* Government of New Brunswick Initial Questionnaire Response (Exhibit CAN-240) at Exhibit NBII-6.

SPF timber is purchased, and was indexed multiple times over the course of the year.[45] Quebec reported average prices for the 2015-2016 fiscal year for each tariffing zone in its initial questionnaire response at Exhibit QC-STUMP-5 (Exhibit USA-025). As demonstrated in this exhibit, Quebec charged average prices for Crown-origin SPF ranging from C$4.33/$m^3$ in tariffing zone 987 to C$24.58/$m^3$ in tariffing zone 866.[46]

34. Ontario reported that its Crown stumpage price depends, in part, on the species of the timber. However, SPF timber is priced together with certain non-SPF timber.[47]

- The first and primary component of Ontario's Crown stumpage rate, the minimum charge, is generally C$4.42/$m^3$, with exceptions for "timber species that are in over-supply due to relatively low market value (such as poplar and white birch, lower quality hardwoods, etc.), have limited application, and/or are harvested primarily for forest improvement purposes." *See* Government of Ontario Initial Questionnaire Response at ON-76 to ON-77 (Exhibit CAN-155).

- The second component, the forestry futures charge, is composed of four sub-components. The first sub-component, the forestry futures base sub-component, was assessed uniformly at C$0.50/$m^3$ during the period of investigation. Two additional sub-components vary by location (including forest management unit). The final sub-component, the forest futures inventory charge, was generally C$2.50/$m^3$, except for "Category 2 red and white pine, poplar, white birch and grade 2 hardwoods [which] are charged at a rate of [C]$0.59 per cubic metre." *See* Government of Ontario Initial Questionnaire Response at ON-80 to ON-84 (Exhibit CAN-155).

- Finally, the third component of the stumpage price, the forest renewal charge, varied by harvester, but Ontario reported a weighted average forest renewal charge for SPF delivered to all processing sites of C$4.06/$m^3$. *See* Government of Ontario Initial Questionnaire Response at ON-80 (Exhibit CAN-155).

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[45] *See* Government of Quebec Initial Questionnaire Response, p. QC-S-55 (Exhibit CAN-170).

[46] *See* Exhibit QC-STUMP-5 (Exhibit USA-025).

[47] *See* Government of Ontario Initial Questionnaire Response at ON-76 to ON-84 (Exhibit CAN-155).

- Adding these three charges together yields an approximate Crown stumpage rate during the POR of approximately C$11.50/$m^3$. Actual Crown stumpage rates for each forest management unit are reported in Government of Ontario Initial Questionnaire Response (Exhibit CAN-155) at Exhibit ON-TAB-5 (Exhibit USA-030) (electronic spreadsheet).

35. In Alberta, Crown stumpage prices for SPF are set pursuant to the process described in Schedule 3 of the Timber Management Regulation. *See* Alberta Timber Management Regulation, Schedule 3 (Exhibit CAN-115). The rate that is applied to SPF stumpage changes from month to month based on the board feet prices of spruce, pine and fir from the preceding month. *See* Alberta Timber Management Regulation, Schedule 3 (Exhibit CAN-115). Actual Crown stumpage prices for SPF can be found at Government of Alberta Verification Exhibit GOA-VE-11 (Exhibit USA-037).

36. With respect to Crown prices in Nova Scotia itself, the USDOC did not solicit information regarding government stumpage rates during the period of investigation because no allegations were made regarding the adequacy of remuneration for Crown stumpage in Nova Scotia.

iii. <u>To both parties</u>: Please address the differences between species within the SPF category and whether they are relevant or not, in light of the fact that they are treated as interchangeable (within a basket) in many transactions.

<u>Response</u>:

37. As explained in the U.S. first written submission, the USDOC found that the provincial governments treated these species as interchangeable despite minor differences or minor variations.[48] The USDOC found that even if some small variations in the relative average diameter of trees harvested in Nova Scotia as compared to Alberta, Ontario, or Quebec existed, neither Canada nor the Canadian respondents had established that this difference rendered the timber incomparable such that it did not reflect the prevailing market conditions in Alberta, Ontario, or Quebec. The fact that none of the provincial governments for which the Nova Scotia benchmark was applied recognize commercial differences between specific SPF species supports the USDOC's SPF-wide comparison of provincial stumpage markets. The provincial governments themselves did not deem purported species-specific differences in commercial value to be significant enough to warrant different pricing among SPF species.[49] Accordingly, Canada's arguments regarding the commercial value of particular SPF species do not undercut the USDOC's determination that Nova Scotia reflected the same prevailing market conditions as

[48] *See generally* U.S. First Written Submission, paras. 117-124.

[49] Lumber Final I&D Memo, pp. 110-111 (Exhibit CAN-010).

in Alberta, Ontario, and Quebec because of the dominance of SPF generally in each of those provinces.

9. <u>To Canada</u>: During the first substantive meeting, in its response to the previous question, Canada referred to 187 tariffing zones each with its own constitution on which the regression analysis was then applied. Please indicate whether this means that there are 187 regional markets in Québec.

<u>Response</u>:

38. This question is addressed to Canada.

10. <u>To the United States</u>: At paragraph 768 of its first written submission, Canada asserts, in relevant part, that:

> **[C]ommerce itself recognized that "the species of a tree is an integral part of the value of that tree". In its analysis of British Columbia, Commerce calculated the benefit conferred by purchases of Crown-origin standing timber by disaggregating transactions by species. Having recognized the importance of species-to-species comparisons in British Columbia, as an investigating authority, Commerce was obliged to apply its reasoning in an internally consistent, coherent way. Had it done so, it would have concluded that the comparability of prices between Nova Scotia and Alberta, Ontario, and Québec was affected by species differences.**

Please respond to Canada's argument.

<u>Response</u>:

39. Canada's statement in paragraph 768 of its first written submission is misleading because the USDOC <u>did</u> use prices for the same species basket of softwood timber that producers obtained from the respective provincial governments: spruce, pine, and fir (SPF).[50] These market-determined prices reflected the prevailing market conditions for the same species basket of softwood timber sold in New Brunswick, Quebec, Ontario, and Alberta. The USDOC explained that the species within the SPF basket are considered collectively.[51] For example, "SPF" is one of the species options that appears in the "Species" column of the log-type chart the

[50] *See* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 109-112 (Exhibit CAN-010).

[51] *See* Lumber Preliminary Decision Memorandum, pp. 44-45 (Exhibit CAN-008).

USDOC referred to in the preliminary determination.[52] The USDOC explained that in this investigation (as well as historically) "the provinces themselves do not generally differentiate between the SPF species; rather, the provincial governments tend to group all eastern SPF species into one category for data collection and pricing" because these species are "interchangeable."[53] Canada's statement in paragraph 768 of its first written submission neglects to mention that the relevant species that grow in British Columbia are not treated as interchangeable. The USDOC's reasoning is sound, based on the evidence on the administrative record, and not internally inconsistent.

11. To Canada: At paragraph 128 of its first written submission, the United States argues that:

> **Although Canada casts the USDOC's comparison as one between low-quality timber in Alberta, Ontario, and Quebec and "the most valuable half of the harvest in Nova Scotia," Canada ignores that the inclusion of timber not processed by sawmills in Nova Scotia would have distorted the comparison by including products in the benchmark (i.e., non-sawable timber such as pulplogs) that were not reported by the Canadian respondents. (footnotes omitted)**

Please respond to the United States' argument. In particular, pointing to record evidence, please confirm whether the stumpage data pertaining to Alberta, Ontario and Québec that the Canadian respondents reported to the USDOC for the period of investigation (POI) included data for any pulpwood purchased by sawmills.

Response:

40. This question is addressed to Canada.

12. To the United States: At paragraph 774 of its first written submission Canada asserts that:

> **Nova Scotia's reported DBH for "merchantable" standing timber includes all subsets of timber, without distinction, including pulpwood. Pulpwood was not included in the Nova Scotia benchmark and tends to be smaller diameter, lower value timber. This omission is problematic given that, in Nova**

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[52] *See* Lumber Preliminary Decision Memorandum, pp. 44-45 (Exhibit CAN-008).

[53] Lumber Preliminary Decision Memorandum, p. 44 (Exhibit CAN-008) (citing prior investigations and reviews of softwood lumber from Canada).

> **Scotia, significant volumes of harvested trees are not processed in sawmills and were therefore excluded from the calculation of the benchmark. In Nova Scotia, only 48% of the primary forest product harvest is processed in a sawmill. Nova Scotia provided the average diameter of all of the timber in its forest, but only provided the price of the largest half of that timber. (footnotes omitted)**

Please respond to Canada's assertion above, focusing on the underlined statement.

Response:

41. Canada's statement that the Nova Scotia DBH measurement reflected "the average diameter of all of the timber in [Nova Scotia's] forest" is incorrect.[54] Rather, the tree measurements contributing to the 15.9 cm DBH were **[[BCI]]**.[55] Nova Scotia reported the DBH for "merchantable" timber and Nova Scotia defines "merchantable" trees to be those of a certain size. When measuring diameter at breast height for trees in the province, the provincial government **[[BCI]]**.[56] The USDOC confirmed this information during verification.[57]

42. Moreover, the provincial procedures for measuring diameter at breast height explain that **[[BCI]]**.[58]

43. Canada's statement is also misleading because it implies that other provinces strictly reported the DBH for sawable timber. This is also incorrect. For example, Quebec reported average diameters at breast height ranging from roughly 15 cm to 22 cm for SPFL[59] based on "official forest inventory data for stand[s] that contain a minimum of 25% of softwood," without any indication that those stands measured only sawable trees.[60] Similarly, Alberta reported the average diameter at breast height for various species "at maturity."[61] Alberta did not specify

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[54] First Written Submission of Canada (October 5,2018) ("Canada's First Written Submission"), para. 774 (underline added).

[55] *See* Government of Nova Scotia Verification Report, Exhibit NS-VE-4 (Exhibit USA-026 (BCI)), **[[BCI]]**.

[56] *See* Government of Nova Scotia Verification Report, Exhibit NS-VE-4 (Exhibit USA-026 (BCI)), **[[BCI]]**.

[57] *See* Government of Nova Scotia Verification Report, pp. 4-5 (Exhibit CAN-318) and Exhibit NS-VE-4, pp. 27-30 and 34 (Exhibit USA-026 (BCI)).

[58] *See* Government of Nova Scotia Verification Report, Exhibit NS-VE-4 (Exhibit USA-026 (BCI)), **[[BCI]]**.

[59] The USDOC explained that Quebec "adds larch into the SPF basket it uses to price Crown-origin standing timber". Lumber Final I&D Memo, p. 111 (Exhibit CAN-010). Hence, the reference here to "SPFL".

[60] Government of Quebec Initial Questionnaire Response, pp. 23-24 (Exhibit CAN-170).

[61] Government of Alberta Initial Questionnaire Response, pp. 31-33 (Exhibit CAN-097).

whether all species "at maturity" are exclusively sawable, or also include pulpable timber. Thus, when the USDOC compared the DBH for each province to the DBH reported for Nova Scotia, it compared to statistics compiled on the same basis.

44. Finally, even if the DBH reported by Nova Scotia for "merchantable" timber understated the average DBH of sawable timber, the USDOC found that the evidence did not demonstrate that this size difference was material, or that the price differential between smaller-diameter timber and larger-diameter timber was so significant as to render Nova Scotia timber incomparable to (presumably smaller) Crown timber from the other provinces.[62]

13. To the United States: At paragraph 848 of its first written submission, Canada states that:

> **Indeed, the Nova Scotia Survey itself indicated that some surveyed transactions were reported as lump-sum transactions, with a single entry for the stumpage rate, harvesting costs, transportation costs, and brokerage fees or commissions (while failing to provide the background survey responses underlying all of these responses for Commerce to examine). (footnotes omitted)**

Please respond to Canada's assertion. In your response, please refer to page 4 of Exhibit CAN-312, to which Canada cites.

Response:

45. Canada's statement in paragraph 848 of its first written submission mischaracterizes the Deloitte survey. The Deloitte survey explicitly states (at page 4 of Exhibit CAN-312) that it sought to confirm "that the reported transactions were limited to purchases of stumpage by Registered Buyers from unaffiliated private landowners," and "the reported value included only the transaction price for the private stumpage, excluding the payment of private silviculture fees, and excluding any non-stumpage charges that may have been 'bundled' in the Registered Buyer's records."[63] Thus, although certain transactions may have been recorded in a Registered Buyer's books as "a single entry for the price they paid for stumpage, along with other costs incurred in harvesting the standing timber, such as brokerage fees or commissions paid to third

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[62] *See* Lumber Final I&D Memo, pp. 110-112 (Exhibit CAN-010). The USDOC noted that "Canadian Parties claim that because logs in their respective provinces are smaller, logs that are pulped in Nova Scotia would be processed as sawlogs in Québec, Ontario, and Alberta." *Ibid*., p. 112.

[63] Deloitte Survey, p. 4 (Exhibit CAN-312).

parties, harvesting costs, trucking costs, etc.," the auditors specifically sought to ensure that the price reported to Deloitte omitted those other costs.[64]

46. Moreover, the transactions reported in the Deloitte survey were subject to extensive verification, which ensured (and later confirmed) that other costs, such as those included in lump sum transactions, were not included in addition to the stumpage price.[65] "Deloitte conducted on-site verifications to ensure that the survey respondents submitted accurate information that adhered to the survey instructions."[66] The USDOC also verified the transactions reported in the Deloitte survey and found no evidence of lump sum transactions in the source documents inspected.[67] The survey "clearly instructed survey respondents to report the 'stumpage rates' they paid for 'softwood sawlogs,'" and the USDOC found that "the source documents indicate that this is what was reported."[68]

14. <u>To the United States</u>: At paragraph 123 of its first written submission, the United States asserts, in relevant part, that:

> **However, the USDOC verified that the statistic measured the diameter at breast height for trees on private land, *i.e.*, the sales from which the Nova Scotia benchmark could have been derived. (footnotes omitted)**

Pointing to record evidence, please indicate where the USDOC made the above finding and the precise basis for that finding.

<u>Response</u>:

47. The USDOC explained in the final issues and decision memorandum, at page 112, that "[t]he GNS reported that the quadratic mean of DBH for all softwood species on private land is 17.29 cm and 15.9 cm for SPF species."[69] It is uncontested that the 15.9 cm statistic reported by Nova Scotia is the diameter at breast height for merchantable trees on private land. The

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[64] Deloitte Survey, p. 4, footnote 3 (Exhibit CAN-312).

[65] *See* Government of Nova Scotia Verification Report, pp. 4-5 (Exhibit CAN-318).

[66] Lumber Final I&D Memo, p. 115 (Exhibit CAN-010) (citing Government of Nova Scotia Verification Exhibit NS-VE-6, pp. 45-47 (Exhibit CAN-512 (BCI))).

[67] Lumber Final I&D Memo, p. 115 (Exhibit CAN-010).

[68] Lumber Final I&D Memo, p. 115 (Exhibit CAN-010); *see also* Government of Nova Scotia Verification Exhibit NS-VE-6, p. 27 (Exhibit CAN-512 (BCI))).

[69] Lumber Final I&D Memo, p. 112 (Exhibit CAN-010).

discussion in the USDOC's verification report for Nova Scotia, at pages 2 and 4-5,[70] confirms these observations, and is further demonstrated in Verification Exhibit NS-VE-4.[71] At page 2 of the USDOC's verification report for Nova Scotia, the USDOC took note of the following minor correction:

> *2. Minor Corrections to Diameter at Breast Height (DBH)*
>
> The GNS made an error by omitting Jack Pine in reporting DBH for "SPF only on private land" in its initial questionnaire response (IQR) at 8. By adding Jack Pine into the SPF category, the quadratic mean of DBH increased to 15.90 cm from 15.88 cm. *See* **NS-VE-1** at 1.[72]

48. Further, at pages 4-5 of the USDOC's verification report for Nova Scotia, the USDOC conducted the following verification step: "*Examined how the GNS determines the diameter at breast height (DBH) figures reported on page 8 of the GNS initial questionnaire response and examined source documentation underlying the data*."[73] In conducting this step of the verification, the USDOC took note of the following:

> GNS officials provided a PowerPoint presentation of the Permanent Sample Plots (PSP) program. The plots for the PSP program were established across Nova Scotia in 1965 by using randomly generated latitude and longitude values. GNS officials explained that the plots are measured on a five-year cycle and information is collected regarding tree species, heights, age, and DBH, and each of these characteristics is stored in a database, and measured on a 5-year cycle. *See* **NS-VE-4** at 1-13.
>
> GNS officials provided an expert report, entitled "Why Quadratic Mean Diameter," and "Forest Inventory Permanent Sample Plot Field Measurement Methods and Specifications." *See* **NSVE-4** at 14-17, and **NS-VE-4** at 18-84, respectively. They explained that the information in these reports informed the statistical and measurement techniques used in maintaining the PSP program.

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[70] *See* Government of Nova Scotia Verification Report, pp. 2, 4-5 (Exhibit CAN-318).

[71] *See* Government of Nova Scotia Verification Exhibit NS-VE-4, p. 91 (Exhibit USA-026 (BCI)).

[72] Government of Nova Scotia Verification Report, p. 2 (Exhibit CAN-318) (italics and bold in original).

[73] Government of Nova Scotia Verification Report, p. 4 (Exhibit CAN-318) (italics in original).

> GNS officials explained that they maintain a forest inventory monitoring system and database in the ordinary course of business. We observed GNS staff perform a query of the database of the average DBH for SPF crown and private trees in the province. The query programming language and results are included **NS-VE-4** at 85-90. The DBH for trees harvest[ed] in private lands matched the figure (15.90 cm) reported in the minor corrections exhibit. *See* **NS-VE-1** at 1.[74]

49. In the final issues and decision memorandum, the USDOC explained that:

> The Department verified that, in the calculation of DBH for the NS Survey, the GNS measures only merchantable trees, *e.g.* trees that are large enough to be sold for stumpage, and therefore parties' contention that trees which are not economically harvestable have been included in the NS Survey is unfounded.[75]

50. It is uncontested that the Deloitte survey of Nova Scotia private stumpage prices compiled stumpage prices from private land.[76] Because both the DBH statistic and the transactions reported in the Deloitte survey were derived from private land, the USDOC "verified that the [15.9 cm] statistic measured the diameter at breast height for trees on private land, i.e., the sales from which the Nova Scotia benchmark could have been derived."[77]

15. To the United States: At paragraph 775 of its first written submission, Canada asserts, in relevant part, that:

> **In fact, the source of Nova Scotia's DBH statistics acknowledges that many of the "merchantable" trees it measures are still growing, and that the minimum DBH for sawlogs in Nova Scotia is typically considered to be 17.8 cm. (footnotes omitted)**

Please respond to Canada's assertion above, considering the USDOC's finding on page 111 of its final determination that:

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[74] Government of Nova Scotia Verification Report, pp. 4-5 (Exhibit CAN-318) (italics and bold in original; underline added).

[75] Lumber Final I&D Memo, p. 111 (Exhibit CAN-010).

[76] *See, e.g.*, Deloitte Survey, pp. 1 and 4 (Exhibit CAN-312).

[77] U.S. First Written Submission, para. 123.

> **The Department verified that, in the calculation of DBH for the NS Survey, the GNS measures only merchantable trees, e.g. trees that are large enough to be sold for stumpage, and therefore parties' contention that trees which are not economically harvestable have been included in the NS Survey is unfounded. (footnotes omitted)**

Response:

51. Canada's statement in paragraph 775 of its first written submission is misleading. Canada refers to "the source" (a person) who "acknowledges" (does not state) a conclusion that Canada (and not "the source") has formulated in its brief.[78] The exhibit to which Canada refers does not make the assertion as Canada presents it.[79] In any case, the U.S. response to question 12 explains that Nova Scotia defines "merchantable" trees to be those of a certain size, *i.e.*, **[[BCI]]**.[80] Thus, the USDOC concluded that, in Nova Scotia, trees **[[BCI]]** were "large enough to be sold for stumpage."[81] Because Nova Scotia reported the quadratic mean diameter of all such trees, the USDOC determined that the reported calculation—15.9 cm—reflected the DBH of all trees "large enough to be sold for stumpage."[82] In the statement referenced above, Canada again conflates the relevance of the DBH measurement to establish comparability between forest conditions with the separate question of valuation of sawlogs and studwood.

52. Canada's argument does not contradict the USDOC's determination that the size of trees in Nova Scotia was, on average, comparable to the size of trees in Alberta, New Brunswick, Ontario, and Quebec.

53. First, as discussed in the U.S. response to question 12 above, neither Alberta nor Quebec limited their reported DBH to sawable timber. For example, Quebec reported average diameters at breast height ranging from roughly 15 cm to 22 cm for SPFL based on "official forest inventory data for stand[s] that contain a minimum of 25% of softwood," without any indication

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[78] Canada's First Written Submission, para. 775 (citing Attachment 15 to Miller Report: Canada et al., "Townsend, Peter, Nova Scotia DNR, 2004, Nova Scotia Inventory Based on Permanent Sample Plots Measured Between 1999 and 2003 Report FOR 2004," Exhibit CAN-305, p. 12).

[79] *See* Attachment 15 to Miller Report: Canada et al., "Townsend, Peter, Nova Scotia DNR, 2004, Nova Scotia Inventory Based on Permanent Sample Plots Measured Between 1999 and 2003 Report FOR 2004", p. 12 (Exhibit CAN-305).

[80] *See* Government of Nova Scotia Verification Report, Exhibit NS-VE-4 (Exhibit USA-026 (BCI)), **[[BCI]]**.

[81] Lumber Final I&D Memo, p. 111 (Exhibit CAN-010).

[82] Lumber Final I&D Memo, p. 111 (Exhibit CAN-010).

that those stands measured only sawable trees.[83] Similarly, Alberta reported the average diameter at breast height for various species "at maturity."[84] Alberta did not specify whether all species "at maturity" are exclusively sawable, or also include pulpable timber. Thus, when the USDOC compared the DBH for each province to the DBH reported for Nova Scotia, it compared to statistics compiled on the same basis.

54. Second, Canada's reference to a 17.8 cm DBH for sawable logs is, in any case, still comparable to the DBH reported by the other provinces. As discussed in the U.S. response to question 6, Alberta reported that the DBH of SPF standing timber species in Alberta ranges from 18.2 cm to 24.6 cm (slightly larger than 17.8 cm), Ontario reported that the DBH of SPF logs destined to sawmills and pulpmills in 2015 was 15.32 cm (only 2.5 cm smaller than 17.8 cm), and Quebec reported that the DBH of SPFL standing timber species ranges from 16 cm to 24 cm (a range which encompasses 17.8 cm).[85]

55. Accordingly, the USDOC's conclusion that the DBH reported by Nova Scotia reflected the DBH of trees large enough to be sold for stumpage was supported by the record, and was properly compared to the DBHs reported by the other provinces, which did not strictly reflect the DBH of sawable trees. However, even if the DBH for "merchantable" timber in Nova Scotia understated the DBH of sawable timber in the province, the larger DBH for sawable timber in Nova Scotia is still comparable to the reported DBHs of timber in the other provinces.

16. <u>To both parties</u>: At paragraph 136 of its first written submission, the United States asserts that:

> **Canada argues that the USDOC did not seek evidence from either respondents or Nova Scotia that would allow it to quantify these alleged differences in market conditions. Canada asserts that "it was the USDOC that was required to carry out a 'systematic inquiry' and 'seek out relevant information' with respect to its chosen benchmark." Canada's arguments, however, do not speak to the USDOC's obligations to undertake that sort of additional evaluation for an in-country benchmark in the countervailing duty investigation underlying this dispute. Canada points to *US – Anti-Dumping and Countervailing Duties (China)*, for example, in which the Appellate Body stated that an investigating**

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[83] *See* Government of Quebec Initial Questionnaire Response, pp. 23-24 (Exhibit CAN-170).

[84] *See* Government of Alberta Initial Questionnaire Response, pp. 31-33 (Exhibit CAN-097).

[85] *See* Government of Alberta Initial Questionnaire Response, Exhibit AB-S-23, p. 20 (Exhibit CAN-096); Government of Ontario Initial Questionnaire Response, Exhibit ON-GEN-7-C, p. 3 (Exhibit USA-033); Government of Quebec Initial Questionnaire Response, p. 24 (Exhibit CAN-170).

> **authority has "a duty to seek out relevant information" from respondents with regard to whether a financial contribution had been made by a public body and "evaluate [the information] in an objective manner." However, an obligation to proactively seek factual information from respondents in the context of a public body determination is different than proactively seeking factual information from non-respondents regarding a benchmark that the USDOC found, based on substantial evidence, reflected the prevailing market conditions in the country of provision. (footnotes omitted)**

Please provide your views on the United States' argument above as regards the investigating authority's obligation to "seek out relevant information" in the context of selecting an appropriate benchmark.

Response:

56. The U.S. first written submission demonstrates that the USDOC's investigative process, findings, and analysis reflect the execution of a diligent investigation and solicitation of the relevant facts.[86] The USDOC sought and received voluminous information from the provincial government of Nova Scotia. The USDOC issued four separate questionnaires to the province and received responses spanning hundreds of pages.[87] The USDOC directed additional questions to Nova Scotia upon receiving from the Canadian parties multiple submissions and comments on the Nova Scotia questionnaire responses and factual information rebutting those responses.[88] And the USDOC verified the questionnaire responses of Nova Scotia[89] after receiving comments from the Canadian parties regarding what should be examined at verification.[90] The extent of inquiry and analysis conducted in this investigation exceeds by far the typical experience of the USDOC, and likely well exceeds that of investigating authorities in other Members.

17. To the United States: At paragraph 872 of its first written submission, Canada states that:

> **In the prior softwood lumber investigation, Commerce also determined that it was "necessary" to include costs incurred by companies in Canadian provinces that were not incurred to**

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[86] *See* U.S. First Written Submission, paras. 181 *et seq.*

[87] *See* Lumber Final I&D Memo, pp. 287, 294, 295, 313 (Exhibit CAN-010).

[88] *See* Lumber Final I&D Memo, pp. 298, 305, 307, 315 (Exhibit CAN-010).

[89] *See* Government of Nova Scotia Verification Report (Exhibit CAN-318).

[90] *See* Lumber Final I&D Memo, p. 319 (Exhibit CAN-010).

> **harvest standing timber in the benchmark jurisdiction. It did so because it found that the costs incurred in connection with the harvesting of standing timber "may differ substantially depending on the location of the timber". Similarly, Commerce previously included costs where there was evidence that a cost was borne in a province but where there was a lack of evidence about whether similar costs were borne in the benchmark jurisdiction. This demonstrates not only that Commerce was aware that it was required to include the additional remuneration in the provincial stumpage prices to achieve a fair price comparison, but also that it was required to do so precisely because Nova Scotia buyers do not incur those costs. (footnotes omitted)**

Please respond to Canada's assertions.

Response:

57. The USDOC's determination to make particular adjustments "where appropriate" in a prior softwood lumber investigation was based on an evaluation of the record evidence regarding comparability in that investigation.[91] In the *Lumber IV* investigation, the USDOC evaluated the prevailing market conditions on a province- and benchmark-specific basis, and determined where appropriate adjustments were necessary to ensure the comparability of the constructed transactions. Here, the USDOC engaged in the same kind of record-based determination to ensure the comparability of a benchmark based on actual stumpage transactions. The USDOC (1) evaluated the composition of the Nova Scotia private stumpage benchmark, (2) concluded it reflected "a 'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees," and (3) compared that benchmark to the company respondents' pure stumpage purchase prices.[92]

58. Prior countervailing duty investigations are distinguishable from the softwood lumber countervailing duty investigation at issue in this dispute for a variety of reasons. For example, in the *Lumber IV* investigation, the USDOC evaluated the adequacy of remuneration paid for stumpage in the Canadian provinces using as a benchmark United States stumpage prices. The USDOC stated in such circumstances that "[m]arket prices within the country necessarily reflect prevailing market conditions in the country of provision", but "[b]ecause we have determined that there is no appropriate Canadian market-based benchmark price available, we turned to the next most commercially reasonable sales, those in the United States," and "adjusted these sales

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[91] *See, e.g.*, *Lumber IV Final Determination*, p. 42 (Exhibit CAN-087).

[92] Lumber Final I&D Memo, p. 138 (Exhibit CAN-010).

prices for factors to account for comparability, i.e., to account for different prevailing market conditions."[93] In that instance, the USDOC made certain adjustments because it relied upon an out-of-country benchmark, and thus was required to make adjustments to ensure that the benchmark used reflected prevailing market conditions in the country where the subsidy was provided. In this investigation, USDOC used an in-country benchmark for the provinces of Alberta, New Brunswick, Ontario, and Quebec, and the benchmark reflected the prevailing market conditions in Canada without needing the same adjustments that would be required for a comparison based on U.S. prices.

18. <u>To both parties</u>: In situations where the government imposes additional costs or payments on private parties as a condition for acquiring a good, what should be the proper way to compare with the benchmark, which may not include all those costs and payments?

<u>Response</u>:

59. Article 14(d) of the SCM Agreement provides that an investigating authority should determine the adequacy of remuneration "in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)." Accordingly, in such a situation, the investigating authority must evaluate whether the benchmark reflects the prevailing market conditions for the good or service in question in the country of provision. If the benchmark reflects the prevailing market conditions for the good or service in the country of provision, no adjustment to the benchmark is necessary to account for the additionally-imposed costs or payments. If the benchmark does not reflect the prevailing market conditions for the good or service in the country of provision, then the investigating authority must adjust the benchmark so that it does, or consider the use of an alternative benchmark that better reflects the prevailing market conditions for the good or service in the country of provision.

60. Where the input price reported by a respondent includes such costs, an adjustment may be warranted. However, if such costs are merely related rather than included in the price of the input, an adjustment would not be appropriate. The USDOC addressed this point in the preliminary decision memorandum:

> Below, we provide descriptions of how we calculated the Nova Scotia and U.S.-based benchmarks used to determine whether the GOA, GBC, GNB, GOO, and GOQ sold Crown-origin standing

[93] *Lumber IV Final Determination*, pp. 30 and 39 (Exhibit CAN-087).

> timber to the mandatory respondents for LTAR. We also discuss how we conducted the benefit calculation in each province at issue.
>
> Concerning the provision of standing timber for LTAR benefit calculation, the Department has analyzed whether to add certain "adjustments," or costs, that the respondent firms argue are associated with or required under their various tenure arrangements. On this point, we note that unlike in *Lumber IV,* we are examining the stumpage price paid on a company-specific basis in this investigation. The current record allows us to examine accurately each individual respondent's arrangement under its tenure agreement and assess the relationship between the tenure arrangement and the stumpage price paid. We preliminarily determine that the stumpage prices reported by the respondents do not include various costs or "adjustments," and that, rather, these costs are related to their long-term tenure rights under various tenure arrangements.[94]

61. The USDOC maintained this finding in the final determination for the Nova Scotia benchmark. The USDOC explained:

> The Department preliminarily determined that the company-specific methodology used in this investigation, as opposed to the aggregate method used in *Lumber IV*, allowed the Department to examine each respondent's specific costs and assess the relationship between each company's tenure arrangements and the stumpage prices paid. In addition, the Department preliminarily determined that these costs are related to the respondents' long-term tenure rights and not to the stumpage prices paid to the Crown.[95]
>
> * * *
>
> Since issuing the *Preliminary Determination*, the Department has verified the questionnaire responses submitted by the respondent companies and the provincial governments. Specifically, the Department has verified the information pertaining to the various agreements granting respondents the right to harvest Crown timber[FN820], and the relationship between their harvest

[94] Lumber Preliminary Decision Memorandum, pp. 50-51 (Exhibit CAN-008).

[95] Lumber Final I&D Memo, p. 127 (Exhibit CAN-010).

> agreements and the stumpage prices the respondents paid for Crown standing timber. We have also verified the Nova Scotia private standing timber benchmark and the costs included in the private prices composing the Nova Scotia benchmark.
>
> [FN820:] We examined Canfor's FMAs, CTPs, and CTQs with the GOA; JDIL's FMAs with the GNB; Resolute's TSGs with the GOQ; Resolute's SFLs and FRLs with the GOO; Tolko's FMAs and CTQs with the GOA; and West Fraser's FMAs, CTQs, and CTPs with the GOA.[96]

62. In addressing the arguments of the Canadian parties in the final decision memorandum, the USDOC's explanation also addresses the point raised by the Panel's question here. The USDOC explained:

> Certain Canadian parties argue that, as a legal matter, we cannot distinguish between "long-term tenure rights" and "stumpage." To support this argument, the parties rely on *Lumber IV* and section 771(5)(E) of the Act, arguing that in measuring the benefit that each respondent received from its purchase of standing timber, the Department must include all costs incurred by the respondent (including legally obligated costs associated with long-term tenure rights) in exchange for its right to harvest Crown timber. We disagree that we cannot legally distinguish between "long-term tenure rights" and "stumpage." Costs associated with long-term tenure rights are billed on separate invoices or as separate line items by the provinces, rather than incorporated into the stumpage price, and, as discussed above, there is no evidence on the record that these costs are taken into account by provincial governments when setting stumpage prices.[97]

63. In contrast, with respect to British Columbia stumpage, the USDOC explained that adjustments were necessary to ensure that the out-of-country based benchmark actually reflected the prevailing market conditions in Canada for the relevant species found in British Columbia.[98] The USDOC explained:

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[96] Lumber Final I&D Memo, pp. 135-136 (Exhibit CAN-010).

[97] Lumber Final I&D Memo, p. 138 (Exhibit CAN-010).

[98] Lumber Final I&D Memo, pp. 63-64 (Exhibit CAN-010). To be clear, the USDOC refers here to the "market conditions in British Columbia" in the sense that it was examining timber species that were unique to British

> As discussed above, the legal requirements governing the Department's selection of benchmarks do not require perfection. A benchmark, by nature, is not an exact match to the subsidy being evaluated. However, pursuant to section 771(5)(D)(iv) of the Act, the Department shall determine the adequacy of remuneration in relation to prevailing market conditions, *i.e.*, price, quality, availability, marketability, transportation, and other conditions of purchase or sale. To calculate "derived market stumpage prices" to compare with Crown stumpage, we deducted certain costs reported by BC-based respondents from the U.S. PNW log price benchmarks. The costs we adjusted for were, *inter alia*, costs associated with the tenure contract and accessing timber for harvesting, and cost of acquiring timber. Because these cost adjustments were made with respect to market conditions in British Columbia, the derived market stumpage prices were representative of the prevailing market conditions in the province.[99]

64. In sum, the USDOC's explanations with respect to these two different situations illustrate the range of considerations that must be taken into account when faced with this question on a case-by-case basis.

19. <u>To Canada</u>: At paragraph 151 of its first written submission, the United States asserts that:

> **However, the surveys of additional costs by Alberta and Quebec only collect information regarding costs in those provinces; those surveys do not demonstrate that Alberta and Quebec <u>actually</u> took the survey results into consideration in setting stumpage prices in those provinces. Accordingly, that information does not undermine the USDOC's determination that no evidence indicated that those costs were affirmatively taken into account by provincial governments when setting stumpage prices. (footnotes omitted)**

Please respond to the United States' arguments.

Columbia. The reference should not be understood to endorse Canada's position that each province should be treated as a separate market. Unlike British Columbia, the other provinces at issue shared common growing conditions and timber species, as the United States has explained at length in the U.S. first written submission and throughout these responses.

[99] Lumber Final I&D Memo, pp. 63-64 (Exhibit CAN-010) (citation omitted).

Response:

65. This question is addressed to Canada.

20. To the United States: The United States asserts at paragraph 57 of its first written submission that:

> **It is undisputed that government-owned timber makes up the majority of the softwood timber harvest in each of the five provinces at issue – 50.79 percent in New Brunswick, 85 percent in Quebec, 90 percent in Ontario, 98 percent in Alberta, and 90 percent in British Columbia. (footnote omitted)**

Please provide the precise evidentiary basis for the above assertion in the record of these proceedings. Please also specify the year that these figures relate to.

Response:

66. It is undisputed that government-owned timber makes up the majority of the softwood timber harvest in each of the five provinces at issue because Canada itself reported this fact in its response to USDOC's initial questionnaire.[100] *See* Government of Canada Initial Questionnaire Response, Exhibit GOC-STUMP-5 at 10 (Exhibit CAN-014).

67. The USDOC also examined the specific calculations for each province in the course of its investigation.

- **New Brunswick:** The USDOC's determination that Crown-origin timber makes up 50.79 percent of the softwood timber harvest in New Brunswick is explained on page 80 of the final issues and decision memorandum at footnote 478, and relies upon data for fiscal year 2015-2016.[101] In particular, the USDOC relied upon Crown stumpage harvest volumes corrected by New Brunswick during the USDOC's verification of the province's questionnaire responses.[102] *See* Government of New Brunswick Verification

[100] *See* Government of Canada Initial Questionnaire Response, Exhibit GOC-STUMP-5, p. 10 (Exhibit CAN-014).

[101] *See* Lumber Final I&D Memo, p. 80, footnote 478 (Exhibit CAN-010).

[102] *See* Government of New Brunswick Verification Exhibit VE-1 ("Minor Corrections"), p. 10 (Table 3) (Exhibit CAN-267 (BCI)).

Exhibit VE-1 ("Minor Corrections") at 10 (Table 3) (Exhibit CAN-267 (BCI)).

- **Quebec:** The USDOC's determination that the provincial government controlled 85 percent of the softwood timber harvest in Quebec is explained on page 99 of the final issues and decision memorandum at footnote 593, and relies upon data for fiscal year 2014-2015.[103] The USDOC's calculation of the government-controlled proportion of the softwood timber harvest is provided in the Quebec Final Market Memorandum at Table 7.2 (Exhibit USA-027 (BCI)). The USDOC's calculation of the government-controlled proportion of the softwood timber milled (but not necessarily harvested) in Quebec is provided at Table 7.1.[104] Both calculations were performed using data reported to the USDOC by Quebec, as corrected during the USDOC's verification of the province's questionnaire responses.[105] *See* Quebec Final Market Memorandum at Revised Table 7 (Exhibit USA-027 (BCI)).

- **Ontario:** A clarification is required with respect to the statement that Crown-origin timber in Ontario "makes up 90 percent of the softwood timber harvest" in the U.S. first written submission. That statement was based on incorrect information reported in the Government of Canada's initial questionnaire response. The correct percentage is discussed on page 92 of the USDOC's final issues and decision memorandum, where the USDOC determined that Crown-origin timber in Ontario accounted for approximately 96.5 percent of the softwood timber harvest volume in the province during fiscal year 2015-2016.[106] Ontario reported in its initial questionnaire response that 391,836.84 cubic meters of softwood timber were harvested from non-Crown lands during the relevant period, and 10,662,556.07 cubic meters of softwood timber were harvested from Crown lands during the relevant period, resulting in

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[103] *See* Lumber Final I&D Memo, p. 99, footnote 593 (Exhibit CAN-010).

[104] Quebec Final Market Memorandum, Table 7.1 (Exhibit USA-027 (BCI)).

[105] *See* Quebec Final Market Memorandum, Revised Table 7 (Exhibit USA-027 (BCI)).

[106] *See* Lumber Final I&D Memo, p. 92 (Exhibit CAN-010). We note that due to Ontario's record-keeping system, Ontario reported Crown harvest volumes for fiscal year 2015-2016, but private harvest volume for fiscal year 2014-2015. *See* Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) at footnote 1 (Exhibit USA-021).

a total harvest of 11,054,392.8 cubic meters of softwood timber.[107] Dividing the Crown softwood harvest by the total softwood harvest demonstrates that Crown-origin timber represented 96.46 percent of the total softwood harvest volume during the relevant period.[108] *See* Government of Ontario Initial Questionnaire Response (Exhibit CAN-155) at Exhibit ON-STATS-2 (as corrected in Government of Ontario Minor Corrections Exhibit ON-MC-6) (Exhibit USA-021).

- **Alberta:** The USDOC's determination that Crown-origin timber constituted 98 percent of the softwood timber harvest in Alberta is explained on page 51 of the final issues and decision memorandum,[109] and relates to fiscal year 2015-2016.[110] The USDOC's calculation of the government-controlled proportion of the softwood timber harvest is provided in the USDOC's market memoranda for Alberta.[111] *See* Alberta Preliminary Market Memorandum at Table 3 (Exhibit USA-028); unchanged in Alberta Final Market Memorandum at 2 (Exhibit USA-029). This calculation relied upon data originally provided to the USDOC by Alberta in its initial questionnaire response for fiscal year 2015-2016. *See* Alberta Preliminary Market Memorandum at Table 3 and footnote 1 (Exhibit USA-028).

- **British Columbia:** The USDOC's determination that Crown-origin timber constituted 90 percent of the softwood timber harvest in British Columbia is discussed on page 20 of the USDOC's preliminary decision memorandum, and relies on data for calendar year 2015.[112] The USDOC derived that percentage from the spreadsheets attached to the Government of British Columbia's

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[107] Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) (Exhibit USA-021).

[108] *See* Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) (Exhibit USA-021).

[109] *See* Lumber Final I&D Memo, p. 51 (Exhibit CAN-010).

[110] *See* Alberta Preliminary Market Memorandum, Table 3 and footnote 1 (Exhibit USA-028).

[111] *See* Alberta Preliminary Market Memorandum, Table 3 (Exhibit USA-028); unchanged in Alberta Final Market Memorandum, p. 2 (Exhibit USA-029).

[112] *See* Lumber Preliminary Decision Memorandum, p. 20 (Exhibit CAN-008).

initial questionnaire response.[113] *See* Government of British Columbia Initial Questionnaire Response (Exhibit CAN-055). British Columbia reported that the coniferous timber harvest from Crown land was 60,445,847 cubic meters, while private land accounted for 6,346,285 cubic meters, out of a province total of 66,811,415 cubic meters.[114] Dividing the Crown harvest volume by the total harvest volume demonstrates that approximately 90.5 percent of the harvest was from Crown land.

21. To the United States: At page 110 of its final determination, the USDOC stated, in relevant part, that:

> **Under 19 CFR 351.511(a)(2)(i), in choosing such in-country prices, the Department will consider factors affecting comparability…..In the *Preliminary Determination*, the Department reiterated its conclusion in *Lumber IV* that "species and growing conditions are both key factors in determining the market value of standing timber." (footnotes omitted; emphasis added)**

Further, at paragraph 110 of its first written submission, the United States argues, in relevant part, that:

> **[A]rticle 14(d) refers to "prevailing market conditions … in the country of provision." What this means is that even if the term "market" (within the phrase "prevailing market conditions") is interpreted as relating to a particular geographical location in Article 14(d), that location would be the "country of provision" – not, as Canada suggests, the local jurisdiction of the subsidy.**

i. Please explain how the United States' argument in paragraph 110 above can be reconciled with the USDOC's statement at page 10 of its final determination that "[i]n choosing … in-country prices, the Department will consider factors affecting comparability".

Response:

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[113] *See* Government of British Columbia Initial Questionnaire Response (Exhibit CAN-055).

[114] *See* Government of British Columbia Initial Questionnaire Response (Exhibit CAN-055). We note that the remaining 19,283 cubic meters is attributable to other federal harvest. *Ibid.*

68. The statement at paragraph 110 of the U.S. first written submission relates to the absence from Article 14(d) of the SCM Agreement of any requirement to use local prices, as Canada has suggested the USDOC was obligated to do. The statement at page 10 of the USDOC's final issues and decision memorandum relates to the importance of comparability between the selected benchmark good and the government-provided input. The question under Article 14(d) of whether or not certain prices are distorted arises prior to the question of comparability. As the USDOC explained, the "analysis of whether a proposed benchmark is market-determined must precede any analysis of how to account for prevailing market conditions in a benchmark comparison."[115] Reversing the order of that analysis "would lead to the absurd result that the Department could never rely on anything other than [an in-country benchmark], regardless of the level of distortion, because such benchmarks would always reflect 'prevailing market conditions' in the country of provision."[116] That result "would effectively nullify" the language in Article 14(d) that guides the determination of adequate remuneration.[117]

ii. Pointing to record evidence, please indicate where the USDOC took into consideration "growing conditions" in assessing whether the Nova Scotia benchmark was suitable for determining adequacy of remuneration for the provision of Crown stumpage in the provinces at issue.

Response:

69. The USDOC considered "growing conditions" in assessing the comparability of the Nova Scotia benchmark on page 113 of the final issues and decision memorandum:

> We also disagree with the Canadian Parties that there are fundamental differences between the Acadian forest (which encompasses Nova Scotia) and the boreal forest (which encompasses Québec, Ontario, and large areas of Alberta). As discussed in the *Preliminary Determination*, we find that species and DBH are the two most critical elements when assessing whether prices for private-origin standing timber in Nova Scotia are comparable to Crown-origin standing timber in New Brunswick, Québec, Ontario, and Alberta. While Nova Scotia is not located in the same forest as Québec, Ontario, and Alberta, as discussed above, the two forests are comparable in terms of species and DBH in that both forest regions are dominated by SPF-based species and the DBH of the forests' standing timber are in line with

[115] Lumber Final I&D Memo, Comment 16, p. 52 (Exhibit CAN-010) (underline added).

[116] Lumber Final I&D Memo, Comment 16, p. 52 (Exhibit CAN-010) (underline added).

[117] Lumber Final I&D Memo, Comment 16, pp. 52 (Exhibit CAN-010).

> one another. We also find that the Canadian Parties have not cited any evidence demonstrating that growing conditions in the Acadian and boreal forests are so different as to render trees from the two forests incomparable to one another.[118]

70. The basis of Canada's "growing conditions" argument has been that growing conditions are relevant because different growing conditions produce different trees that cannot be considered comparable. But the USDOC compared the characteristics of trees grown in these allegedly different growing conditions and found that the timber that grows in Nova Scotia is, in fact, physically comparable to the timber of the same species that grows in New Brunswick, Quebec, Ontario, and Alberta.[119] Despite alleged differences in growing conditions, the provincial forests produced similar trees.[120] As documented in the U.S. response to question 6, the USDOC found that the diameter at breast height of the trees grown in these forests was similar and the forests were dominated by SPF-based species.[121] Moreover, the USDOC found that Canada had not "cited any evidence demonstrating that growing conditions in the Acadian and boreal forests are so different as to render trees from the two forests incomparable to one another."[122] The USDOC therefore considered "growing conditions" in assessing whether the Nova Scotia benchmark was comparable to the other provinces at issue.

22. At paragraphs 237 and 238 of Canada's opening statement (Day 1), Canada asserts that:

> **These differences go directly to whether Commerce measured the adequacy of remuneration for standing timber in relation to prevailing market conditions. However, the United States attempts to reframe Canada's arguments with respect to market differences between Nova Scotia and the other provinces as a request for adjustments by Canada. (footnotes omitted)**
>
> **The U.S. ignores that Canada's argument is not a request for "cost adjustments". Instead, the glaring and fundamental differences in the market conditions in Nova Scotia on the one hand and Alberta, Ontario, and Québec on the other,**

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[118] Lumber Final I&D Memo, p. 113 (Exhibit CAN-010) (underline added).

[119] Lumber Final I&D Memo, p. 113 (Exhibit CAN-010).

[120] Lumber Final I&D Memo, p. 113 (Exhibit CAN-010).

[121] Lumber Final I&D Memo, p. 113 (Exhibit CAN-010).

[122] Lumber Final I&D Memo, p. 113 (Exhibit CAN-010).

demonstrate that Commerce's chosen benchmark was inappropriate and unusable.

i. To Canada: Is it Canada's position that the USDOC's chosen benchmarks would have been "inappropriate and unusable" even if the necessary adjustments had been made so that those benchmarks did reflect the prevailing market conditions in the provinces in question? If so, please explain why.

Response:

71. This question is addressed to Canada.

ii. To the United States: Please comment.

Response:

72. Canada has proposed a number of competing theories about differences in market conditions, differences in geographical conditions, differences in provincial government conditions, differences in conditions of sale, differences in conditions of transportation, differences in terrain, differences between woodlots, differences between trees, and so forth. But Canada has failed to identify any parameters that would allow for a valid comparison under its approach. At the same time, Canada emphasizes that a comparison between identical goods is not necessary under Article 14(d) of the SCM Agreement, but rather that a comparison of the "same or similar" goods will also suffice.[123] In Canada's words, "assessment of adequacy of remuneration normally involves a comparison to a market-determined price, for the same or similar goods."[124] Regardless of whether Canada describes the foregoing differences as differences in market conditions or differences requiring adjustments, Canada has failed to show that the comparison in this case was not based on a comparison to a market-determined price for the same or similar goods. The Nova Scotia stumpage prices provided a comparable benchmark for the stumpage transactions under investigation and none of the alternatives Canada sought out would have been free from the myriad differences that fuel Canada's objections here.

23. To both parties: In the event that an investigating authority selects a market-determined benchmark in the country of provision, does it need to make adjustments to that benchmark?

Response:

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[123] *See, e.g.*, Canada's First Written Submission, para. 45 (underline added).

[124] Canada's First Written Submission, para. 45.

73. Article 14(d) of the SCM Agreement requires that an investigating authority determine the adequacy of remuneration "in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)." If the benchmark reflects the prevailing market conditions for the good or service in question in the country of provision, no adjustment to the benchmark is necessary. If the benchmark does not reflect the prevailing market conditions for the good or service in the country of provision, then the investigating authority must adjust the benchmark so that it does, or consider the use of an alternative benchmark that better reflects the prevailing market conditions for the good or service in the country of provision. An investigating authority will need to determine whether any adjustments to the benchmark are necessary on a case-by-case basis, taking into account the facts in a given situation.

24. <u>To Canada</u>: The United States, at paragraph 19 of its opening statement (Day 1), asserts, in relevant part, that:

> **Moreover, accepting Canada's position would amount to allowing the government to both provide the subsidy <u>and</u> determine for itself whether it received adequate remuneration. But the Appellate Body rejected this argument when Canada took a similar position in *Canada – Aircraft* with respect to Article 1.1(b). It is not for the provider of the subsidy but rather for the market to determine what the value of the input is. (footnotes omitted)**

Please comment.

<u>Response</u>:

74. This question is addressed to Canada.

25. <u>To the United States</u>: Canada, at paragraph 241 of its opening statement (Day 1), asserts, in relevant part, that:

> **But it would be unrealistic and effectively impossible for the other Canadian parties to quantify every relevant difference. Detailed information on the Nova Scotia market is not readily available to other Canadian provinces or the respondent companies, and is not collected in the ordinary course of business. To the extent that information was available to quantify such differences, that information was presented in expert reports, which were then accorded no weight by Commerce on the basis that they were produced for litigation.**

Please respond to Canada's assertions.

Response:

75. The United States makes two observations in response to Canada's assertions, which are quoted in the question. First, Canada argues against its own position and contradicts its assertions elsewhere that the USDOC should have undertaken further investigative efforts at every turn in this investigation. Evidently, according to Canada, it would have been pointless for the USDOC to do so because the information is "not readily available" and "not collected in the ordinary course of business." It is unclear, then, how the USDOC could have succeeded in obtaining information that does not exist. Canada's statement also illustrates the flaws in Canada's position that the USDOC should have asked just one more question in every instance. Canada cannot point to additional relevant evidence the USDOC would have obtained through further efforts because the additional inquiries Canada urges are theoretical and speculative, and ultimately immaterial to the USDOC's task of making a proper benchmark comparison under Article 14(d) of the SCM Agreement.[125]

76. Second, Canada's assertions are factually incorrect. As the United States has explained, Canada is wrong to assert that reports submitted by Canadian interested parties were accorded "no weight."[126] The USDOC considered all record evidence, including the reports placed on the record by all interested parties, in reaching its determination.[127] However, in weighing the competing evidence before it, the USDOC determined to accord limited weight to reports prepared for the sole purpose of the administrative investigation.[128] The USDOC explained that such reports had the "potential for bias, with data and conclusions that may be tailored to generate a desired result."[129] But the USDOC did not simply ignore the reports.

77. For example, the USDOC evaluated the Asker Study's conclusions, which stemmed from the fact that Nova Scotia has 0.49 kilometers of road per square kilometer of land, while Alberta has only 0.34 kilometers of road per square kilometer. The USDOC noted that "the Asker Study concludes that":

> . . . assuming the same cost for constructing a meter of road, and assuming this road density difference is similar in forest regions,

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[125] *See generally* U.S. First Written Submission, paras. 131-138.

[126] *See, e.g.*, U.S. First Written Submission, paras. 269-273, 277 (addressing Quebec reports); paras. 304-305 (addressing Ontario reports); paras. 388-390 and 425-426, 429, 431-438 (addressing BC reports).

[127] *See, e.g.*, Lumber Final I&D Memo, pp. 37, 53, 59-62, 75-76, 92-94, 98-104, 116-123, 139-149 113 (Exhibit CAN-010).

[128] *See, e.g.*, Lumber Final I&D Memo, pp. 53, 64, 145, 147-48 (Exhibit CAN-010).

[129] Lumber Final I&D Memo, p. 53 (Exhibit CAN-010). *See also ibid.*, pp. 59, 64, 76, 145.

> the road density difference between Nova Scotia and Alberta could result in total construction differences of approximately C$1,[8]00 per square kilometer . . .[130]

78. The USDOC explained, however, that:

> As noted by the petitioner, the Canadian Parties' assumptions are further based on an estimate of average road construction costs offered by "one Nova Scotia logger." As the quote from the Asker Study reveals and as the petitioner highlights, the Canadian Parties' claims concerning the relative differences in tree stand to mill distance and infrastructure development between Nova Scotia and the provinces of Québec, Ontario, and Alberta are based on two assumptions and estimated data from a single logger in Nova Scotia. Thus, we find the conclusions in the Asker Report to be based on speculation and not substantial evidence. Additionally, in contrast to the conclusions of the Asker Study, information from the respondent parties indicates that some mills are located close to their respective standing timber sources, thereby resembling the conditions that Canadian Parties claim exist in Nova Scotia. Thus, to the extent such differences in hauling distance and infrastructure development exist, we find that the Canadian Parties have not adequately substantiated and quantified the extent of the purported differences or that any differences are reflected in Nova Scotia stumpage prices.[131]

79. As the quotation above demonstrates, the USDOC did not ignore or simply dismiss the Asker Study. Rather, the USDOC engaged with the study's assumptions and found the study's conclusions "to be based on speculation and not substantial evidence."[132]

26. <u>To the United States</u>: Canada, at paragraphs 242 and 243 of its opening statement (Day 1), asserts that:

> **The United States now claims that Commerce's duties to diligently investigate and base its determination on positive record evidence do not apply with respect to the interactions between Commerce and Nova Scotia because Nova Scotia was**

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[130] Lumber Final I&D Memo, p. 114 (Exhibit CAN-010) (quoting Asker Report, pp. 52-53 (Exhibit CAN-015)).

[131] Lumber Final I&D Memo, p. 114 (Exhibit CAN-010) (footnotes omitted).

[132] Lumber Final I&D Memo, p. 114 (Exhibit CAN-010).

> **a "non-respondent" in the investigation. This argument is baseless.**
>
> **Nova Scotia was a respondent. Nova Scotia responded to questionnaires, Commerce verified its questionnaire responses, and Nova Scotia submitted case briefs and appeared at Commerce's Government of Nova Scotia's Entry of Appearance accepted by Commerce, which identifies Nova Scotia as a government of a country in which the subject merchandise is produced or manufactured, the same basis on which the Governments of B.C., Alberta, Ontario, Québec, and New Brunswick participated as respondents in this proceeding.**

Please respond to Canada's assertions.

Response:

80. Canada misreads paragraph 136 of the U.S. first written submission, to which Canada cites in paragraph 242 of its opening statement on the first day of the first substantive meeting.[133] When the U.S. first written submission referred to "non-respondents", the United States meant the private individuals from whom Deloitte requested information when it conducted the Nova Scotia Survey. If this was unclear, the United States regrets any confusion.

81. Nova Scotia certainly was a respondent in the USDOC's countervailing duty investigation. The USDOC sought and received a significant amount information from Nova Scotia, as explained in the U.S. response to question 16, above. The United States disagrees with Canada's suggestion that, in addition to soliciting information from the provincial government, the USDOC also should have surveyed private individuals throughout Nova Scotia to "provide Commerce with an understanding of how the Nova Scotia Survey respondents understood the meaning of the 'stumpage transactions' they were asked to report."[134] The USDOC conducted a verification of the survey responses, including verification of the Deloitte auditors who themselves also verified the responses in their own study.[135]

82. As the USDOC explained in the final issues and decision memorandum, "in making their arguments, the Canadian Parties fail to mention that Deloitte conducted on-site verifications to

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[133] *See* Oral Statement of Canada at the First Substantive Meeting of the Panel, Day 1 (February 26, 2019) ("Canada's First Opening Statement (Day 1)"), para. 242, footnote 161.

[134] *See, e.g.,* Canada's First Written Submission, paras. 843-844.

[135] *See* Lumber Final I&D Memo, pp. 116-120 (Exhibit CAN-010) (describing the USDOC's verification of Deloitte auditors and the conduct of the survey).

ensure that the survey respondents submitted accurate information that adhered to the survey instructions."[136] The USDOC described the process in detail as part of the verification report for Nova Scotia:

> Deloitte officials explained that they processed the data as they were returned. Upon receipt of a completed survey, Deloitte scheduled on-site visits to verify random samples of submitted transactions. Through site on-visits, Deloitte reconciled survey data with source documents such as scale slips, payment invoices, signed contracts, accounting ledgers, and inventory management records. Deloitte verified source documents to ensure alignment with values reported in the participant's submission. *See* **NS-VE-6** at 46-47.[137]

83. Canada has failed to demonstrate that the USDOC's efforts in examining and soliciting relevant information were insufficient in light of these facts.

27. At paragraphs 68-69 and 77 of its opening statement (Day 2), Canada indicates that the USDOC "expressly and consistently recognized that it was obliged to consider all of the costs imposed by the provincial governments on Canadian companies", and that the USDOC "abandoned its consistent practice" in the underlying investigation.

i. <u>To Canada</u>: Please indicate whether, and if so why, an investigating authority is obliged to apply the same procedure in subsequent investigations where there are several intervening years.

<u>Response</u>:

84. This question is addressed to Canada.

ii. <u>To the United States</u>: Please indicate whether, and if so why, the USDOC did not apply the same procedure as in earlier investigations.

<u>Response</u>:

85. In each proceeding involving softwood lumber from Canada, the USDOC has determined to make or not to make adjustments, as appropriate, for the selected benchmark in each case.

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[136] Lumber Final I&D Memo, p. 118 (Exhibit CAN-010) (citing Government of Nova Scotia Verification Report, p. 6 (Exhibit CAN-318).

[137] Government of Nova Scotia Verification Report, p. 8 (Exhibit CAN-318) (italics and bold in original).

The USDOC's determination in this investigation is no different, in that the need for adjustments is informed by the nature of the selected benchmark.

86. In the *Lumber IV* countervailing duty investigation and subsequent administrative reviews, the USDOC made certain adjustments requested by interested parties. The rationale for doing so is rooted in the circumstances of those proceedings. First, as discussed in the U.S. response to question 17, in the *Lumber IV* investigation, the USDOC evaluated the adequacy of remuneration paid for stumpage in the Canadian provinces using as a U.S. benchmark. The USDOC stated, in that investigation, that "[m]arket prices within the country necessarily reflect prevailing market conditions in the country of provision" but "[b]ecause we have determined that there is no appropriate Canadian market-based benchmark price available, we turned to the next most commercially reasonable sales, those in the United States," and "adjusted these sales prices for factors to account for comparability, i.e., to account for different prevailing market conditions."[138] The USDOC made certain adjustments because it relied upon an out-of-country benchmark, and thus was required to make adjustments to reflect prevailing market conditions in the country where the subsidies were provided, Canada. That is not the case with the Nova Scotia pure stumpage benchmark at issue in the countervailing duty investigation that is the subject of this dispute.

87. When certain aspects of the *Lumber IV* investigation were re-opened upon remand in the course of litigation, the USDOC continued to make certain adjustments when it relied upon log prices to determine whether provincial stumpage prices were set in accordance with market principles.[139] However, the USDOC did so to get "back to the stump" in order to compare the resulting benchmark with Crown stumpage fees.[140] That is not the case with the Nova Scotia pure stumpage benchmark at issue in the countervailing duty investigation that is the subject of this dispute.

88. The USDOC also made certain adjustments when it relied upon Maritimes (Nova Scotia and New Brunswick) stumpage prices as a benchmark for the provision of stumpage in provinces other than British Columbia in subsequent administrative reviews in *Lumber IV*.[141] However, in

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[138] *Lumber IV Final Determination*, pp. 30 and 39 (Exhibit CAN-087). *See also Lumber IV First Remand*, p. 3 (Exhibit CAN-094) (describing the benchmark used in the original final determination as "U.S. stumpage prices, adjusted to account for prevailing market conditions in Canada").

[139] *Lumber IV First Remand*, p. 11 (Exhibit CAN-094).

[140] *Lumber IV First Remand*, p. 14 (Exhibit CAN-094) ("[W]e begin with species-specific log prices, where available, for each province in Canada. We then derive species-specific market stumpage prices for each province by deducting harvesting costs, including costs that are unique to harvesters of government stumpage, i.e., forest planning, from those species-specific log prices.").

[141] *See Second Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada*, (December 12, 2005), p. 15 (Exhibit CAN-223).

those administrative reviews, the USDOC concluded that the benchmark "reflect[ed] prices at the point of harvest," and thus the USDOC "adjusted the [provincial] unit stumpage prices … such that they were on the same 'level' as the private stumpage prices [the USDOC] obtained from the Maritimes" and used as the benchmark.[142] The USDOC's determination to make adjustments again was premised on the characteristics of the selected benchmark – one that, although from the country of provision for the good of provision, reflected prices at the point of harvest. The USDOC thus made adjustments to ensure that the comparison stumpage price also reflected prices at the point of harvest. That is not the case with the Nova Scotia pure stumpage benchmark at issue in the countervailing duty investigation that is the subject of this dispute. Here, "Deloitte explained that the report surveyed initial studwood and sawmill grade purchases, as brought through the mill gate from the logging site."[143]

89. As explained, in this investigation, the USDOC determined that it did not need to make adjustments for provinces other than British Columbia. This determination followed the same record-based analysis as the prior determinations. Here, the USDOC evaluated the constituent features of the Nova Scotia private stumpage benchmark, concluded it reflected "a 'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees," and compared that benchmark to the company respondents' pure stumpage purchase prices.[144] Canada's general statements about "consistency" fail to take into account the particulars of this investigation and the prior proceedings, and, as demonstrated, lack any foundation.

28. <u>To the United States</u>: At paragraphs 80-81 of its opening statement (Day 2), Canada indicates that the panel in *US – Softwood Lumber IV* found that "in-kind costs" were a component of provincial timber prices. Please indicate whether, and if so on what basis, the USDOC found to the contrary in the underlying investigation.

<u>Response</u>:

90. The United States generally discussed the USDOC's determinations to make or not make adjustments in the U.S. response to question 27. The United States refers the Panel to that response.

91. With respect to adjustments for "in-kind costs" requested by Canadian interested parties, the USDOC explained the basis for its decision not to make any adjustment for "in-kind costs" in the final issues and decision memorandum:

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[142] *Second Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada*, (December 12, 2005), p. 15 (Exhibit CAN-223).

[143] Government of Nova Scotia Verification Report, p. 8 (Exhibit CAN-312 (BCI)).

[144] Lumber Final I&D Memo, p. 118 (Exhibit CAN-010).

We first address the respondents' arguments that the Department did not provide a sufficient, reasoned analysis to justify its decision to depart from the methodology applied in *Lumber IV* regarding cost adjustments. The Canadian Parties propose applying certain adjustments made in calculating the benefit of stumpage for LTAR in *Lumber IV*. However, the record evidence in this investigation stands on its own, and regardless of whether this investigation is conducted on an aggregate basis or company-specific basis, we rely on the record of this investigation to determine whether any adjustments to the stumpage prices respondents paid or to the Nova Scotia benchmark are warranted.

For the purposes of the final determination, when calculating the benefit to respondents from Crown-origin standing timber for LTAR, we compared the stumpage charges invoiced by the Crown at the time of harvest to the Nova Scotia benchmark. Under section 771(5)(E)(iv) of the Act, the Department is required to measure the adequacy of remuneration in relation to the "prevailing market conditions for the good or service being provided." Accordingly, in considering the respondents' arguments for adjustments to their Crown-origin stumpage prices, the Department examined the record with regard to the costs incorporated into the stumpage prices paid by harvesters of standing timber from private landholders in Nova Scotia and the costs respondents incurred to harvest Crown-origin standing timber. As discussed below, we find no evidence that the costs identified by the respondents are incorporated into the prices paid by harvesters of private timber in Nova Scotia, and, thus, we are not making the adjustments as argued by the respondents either to the benchmark or to the respondents' Crown-origin stumpage purchase prices.

* * *

With regard to the respondents' proposal that the Department add certain in-kind costs (e.g., for silviculture, road construction, forest management and planning, etc.) to their Crown-origin stumpage purchase prices, we find that no record evidence supports concluding that in-kind costs associated with harvesting Crown timber are included in the NS Survey private stumpage prices. Thus, to make the comparison between the benchmark and the respondents' purchase price on the same cost basis, we decline to add those in-kind costs to respondents' Crown-origin stumpage

> purchase prices. In particular, with regard to silviculture, record evidence demonstrates that the GNS charges registered buyers a C$3.00/$m^3$ to cover the cost of silviculture, or, in the alternative, registered buyers may elect to perform their own silviculture activities rather than pay the fee. Regardless of how the registered buyer chooses to pay for silviculture, however, the cost is in addition to, and thus separate from, the registered buyer's purchase of stumpage. We find no record evidence to support that silviculture costs are included in the NS Survey stumpage purchase prices. Accordingly, to make the proper comparison between the benchmark and respondents' purchases on the same cost basis, we decline to add silviculture costs to the price of the respondents' purchases of Crown-origin stumpage in the other eastern provinces.[145]

92. As explained above in the U.S. response to question 27, the USDOC evaluated the constituent features of the Nova Scotia private stumpage benchmark, concluded it reflected "a 'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees," and compared that benchmark to the company respondents' pure stumpage purchase prices.[146]

93. Finally, the U.S. first written submission responds to Canada's arguments concerning the findings of the panel in *US – Softwood Lumber IV*, and explains how the situation there is distinguishable factually and legally from the investigation at issue in this dispute. The United States refers the Panel to paragraph 147 of the U.S. first written submission.

29. To Canada: At paragraph 10 of its opening statement (Day 2), the United States indicates that:

> **[T]he USDOC found that these additional expenses were not directly related to stumpage prices, that they were billed as separate items, and that no record evidence indicated that any such additional items were included within the Nova Scotia benchmark prices (despite Canada implying otherwise). (footnote omitted)**

Please comment and point to record evidence in support of your assertions.

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[145] Lumber Final I&D Memo, pp. 136-137 (Exhibit CAN-010) (footnotes omitted; underline added).

[146] Lumber Final I&D Memo, p. 118 (Exhibit CAN-010).

Response:

94. This question is addressed to Canada.

30. To both parties: At paragraph 11 of its opening statement (Day 2), the United States indicates that "[t]he costs that provincial governments do or do not incur when delegating these 'various activities to forestry companies' are not the relevant inquiry under Article 14(d)…"

i. Please indicate how loggers and sawmills would get access to the harvest areas if there were no roads and parties were not made responsible for building roads.

ii. In addition, if the government was or was not responsible for building the roads, how would this affect the *net* stumpage fees it would receive?

Response:

95. The United States is responding to the two subparts of the Panel's question together. The inquiry under Articles 1.1(b) and 14(d) of the SCM Agreement, as indicated by the text of those provisions, is concerned with the benefit conferred upon the recipient in relation to what the recipient would have had to pay to obtain the input under market conditions.[147] Here, the input is a single component – stumpage. Under market conditions, to purchase stumpage, a purchaser would have to pay for stumpage. While the stumpage component is capable of being packaged together with other components, it does not follow that, under prevailing market conditions, to purchase stumpage, a purchaser would have to pay for stumpage plus other components in order to purchase stumpage. The survey responses collected by Deloitte provide evidence of exactly that – prices for the purchase of stumpage – and not prices for the purchase of stumpage plus other components such as forestry activities. The survey provides the only evidence of prevailing market conditions in Canada, given the predominance of the provincial governments elsewhere, and the fact that other provincial governments require (or may require) stumpage purchasers to purchase other components from them as well is not indicative of the prevailing market conditions for the purchase of stumpage in Canada. The record is clear that stumpage

[147] *See US – Carbon Steel (India) (AB)*, paras. 4.246 ("we find it significant that the term 'transportation' is explicitly listed among the 'prevailing market conditions' illustratively identified in the second sentence of Article 14(d) of the SCM Agreement. To us, this confirms that the costs associated with the transportation of the good in question is a factor that must be accounted for" and "the use of *ex works* prices for the purpose of a benefit comparison under Article 14(d) of the SCM Agreement would not capture the full cost to the recipient of receiving the government-provided good in question, and would therefore fail to assess whether the financial contribution at issue makes the recipient better off than it would otherwise have been absent that contribution.").

rights are severable and transferable, notwithstanding that certain provinces may bundle stumpage together with other rights or obligations.

96. There is no support in the underlying record for Canada's argument to include additional charges not included in respondents' reported stumpage prices and not included in Nova Scotia's "'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees."[148] As explained in the U.S. first written submission, the USDOC found that these additional expenses were not directly related to stumpage prices, that they were billed as separate items, and that no record evidence indicated that any such additional items were included within the Nova Scotia benchmark prices (despite Canada implying otherwise).[149] We further refer the Panel to the U.S. responses to questions 18, 27, and 28.

31. <u>To the United States</u>: At paragraph 836 of its first written submission, Canada asserts, in relevant part, that:

[[BCI]] (footnotes omitted; emphasis original)

Please respond to Canada's assertions.

<u>Response</u>:

97. Canada's statement in paragraph 836 of its first written submission consists of **[[BCI]]**.

98. Nova Scotia reported to USDOC that it required private-origin stumpage prices "to set forestry policy, including Crown stumpage rates."[150] This was confirmed by the Statement of Work provided by Deloitte to Nova Scotia, in June 2016 (in advance of USDOC's investigation), which provided that:

[[BCI]][151]

99. The survey period "included transactions taking place between April 1, 2015 through March 31, 2016, which aligned with the fiscal year of the Government of Nova Scotia."[152]

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[148] Lumber Final I&D Memo, p. 138 (Exhibit CAN-010).

[149] *See* Lumber Final I&D Memo, p. 136 (Exhibit CAN-010). *See also* Canada's First Written Submission, paras. 876-878.

[150] Government of Nova Scotia Initial Questionnaire Response Narrative, p. 2 (Exhibit CAN-313).

[151] Government of Nova Scotia First Supplemental Questionnaire Response (April 3, 2017), Exhibit NS-SUPP1 ("Statement of Work provided by Deloitte to Nova Scotia, in June 2016"), p. 8 (Exhibit USA-032 (BCI)).

[152] Government of Nova Scotia First Supplemental Questionnaire Response, p. 8 (Exhibit USA-031 (BCI)).

100. These statements are mirrored in the Deloitte Survey, which begins by repeating that it is the:

> policy of Nova Scotia Department of Natural Resources ("NSDNR") that its Crown land stumpage rates (i.e., the price to be paid for the right to harvest standing trees on Crown lands) be set so that the price of Crown timber reflects the price negotiated between private parties in a competitive marketplace. Accordingly, periodic surveys are conducted of Registered Buyers who routinely purchase stumpage from independent private land owners in order to assess pricing negotiated by private parties in a competitive marketplace. Pursuant to this policy, we undertook a survey of Registered Buyers for the purpose of collecting detailed information pertaining to Registered Buyers' transactions to purchase private stumpage from independent private woodlot owners in the Province of Nova Scotia.[153]

101. During the USDOC's verification of Nova Scotia's questionnaire responses, the provincial government again reiterated to USDOC officials that it periodically commissions surveys for the purpose of setting Crown prices in the province, with prior surveys occurring in 2008, 2009-2010, and 2011-2012.[154] This was consistent with Nova Scotia's statement in its initial questionnaire response that during the period of investigation, Crown prices were set using the 2011-2012 private stumpage survey results indexed to 2015.[155] The USDOC concluded that Nova Scotia had a policy of periodically surveying private stumpage transactions and using those prices to set its Crown stumpage price, and conducted the 2015 Deloitte Survey for the same purpose.[156]

102. Canada does not contend that Nova Scotia does not have a policy of setting Crown stumpage prices to reflect private prices. Canada implies rather that the USDOC should have concluded, in the face of the multiple unambiguous statements detailed above, that the 2015 survey was not conducted pursuant to that policy because the transactions surveyed related to softwood stumpage transactions relevant to pricing sawlogs and studwood. But in contrast to the implications and speculation on which Canada relies, the evidence indicates (and it was reasonable for the USDOC to conclude) that the 2015 Deloitte survey was conducted in Nova Scotia's ordinary course of business for its stated purpose.

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[153] Deloitte Survey Report of 2015 Transactions, p. 1 (Exhibit CAN-312).

[154] Government of Nova Scotia Verification Report, p. 6 (Exhibit CAN-318).

[155] Government of Nova Scotia Initial Questionnaire Response, p. 5 (Exhibit CAN-312).

[156] Lumber Final I&D Memo, p. 118 (Exhibit CAN-010).

32. To the United States: At paragraph 119 of its opening statement (Day 3), Canada asserts that:

[[BCI]]

Please respond to Canada assertions.

Response:

103. Canada's statement at paragraph 119 of its opening statement on the third day of the first substantive meeting introduces new evidence that appears to relate to the time after the Nova Scotia Survey was conducted. The new evidence that Canada seeks to introduce is irrelevant to the USDOC's finding that the survey was "conducted by the GNS in the ordinary course of business."[157] In the preliminary decision memorandum, the USDOC explained that

> We find that the private stumpage prices in the *GNS Private Stumpage Survey Report*, which was conducted by the GNS in the ordinary course of business, and the disaggregated unit prices on which the report was based, contain a sizable number of observations, reflect prices throughout the province, and reflect private stumpage prices for a variety of species and log types. In particular, the *GNS Private Stumpage Survey Report* includes the prices paid for private-origin saw logs as well as studwood/ lathwood logs in the SPF category, which, as described below, is the primary and most commercially significant species reported in the SPF groupings for New Brunswick, Québec, Ontario, and Alberta. Therefore, we preliminarily determine that the *GNS Private Stumpage Survey Report* constitutes a reliable data source that is sufficiently representative of the private stumpage market in Nova Scotia to serve as a tier-one benchmark.[158]

104. Whether the Nova Scotia stumpage survey was **[[BCI]]** is immaterial to the USDOC's conclusions, which rested on the fact that the survey was commissioned for the purpose of setting Crown stumpage prices.[159]

105. The fact that Canada has based its argument on **[[BCI]]** highlights the absurdity of Canada's tactic. This information was not, and could not have been, considered by the USDOC. Likewise, this is information that the interested parties participating in the investigation have not

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[157] Lumber Preliminary Decision Memorandum, p. 44 (Exhibit CAN-008).

[158] Lumber Preliminary Decision Memorandum, p. 44 (Exhibit CAN-008).

[159] *See* Lumber Final I&D Memo, p. 118 (Exhibit CAN-010).

considered. The investigative process depends on the opportunity for parties on both sides to provide information and argument concerning evidence put before the investigating authority. The information that Canada now seeks to introduce avoids that scrutiny, and thus tells only the story Canada wants it to tell. This development has no bearing on the Panel's review of the USDOC's determination.

33. To the United States: At paragraph 121 of its opening statement (Day 3), Canada asserts that:

> **Commerce never saw underlying documentation for any of the surveyed transactions except for thirteen transactions examined at verification, accounting for [[BCI]] of the transactions. Even within this small sample size, Commerce itself specifically identified five transactions reflecting errors in data collection or processing. A close inspection of the examined transactions actually reveals that a [[BCI]] of the thirteen transactions exhibited cause for concern. (footnotes omitted)**

Canada makes additional assertions regarding the reliability of the Nova Scotia study in paragraphs 122-125. Please respond to Canada's assertions.

Response:

106. The discussion in paragraphs 121-125 of Canada's opening statement on the third day of the first substantive meeting mischaracterizes the findings of the USDOC, as is evident upon review of the USDOC's preliminary decision memorandum, the verification report for Nova Scotia, and the final issues and decision memorandum.

107. In the preliminary decision memorandum, the USDOC analyzed the Deloitte survey and observed that it provided robust data for benchmark purposes:[160]

> In preparing the *GNS Private Stumpage Survey*, Deloitte collected detailed information pertaining to purchases by Registered Buyers (*e.g.*, forestry companies, businesses and individuals, who own or operate facilities that process primary forest products, or import/ export primary forest products from Nova Scotia) of private stumpage from independent private woodlot owners in Nova Scotia during the period April 1, 2015, through March 31, 2016.

[160] Available benchmark data in most cases is much more limited.

> With respect to the data collection and validation, the *GNS Private Stumpage Survey* states:
>
> > After testing, validating, and formatting the raw survey data, the final sample volume reported by Deloitte was 407,773 m^3 of softwood sawable stumpage purchased across all three regions of the Province.
> >
> > This volume of stumpage was purchased through over 5,544 individual transactions during the specified time period. Expressed on a volume basis, NSDNR calculates that the survey covered more than 36 percent of the total volume of private stumpage transactions in Nova Scotia for softwood sawable products.[161]

108. With respect the subsequent verification of Nova Scotia and Deloitte, the USDOC explained that Deloitte had already conducted its own on-site verifications to ensure that the survey respondents submitted accurate information that adhered to the survey instructions.[162] The USDOC described that process in detail:

> > Deloitte officials explained that they processed the data as they were returned. Upon receipt of a completed survey, Deloitte scheduled on-site visits to verify random samples of submitted transactions. Through site on-visits, Deloitte reconciled survey data with source documents such as scale slips, payment invoices, signed contracts, accounting ledgers, and inventory management records. Deloitte verified source documents to ensure alignment with values reported in the participant's submission. *See* **NS-VE-6** at 46-47.[163]

109. The USDOC further verified the information submitted by Nova Scotia following an approach that was consistent with its standard verification procedures. The USDOC's standard verification procedures function to spot-check the information submitted in an investigation and allow for testing at random the underlying documentation that supports a given response.

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[161] Lumber Preliminary Decision Memorandum, p. 43 (Exhibit CAN-008) (citations omitted).

[162] Lumber Final I&D Memo, p. 118 (Exhibit CAN-010) (citing Government of Nova Scotia Verification Report, p. 6 (Exhibit CAN-318).

[163] Government of Nova Scotia Verification Report, p. 8 (Exhibit CAN-318) (italics and bold in original).

110. In conducting the verification for Nova Scotia, the USDOC selected a number of reported transactions for which it would examine underlying documentation at verification with Nova Scotia. The USDOC identified seven transactions in advance of verification for which it intended to examine source documentation ("the pre-selected transactions").[164] The USDOC identified an additional six transactions for examination during the verification ("the surprise transactions") for a total of thirteen transactions.[165] This total number of stumpage transactions examined in the Deloitte Survey was consistent with (or greater than) the number of transactions per province verified with each of the company respondents.[166]

111. Canada asserts that **[[BCI]]** of the thirteen transactions that the USDOC examined at verification "exhibited cause for concern," but Canada's citation for this allegation refers only to its own case brief arguing this point to the USDOC in the course of the underlying investigation.[167] Further, the argument to which Canada cites does not relate to whether **[[BCI]]** of the specific transactions the USDOC examined at verification "exhibited cause for concern," but rather repeats a general unsupported argument that because certain stumpage transactions reported in the survey involve **[[BCI]]**, and "[p]ayments made to a **[[BCI]]** are likely to include costs beyond those paid to the owner of the land for the right to harvest standing timber (i.e., stumpage)," there that there "is reason to believe" that the stumpage transactions reported to Deloitte **[[BCI]]** the stumpage price.[168]

112. These concerns, too, are unsubstantiated. As part of the verification, the USDOC actually verified that Deloitte stripped out any and all such additional costs. The Deloitte survey explicitly states that it sought to confirm "that the reported transactions were limited to purchases of stumpage by Registered Buyers from unaffiliated private landowners," and "the reported value included only the transaction price for the private stumpage, excluding the payment of

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[164] *See* Government of Nova Scotia Verification Report, p. 8 (Exhibit CAN-511 (BCI)).

[165] *See* Government of Nova Scotia Verification Report, p. 9 (Exhibit CAN-511 (BCI)).

[166] *See* Canfor Verification Report, pp. 8-9, 20 (examining 14 pre-selected stumpage transactions from Alberta, 14 preselected stumpage transactions from British Columbia, and no surprise transactions) (Exhibit CAN-357 (BCI)); JDIL Verification Report, p. 6 (examining six pre-selected stumpage transactions in New Brunswick and no surprise transactions) (Exhibit CAN-241); Resolute Verification Report, p. 11 (examining four pre-selected stumpage transactions in Ontario, four pre-selected stumpage transactions in Quebec, and no surprise transactions) (Exhibit CAN-174); Tolko Verification Report, pp. 11, 18 (examining six pre-selected stumpage transactions in Alberta, 14 pre-selected stumpage transactions in British Columbia, and no surprise transactions) (Exhibit CAN-316 (BCI)); West Fraser Verification Report, pp. 10, 12 (examining 10 pre-selected stumpage transactions in British Columbia, nine pre-selected stumpage transactions in Alberta, and no surprise transactions) (Exhibit CAN-362 (BCI)).

[167] *See* Oral Statement of Canada at the First Substantive Meeting of the Panel, Day 3 (February 28, 2019) (Confidential Version) ("Canada's First Opening Statement (Day 3)"), para. 122 and footnote 79 (citing GOC Joint Case Brief, p. 62 and footnote 146 (Exhibit CAN-513)).

[168] GOC Joint Case Brief, p. 62 and footnote 146 (Exhibit CAN-513)).

private silviculture fees, and excluding any non-stumpage charges that may have been 'bundled' in the Registered Buyer's records."[169] This was consistent with Deloitte's requests for information from Registered Buyers, which "clearly instructed survey respondents to report the 'stumpage rates' they paid for 'softwood sawlogs."[170] As explained, the transactions covered by the Deloitte survey were subject to extensive verification, which included on-site verifications conducted by Deloitte, to ensure that the survey respondents submitted accurate information that adhered to the survey instructions.[171] Thus, although certain transactions may have initially included additional costs, Deloitte specifically sought to ensure that the price reported to Deloitte omitted those other costs. Canada cannot demonstrate, outside of the transactions discussed further below, that Deloitte was unsuccessful in omitting those other costs.

113. With respect to paragraph 123 of Canada's opening statement on the third day of the first substantive meeting, Canada makes reference to certain transactions – that **[[BCI]]** – as cause for concern.[172] However, because **[[BCI]]**, and the vendor statement payment details indicated that the transaction prices were for **[[BCI]]**, Deloitte officials determined that it was inappropriate to **[[BCI]]**.[173] The USDOC examined source documents relating to these transactions, and, like Deloitte, found **[[BCI]]**, or indicating that **[[BCI]]** costs were **[[BCI]]** the reported transaction price.[174] Thus, the alleged cause for concern is merely Canada faulting Deloitte for failing to account for **[[BCI]]**.

114. With respect to paragraph 124 of its opening statement on the third day of the first substantive meeting, Canada faults the USDOC for not **[[BCI]]**. This is incorrect. As discussed at the outset of this response, the USDOC examined source documents for "the pre-selected six transactions," **[[BCI]]** of which involved an alleged **[[BCI]]**, but also "selected [an] additional six transactions … during the verification" for examination.[175] Of those additionally-selected six transactions, **[[BCI]]** involved the alleged **[[BCI]]**.[176] Yet the

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[169] Deloitte Survey, p. 4 (Exhibit CAN-312).

[170] Lumber Final I&D Memo, p. 118 (Exhibit CAN-010) (citing Government of Nova Scotia Verification Report, p. 6 (Exhibit CAN-318); *see also* Government of Nova Scotia Verification Exhibit NS-VE-6, p. 27 (Exhibit CAN-512 (BCI)).

[171] Lumber Final I&D Memo, p. 118 (Exhibit CAN-010) (citing Government of Nova Scotia Verification Report, p. 6 (Exhibit CAN-318). *See also* Government of Nova Scotia Verification Exhibit NS-VE-6, pp. 45-47 (Exhibit CAN-512 (BCI)); *see also* Deloitte Survey, pp. 3-4 (Exhibit CAN-312).

[172] Government of Nova Scotia Verification Exhibit NS-VE-6, pp. 45-47 (Exhibit CAN-512 (BCI)).

[173] Government of Nova Scotia Verification Exhibit NS-VE-6, pp. 45-47 (Exhibit CAN-512 (BCI)).

[174] Government of Nova Scotia Verification Exhibit NS-VE-6, pp. 45-47 (Exhibit CAN-512 (BCI)).

[175] Government of Nova Scotia Verification Report, pp. 8-9 (Exhibit CAN-511 (BCI)).

[176] Government of Nova Scotia Verification Report, p. 9 (Exhibit CAN-511 (BCI)).

USDOC continued to find "no discrepancies," despite its further examination of the potential issue.[177]

115. Canada also faults the USDOC, in paragraph 124 of its opening statement on the third day of the first substantive meeting, for **[[BCI]]**. However, minor corrections to information initially reported to the USDOC are common (if not expected) and are evident across the other verifications in this investigation as well. The USDOC's verification of every provincial government and every company respondent in this investigation involved corrections to, and uncovered issues with, those governments' and company respondents' responses to USDOC.[178] Following Canada's argument, if the USDOC were to assume that minor corrections and uncovered issues in Nova Scotia's questionnaire responses were indicative of broader issues in its questionnaire response, then the USDOC would have had no reason to accept any participating provincial government's or company respondent's questionnaire responses, due to the minor corrections presented and issues uncovered in each of those responses at verification. Moreover, unlike in the verification of Nova Scotia, the USDOC did not select additional "surprise" transactions for verification to demonstrate that the errors in the provincial and company respondents' questionnaire responses were not pervasive. Accordingly, by Canada's standard, USDOC did more to verify the risk of errors in the Deloitte Survey during the verification of Nova Scotia than it did to verify the risk of errors in every other questionnaire respondent's answers.

116. Finally, in paragraph 125 of its opening statement on the third day of the first substantive meeting, Canada argues that "transaction" was ill-defined by Deloitte, encouraging variations in interpretations by survey participants and ambiguity by the USDOC's verification. Canada's assertions have no basis in fact. The USDOC specifically examined the definition of "transaction" used by Deloitte officials in the survey: "**[[BCI]]**."[179] Although this was **[[BCI]]**, Canada again omits that the source documents, including **[[BCI]]**, were subject to verification initially by Deloitte and, later, by the USDOC.[180] Accordingly, the USDOC found

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[177] Government of Nova Scotia Verification Report, p. 9 (Exhibit CAN-511 (BCI)).

[178] *See* GOA Verification Report, pp. 2-3 (five corrections) (Exhibit CAN-110); GBC Verification Report, pp. 2-3 (seven corrections) (Exhibit CAN-088); GNB Verification Report, p. 2 (five corrections) (Exhibit CAN-268); GOO Verification Report, pp. 2-3 (six corrections) (Exhibit CAN-160); GOQ Verification Report, pp. 2-3 (17 corrections) (Exhibit CAN-184); Canfor Verification Report, pp. 2-3 (12 corrections) (Exhibit CAN-357); JDIL Verification Report, p. 2 (10 corrections) (Exhibit CAN-241); Resolute Verification Report, pp. 2-3 (10 corrections) (Exhibit CAN-174); Tolko Verification Report, pp. 2-3 (eight corrections) (Exhibit CAN-316); West Fraser Verification Report, pp. 2-4 (six corrections) (Exhibit CAN-362).

[179] Government of Nova Scotia Verification Report, p. 7 (Exhibit CAN-511 (BCI)).

[180] Lumber Final I&D Memo, p. 118 (Exhibit CAN-010) (citing Government of Nova Scotia Verification Report, p. 6 (Exhibit CAN-318); *see also* Government of Nova Scotia Verification Exhibit NS-VE-6, pp. 45-47 (Exhibit CAN-512 (BCI)); *see also* Deloitte Survey, pp. 3-4 (Exhibit CAN-312).

that the reported transaction price reflected "the negotiated, contracted price between the buyer and seller."[181]

2 THE USDOC'S REJECTION OF LOG PRICES IN ALBERTA AS A STUMPAGE BENCHMARK

34. To Canada: At paragraph 340 of its first written submission, the United States asserts, in relevant part, that:

> **The USDOC also found that the salvage log transactions from the TDA data "were not offered for sale on the open market," given that "the tenure holder is required to take part in salvage transactions at the direction of the non-timber concession holder." Canada argues that the salvage log transactions do not involve "required" purchases or sales. However, the USDOC observed that "[t]he Timber Management Regulations require FMA holders and Timber Quota holders to salvage timber under threat of having the volume charged against its [annual allowable cut] for refusal to do so." The result is that tenure holders are pressured to purchase salvage timber to mitigate losses. (footnotes omitted)**

Please respond to the United States' assertions.

Response:

117. This question is addressed to Canada.

35. To the United States: At paragraph 98 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **At no point in the investigation did Commerce ask any questions about section 153 or how it operates. Had Commerce done so, Alberta would have confirmed that no demands to salvage had been made, much less refused, during the period of investigation, and that no unsalvaged volume was charged against Annual Allowable Cuts. This is because salvage wood is valuable, and companies do not need to be forced to bring it to market. Section 153 has no relation**

[181] Lumber Final I&D Memo, p. 119 (Exhibit CAN-010).

whatsoever to arm's-length benchmark log prices provided to Commerce. (footnotes omitted)

Please respond to Canada's arguments.

Response:

118. Canada's assertion is flawed in several ways. First, Canada's focus on logs instead of stumpage is misplaced because the USDOC's analysis was concerned primarily with stumpage. The USDOC explained that, with respect to stumpage in Alberta, more than 98 percent of the harvest volume was Crown-origin timber provided by the government to lumber producers.[182] The USDOC determined that this evidence reflected "near complete Crown dominance of the market for standing timber in Alberta,"[183] and that under these circumstances, "the market . . . is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price."[184]

119. In addition, the record contained only a minimal number of private stumpage transactions in Alberta that the USDOC could even consider for use as a stumpage benchmark. Alberta provided a survey of private prices for Alberta logs (the TDA survey), but this survey contained only a very small volume of private stumpage transactions (representing less than one-third of one percent of the total volume).[185] The USDOC determined that these stumpage prices were "relatively inconsequential as compared to the total volume of sales"[186] and, upon further examination, found these transactions not to be reflective of freely determined prices between buyers and sellers, for a host of reasons.[187]

120. The USDOC's determination could have stopped with the analysis of stumpage prices, but the Canadian parties requested that the USDOC further consider the possibility of using log

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[182] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing GOA – SQA Stumpage) (Exhibit CAN-008).

[183] Lumber Final I&D Memo, p. 51 (Exhibit CAN-010).

[184] Lumber Final I&D Memo, p. 51 (Exhibit CAN-010). The USDOC likewise noted in its preliminary determination that "where the market for a particular good or service is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price. In this sense, the analysis would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect." Lumber Preliminary Decision Memorandum, p. 28 (Exhibit CAN-008).

[185] Lumber Preliminary Decision Memorandum, p. 29 (citing GQRGOA, pp. ABIV-50, ABIV-117 to ABIV-132 and Exhibits AB-S-41, AB-S-42, and AB-S-89 to AB-S-100) (Exhibit CAN-008).

[186] Lumber Final I&D Memo, pp. 49-50 (Exhibit CAN-010).

[187] *See* U.S. First Written Submission, paras. 324-31; Lumber Final I&D Memo, pp. 51-52 (Exhibit CAN-010); Lumber Preliminary Decision Memorandum, pp. 28-29 (Exhibit CAN-008).

prices. As a general matter, the USDOC explained that it preferred to rely on the primary benchmark (stumpage) rather than constructing a benchmark (derived from log prices).[188] The USDOC's determination could have stopped here, too, with this explanation of the USDOC's rationale. However, the USDOC further addressed certain questions relating to log prices in order to fully consider the arguments and comments of the interested parties.[189] The USDOC explained:

> In the *Preliminary Determination*, we determined that available prices stemming from purchases of private stumpage in Nova Scotia, *i.e.*, the NS Survey prices, satisfied the regulatory requirements for a tier-one benchmark to measure the adequacy of remuneration for Crown stumpage in Alberta. As discussed in Comments 39-43, we continue to find that NS Survey prices are the appropriate tier-one benchmark for Crown stumpage in the province. Consequently, given the hierarchical approach for benchmark selection under 19 CFR 351.511(a)(2), it is not necessary for the Department to examine the suitability of or rely upon non-tier-one benchmark data, such as the TDA survey prices in Alberta, which would fall under the third tier of the LTAR benchmark hierarchy set forth in 19 CFR 351.511(a)(2).
>
> Nonetheless, as set forth below, we disagree with the parties' contentions that the TDA log prices reflect market prices that are consistent with market principles pursuant to 19 CFR 351.511(a)(2)(iii) that would be useable as a tier-three benchmark.[190]
>
> * * *
>
> If we were evaluating TDA survey data under tier three of our benchmark hierarchy, we would examine whether these data represent prices that are consistent with market principles. Our consideration of the appropriateness of TDA survey data as a tier-three benchmark indicates the following: first, the salvage timber is cut without regard to the tenure holder's approved cutting plan, and therefore the prices are not a fair representation of the price of mature standing timber; second, TDA transaction data contain "salvage" transactions of logs that were not offered for sale on the

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[188] *See* Lumber Final I&D Memo, pp. 49-50 (Exhibit CAN-010).

[189] *See* Lumber Final I&D Memo, pp. 49-50 (Exhibit CAN-010).

[190] Lumber Final I&D Memo, p. 49 (Exhibit CAN-010) (footnotes omitted).

> open market – the tenure holder is required to take part in salvage transactions at the direction of the non-timber concession holder; third, 60 percent of the transactions by volume are sales of Crown-origin logs, for which Crown stumpage was paid – and thus these transactions are unreliable insofar as they would yield a circular comparison of Crown stumpage prices with a benchmark that also included Crown stumpage; and fourth, timber in Alberta is subject to an export prohibition under Section 31 of the *Alberta Forests Act*, which prevents log sellers from seeking the highest prices in all markets and, thus, artificially creates downward pressure on log prices throughout the province.
>
> For the foregoing reasons, in this final determination, we find that the TDA transaction prices are not useable as either a tier-one or a tier-three benchmark to measure the benefit conferred by the GOA's provision of stumpage for LTAR.[191]

121. A second flaw in Canada's assertion is the implication that Canadian interested parties did not have the opportunity to comment on the operation of section 153. The Government of Alberta submitted the exhibit containing section 153 among its very first submissions at the beginning of the investigation.[192] The relevant provision under the Timber Management Regulation reads as follows:

> Where the holder of a forest management agreement or a timber quota neglects or refuses a request from the director to salvage timber in a management unit in which he has a forest management agreement or timber quota, the volume of unsalvaged timber may be charged as production against the timber quota or forest management agreement.[193]

122. Based on this provision of Alberta law, the USDOC drew the logical conclusion that "[t]he Timber Management Regulations require FMA holders and Timber Quota holders to salvage timber under threat of having the volume charged against its [annual allowable cut] for refusal to do so."[194] The result is that tenure holders are pressured to purchase salvage timber to mitigate losses. The Government of Alberta, or the Government of Canada, or any other

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[191] Lumber Final I&D Memo, p. 50 (Exhibit CAN-010) (footnotes omitted).

[192] *See* Government of Alberta Initial Questionnaire Response (March 13, 2017), Exhibit AB-S-15 (Timber Management Regulation, section 153(1)) (Exhibit CAN-115).

[193] *See* Government of Alberta Initial Questionnaire Response (March 13, 2017), Exhibit AB-S-15 (Timber Management Regulation, section 153(1)) (Exhibit CAN-115).

[194] Lumber Final I&D Memo, p. 49 (Exhibit CAN-010).

Canadian interested party had the opportunity to address this exhibit, which the Government of Alberta itself submitted, at any time starting from the beginning of the proceeding.

123. A third flaw in Canada's assertion is the implication that the Government of Alberta could simply disavow its own law and therefore exclude it from consideration. The Government of Alberta submitted the exhibit containing section 153, presumably because the Government of Alberta considered it to be responsive to the stumpage questionnaire. Canada's assertion that the law "has no relation whatsoever to arm's-length benchmark log prices provided to Commerce"[195] simply is not credible.

36. <u>To Canada</u>: At paragraph 341 of its first written submission, the United States asserts, in relevant part, that:

> **The USDOC, however, disagreed that the origin of the logs is irrelevant. According to the record, the transactions of Crown-origin logs "are encumbered by a Crown lien which has priority over all other encumbrances, until Crown stumpage is paid; thus, title to harvested logs does not pass to the buyer until Alberta Timber Dues are paid in full." The USDOC explained that "[t]his encumbrance creates risks for both the tenure holder and the buyer which would not exist in an open market situation." Further, Alberta may not be the seller of these Crown-origin logs, but the Crown stumpage fees linked to Crown-origin stumpage is a cost that factors into the pricing of Crown-origin logs. Thus, the origin of the logs is not "irrelevant." (footnotes omitted)**

Please respond to the United States' assertions above.

<u>Response</u>:

124. This question is addressed to Canada.

37. <u>To the United States</u>: At paragraph 279 of its first written submission, Canada states that:

> **The Brattle Report's conclusions with respect to the Alberta log market and prices were reinforced by the general conclusions regarding log prices and government distortion set out in Dr. Kalt's report. The evidence of more than one expert therefore confirmed that the proposed benchmark was derived**

[195] Canada's First Opening Statement (Day 1), para. 98.

> **from market-determined log prices. However, Commerce completely ignored the evidence in the Brattle and Kalt Reports when rejecting the proposed benchmark derived from TDA Survey log prices. Consequently, Commerce failed to take into account all of the relevant evidence when rejecting the proposed in-market benchmark. (footnotes omitted)**

Please respond to Canada's assertions.

Response:

125. Canada's statement at paragraph 279 of its first written submission regarding these reports is misleading, and the assertion that "Commerce completely ignored" these reports is demonstrably false. The USDOC addressed the Brattle Report directly in the final determination at pages 53-54:

> Finally, the GOA also relies on the Brattle Report to argue that the existence of supply overhang is consistent with Crown stumpage rates being too high, rather than too low.[FN324] In particular, citing the Brattle Report, the GOA asserts that stumpage fees act like a tax, which reduces output by reducing the number of trees that are economical to harvest, and creates a larger overhang than would otherwise exist.[FN325] As an initial matter, this report was commissioned by the GOA for the purposes of this investigation[FN326] and as such, carries only limited weight given its potential for bias, with data and conclusions that may be tailored to generate a desired result. Further, whether Crown stumpage prices are too "high" or "low" is not what the Department is attempting to measure in its distortion analysis. Rather, our concern, reflected above, is that private prices are "effectively determined" by Crown stumpage prices, which renders any price comparison circular. Thus, the Brattle Report's conclusions do not inform the Department's analysis of this question.
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> [FN324:] *See* GOA Case Brief at 19, citing Brattle Report at 30-32.
>
> [FN325:] *Id.*
>
> [FN326:] *See* Brattle Report at 3-6. ("We have been asked by the Government of Alberta (or 'the Province') to conduct an economic analysis regarding certain aspects of the allegations that it provides the right to harvest provincially-owned standing softwood timber

> to lumber producers in Alberta at prices below what would be charged by private owners of timberlands and that these timber sales at allegedly 'less than adequate remuneration' constitute a countervailable subsidy.")[196]

126. The USDOC also addressed the Kalt Report and the Wilkinson Affidavit in the final determination at page 53:

> With respect to this third finding [that prices for standing timber from non-Crown sources would mirror the administratively-set prices charged by the GOA on Crown lands], the GOA and West Fraser challenge whether the existence of "overhang" in Alberta actually supports the Department's distortion analysis. In particular, the GOA cites to an affidavit from Dan Wilkinson, Director of Markets for the Alberta Forest Products Association, to argue that the supply overhang results from a variety of causes, such as the level of harvesting and transportation costs relative to the downstream price for lumber; decisions of mixed-wood lot holders, who run pulp and oriented strand board mills, to not harvest because it is impractical or uneconomic; First Nations and wildlife habitat considerations; and a fall in demand for oriented strand board and dimensional lumber in the market since the 2007 recession.[FN320] However, Mr. Wilkinson's statements were generated specifically for purposes of this investigation and are not supported by any evidence or empirical data on the record of this investigation.[FN321] Furthermore, Mr. Wilkinson does not quantify the extent to which the unused AAC is a result of these factors, and instead only uses general terms such as "mostly" and "partly."[FN322] Lastly, this affidavit does not account for the fact that on the margin, the tenure holder has access to additional supply from Crown lands that it can harvest rather than going to the private market, not only because there is unused volume allocation during the POI, but also because mills are awarded periodic allotments that span five years. Therefore, the available supply to a particular tenure holder may be even greater in a given year because, in any year of the five-year cut control period, the tenure holder can harvest beyond one-fifth of its five-year allocation, as long as they do not exceed the allocation for the five-year period.

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[196] Lumber Final I&D Memo, pp. 53-54 (Exhibit CAN-010).

> [FN320:] *See* GOA Case Brief at 18 (citing Kalt Report – In-Jurisdiction Benchmarks at 5-9, and Attachment 2.)
>
> [FN321:] *See* Kalt Report – In-Jurisdiction Benchmarks at Attachment 2.
>
> [FN322:] *Id.*[197]

Footnotes 320, 321, and 322 of the final issues and decision memorandum reflect that the USDOC did take into account the Kalt Report, to which the Government of Alberta referred.

127. Elsewhere in the final issues and decision memorandum, the USDOC also directly addressed the Kalt Report, and other reports submitted by Canadian interested parties, numerous times. While those instances are not directly related to the USDOC's determination not to use the proposed benchmark derived from TDA Survey log prices, which is the subject of this question, they are indicative of the USDOC's engagement with the reports submitted by Canadian interested parties. So, the United States is taking this opportunity to highlight for the Panel other examples of the USDOC's discussion of the reports. As the passages quoted below demonstrate, the USDOC explained its concerns about the reports and pointed to other evidence on the record that the USDOC found outweighed the conclusions reached in the reports:

> Neither the Kalt Report nor the Stoner & Mercurio Report provide any analysis of actual prices within the Québec stumpage market, nor do these reports provide any analysis of the actual government presence and involvement within the Québec market as required as part of any distortion analysis under 19 CFR 351.511(a)(2)(i).[198]
>
> * * *
>
> [T]he GOC/GBC argue that export premia are a normal feature of log markets and that such price difference does not reveal anything about the impact of the log export process. To support this assertion, the GOC/GBC cite to the Kalt Report. As an initial matter, this report was commissioned by the GOC/GBC for the purposes of this investigation, and as such, there is a concern that the data and conclusions were tailored to generate a desired result. This concern is particularly relevant for this issue. In order to demonstrate that an export premia exist in log markets in general, the report notes differences in domestic and export log prices in

[197] Lumber Final I&D Memo, p. 53 (Exhibit CAN-010).

[198] Lumber Final I&D Memo, p. 103 (Exhibit CAN-010).

only three self-selected markets (New Zealand, Chile, and the US PNW). Further, in its case brief, the GOC/GBC note these prices demonstrate a "consistent existence of an export premium." The Department finds that the absence of any evidence regarding how this sample was selected, and its focus on only three self-selected markets, prevents us from evaluating the validity of the Kalt Report's conclusions. Additionally, a review of the underlying data presented in the Kalt Report contradicts the GOC/GBC's assertion of a consistent export premium. Specifically, each market includes instances where the domestic price is higher than the export price. Given that these self-selected markets show instances where the domestic price is higher than the export price, the Department finds that the record does not support the assertion that export premia are a normal feature of log markets.

Moreover, assuming *arguendo*, that export premia exist in log markets, this does not overcome the record evidence that indicates that the export process suppresses prices throughout British Columbia. Further, the existence of an export premia does not explain why domestic prices in British Columbia are consistently lower than the same type of log in the United States.[199]

* * *

[T]he GOC/GBC cite the Kalt Report and Leamer Report as for the proposition that log markets are inherently localized such that log prices would not equalize across different markets. Therefore, the GOC/GBC contend that the Department's "ripple effect" theory is unsubstantiated. We disagree. As an initial matter, the Kalt and Leamer Reports were commissioned by the GBC for the purposes of this investigation and as such, carry only limited weight given their potential for bias and data and conclusions that were tailored to generate a desired result. Further, the record of this investigation includes numerous other independent reports, not commissioned for the purposes of this investigation, that indicate that log markets covering large areas (intersected by international borders) can be integrated. In other words, these independent reports directly contradict the conclusion drawn by the GOC/GBC's experts in self-commissioned studies regarding the extent to which log markets are localized. Specifically, the results

[199] Lumber Final I&D Memo, p. 143-144 (Exhibit CAN-010) (footnotes omitted).

> of these reports identify areas where there is significant integration in a timber market over large areas covering multiple jurisdictions and instances where logs are following the "law of one price." As additional support for the proposition that log markets are not inherently local, we note that data submitted by the GOQ and GNB indicate that logs harvested in Québec and New Brunswick are traded between other provinces and even with the United States. The GNB itself has made statements that indicate that the log market in New Brunswick is integrated with the surrounding region. As such, we find that there is conflicting evidence about the nature of log markets. In weighing this conflicting evidence, we find that it is reasonable to accord greater weight to the numerous, independent reports and other information on the record of this investigation that contradict the findings of the Kalt and Leamer Reports that were commissioned specifically for purposes of this investigation.[200]
>
> * * *
>
> [W]e disagree with the GOC/GBC that the record establishes that it is not economically feasible to export logs from much of the interior. First, for this argument, the GOC/GBC rely upon the Kalt Report and Bustard Report, which were commissioned specifically for purposes of this investigation. As such, these reports carry limited weight given their potential for bias and conclusions that were tailored to generate a desired result. Furthermore, this finding is contradicted by other record evidence that logs from different parts of the interior are exported. These exports account for a significant amount of the total exports from the entire province. As such given that there are substantial exports from various sections of the interior, it is feasible to export logs from the interior. While these exports may predominantly originate from a different area of the interior, record evidence reflects that the vast majority of mills in the interior overlap with one another and with potential export markets, and the impact on the border regions of the interior would have a similar "ripple effect" on the BC interior.[201]

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[200] Lumber Final I&D Memo, p. 145-146 (Exhibit CAN-010) (footnotes omitted).

[201] Lumber Final I&D Memo, p. 147-148 (Exhibit CAN-010) (footnotes omitted).

128. Canada's assertion that the USDOC completely ignored the reports placed on the record by Canadian interested parties is contradicted by a plain reading of the USDOC's final issues and decision memorandum.

38. To Canada: At paragraph 342 of its first written submission, the United States asserts, in relevant part, that:

> **[C]anada acknowledges that Alberta timber is subject to an export prohibition, but argues that Alberta did not invoke this prohibition during the period of investigation and granted all twelve export authorization applications received in 2015. This argument is without merit and does not demonstrate that the export prohibition did not impact the TDA log prices. The *Alberta Forests Act* contains two limited exceptions to the export prohibition: one exception is for logs that are used for research or experimental purposes, and the other is an exemption for a period not to exceed a year. Presumably, the twelve export authorization applications received by Alberta met the requirements of one of these limited exceptions. The fact that Alberta had no need to enforce the prohibition during the period of investigation suggests that the log sellers are aware that they are not authorized to sell logs in the export market, absent the exceptional circumstances described above. (footnotes omitted; emphasis original)**

Please respond to the United States' assertions.

Response:

129. This question is addressed to Canada.

39. To the United States: At paragraph 93 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **The United States also suggests that Commerce made a finding with respect to "log distortion" in Alberta. This is incorrect. Commerce's only finding of distortion pertained to prices in Alberta's private-stumpage market. We can also see here from its Final Determination that Commerce was aware that Alberta's proposed benchmark was derived from log prices. However, Commerce expressly made *no* market distortion finding and did *not* evaluate whether arm's-length log prices were distorted by "the dominance of the government in the market for stumpage". (footnotes omitted)**

Please respond to Canada's assertions.

Response:

130. Canada's assertions are unclear. The USDOC did not evaluate whether log prices were distorted by the dominance of the government in the market for stumpage.[202] Nor did the U.S. first written submission suggest that the USDOC conducted such an analysis.[203] As explained in the U.S. first written submission, the USDOC concluded that "the private stumpage prices in Alberta are distorted and cannot be used as an appropriate benchmark."[204] The U.S. first written submission explained that "with respect to log distortion (and in addition to its analysis of Alberta's stumpage distortion), even if no in-country stumpage prices were on the record, the log prices from the TDA data could not be used as a benchmark because the observed prices are not consistent with market principles."[205]

131. This mirrors the USDOC's analysis of whether the TDA data "represent prices that are consistent with market principles," and its subsequent conclusion that they did not.[206] The U.S. first written submission stated correctly that in evaluating the log prices from the TDA data, the USDOC concluded that those prices were not consistent with market principles (i.e., were distorted).

40. To Canada: At paragraph 97 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **In particular, salvaged logs are not damaged nor necessarily prematurely cut.**

Please elaborate on the above assertion, and point to record evidence in its support.

Response:

132. This question is addressed to Canada.

3 THE USDOC'S REJECTION OF PRIVATE MARKET STUMPAGE PRICES IN ONTARIO AS A STUMPAGE BENCHMARK

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[202] *See* Lumber Final I&D Memo, p. 50 (Exhibit CAN-010).

[203] *See* U.S. First Written Submission, para. 335.

[204] *See* U.S. First Written Submission, para. 335.

[205] *See* U.S. First Written Submission, para. 335.

[206] *See* Lumber Final I&D Memo, pp. 49-50 (Exhibit CAN-010).

41. To Canada: At paragraph 337 of its first written submission, Canada states, in relevant part, that:

> **[T]ree stands that were estimated to be a part of the planned harvest may have been found, operationally, to be uneconomical to harvest because they are physically inaccessible or are in inoperable areas. (footnote omitted)**

Please identify the precise location on the record of the evidentiary basis for the above assertion.

Response:

133. This question is addressed to Canada.

42. To Canada: At paragraph 65, the Hendricks Report (Exhibit CAN-019) states that:

> **[T]he presence of excess mill capacity demonstrates that the supply of Crown softwood timber worth harvesting (i.e., that is profitable) in any given year is limited and that any private softwood timber worth harvesting is worth buying.**

Pointing to record evidence, please indicate the basis for the assertion of excess mill capacity referred to in the statement above.

Response:

134. This question is addressed to Canada.

43. To Canada: At paragraphs 121 and 122 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **The United States and Commerce, in its Final Determination, claim that the Hendricks Report "ignores the fact that there is one dominant price setter, [Ontario], in the Ontario timber market". This conclusory statement is false. (footnotes omitted)**
>
> **Not only does Dr. Hendricks deal with this obvious fact, *the entire premise* of his report is that, *despite* the large role of the Crown in Ontario, the conditions of competition were such that market forces set prices for stumpage in Ontario during the period of investigation, without distortion.**

Please identify where the "premise" of the Hendricks Report, referred to above, can be found in that report.

Response:

135. This question is addressed to Canada.

44. To both parties: How did the tenure-holders' flexibility to exceed the volume targets set out in their Annual Work Schedules (AWS) affect their ability to harvest their full volume targets in subsequent years? How does this affect average prices across the duration of the tenure?

Response:

136. The USDOC explained in the final issues and decision memorandum that "the Crown's administered stumpage rates and the Crown's overwhelming share of the market, as well as the flexible supply of Crown timber that is available to tenure holders, influences the prices for private standing timber such that private prices in Ontario cannot be used as a benchmark."[207] The USDOC explained that the "ability of the majority of tenure-holders in Ontario to purchase significant amounts of standing timber in excess of their allocated volume reduces the need of those tenure-holders to source from non-Crown sources, such as the private market," and "private woodlot owners would be forced to price their standing timber at or below the Crown stumpage price."[208]

137. The USDOC explained, in particular, that, with respect to the supply of standing timber in Ontario from the Crown and private sources:

> The [Government of Ontario] does not allocate harvest volumes to tenure holders; rather, it allocates harvest areas (the AHA) to a tenure holder over the ten-year term of [a forest management plan ("FMP")]. The volume of standing timber that a tenure holder can harvest in a given year is flexible. Each year a tenure holder develops an [annual work schedule ("AWS")] in which it sets a target for the area to be harvested, but that target is not binding; the only effective harvest limit is the [allowable harvest amount ("AHA")] over a ten-year period. This arrangement ensures that the Crown supply of timber is flexible on a yearly basis, such that in years when the demand for lumber products is high, tenure holders can consume more than their annual target of public timber

[207] Lumber Final I&D Memo, Comment 31, p. 92 (Exhibit CAN-010).

[208] Lumber Preliminary Decision Memorandum, p. 31 (citing GQRGOO, Tables 2, 4, and 12) (Exhibit CAN-008).

> at an administered price before turning to the private market for additional supply. In addition, the [Government of Ontario] does not regulate the transfer or sale of timber between sawmills or to third parties. The ability to trade Crown timber between mills makes the Crown timber market more flexible and allows tenure holders to harvest more extensively from Crown land before turning to the private market. We find that the ability to harvest at levels greater than the short-term targets set in the AWSs and the option to transfer timber between mills expands the market for Crown timber, which has the effect of depressing demand, and, therefore, prices in the private market.[209]

138. As addressed in the U.S. response to question 20, during fiscal year 2015-2016, Crown-origin timber accounted for 96.5 percent of the harvest volume in Ontario.[210] The USDOC explained that, considering the "extremely small" volume of private-origin standing timber, the "evidence indicating that tenure-holding companies may harvest Crown-origin standing timber in excess of their allocated volumes" supports a conclusion that private stumpage remains a merely residual option for purchasers (or even an option of last resort).[211]

139. The amount of AHA timber consumed each year does not directly affect stumpage prices. However, certain components of the Ontario Crown stumpage charge may increase (or decrease) from year to year. As described in the U.S. response to question 8 (and in the USDOC's final issues and decision memorandum at page 93), Ontario sets its Crown stumpage prices using four components: (1) the minimum charge, inflated annually since 1997-98 using Statistic Canada's Implicit Price Index; (2) the residual value ("RV") charge, which is assessed when (and only when) the price of a basket of end-products (*e.g.*, various softwood lumber products) exceeds a measure of the cost of producing and delivering those end-products (and which did not occur and was not charged during the period of investigation); (3) the forest renewal charge, which is based on yearly cost estimates; and (4) the forestry futures charge.[212] Thus, certain timber may be more expensive or less expensive from year to year depending on the amount of inflation in the minimum charge, whether the RV charge is imposed, and the amount of the forest renewal charge.[213]

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[209] Lumber Final I&D Memo, p. 93 (footnotes omitted) (Exhibit CAN-010).

[210] *See* Lumber Final I&D Memo, p. 92 (Exhibit CAN-010).

[211] Lumber Preliminary Decision Memorandum, p. 31 (Exhibit CAN-008).

[212] *See* Lumber Final I&D Memo, p. 93 (Exhibit CAN-010).

[213] *See* Lumber Final I&D Memo, p. 93 (Exhibit CAN-010).

45. <u>To both parties</u>: Canada asserts, in relevant part, at paragraph 328 of its first written submission:

> **[C]rown-origin timber accounted for 91.9% of the harvest volume in Ontario…(footnotes omitted)**

The United States asserts at paragraph 281 of its first written submission:

> **[D]uring 2015-16, Crown forest in Ontario accounted for 96.5 percent of the harvest volume in the province, while the harvest volume from non-Crown lands accounted for the remaining 3.5 per cent. (footnotes omitted)**

Please confirm, pointing to record evidence, the share of Crown-origin timber in total volume of timber harvested in Ontario in the POI.

<u>Response</u>:

140. As addressed in the U.S. response to question 20, the correct percentage appears on page 92 of the USDOC's final issues and decision memorandum, where the USDOC determined that Crown-origin timber in Ontario accounted for approximately 96.5 percent of the softwood timber harvest volume in the province during fiscal year 2015-2016.[214] Ontario reported in its initial questionnaire response that 391,836.84 cubic meters of softwood timber were harvested from non-Crown lands during the relevant period, and 10,662,556.07 cubic meters of softwood timber were harvested from Crown lands during the relevant period, resulting in a total harvest of 11,054,392.91 cubic meters of softwood timber.[215] Dividing the Crown softwood harvest (10,662,556.07 cubic meters) by the total softwood harvest (11,054,392.91 cubic meters) demonstrates that Crown-origin timber represented 96.46 percent of the total softwood harvest volume during the relevant period.[216]

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[214] *See* Lumber Final I&D Memo, p. 92 (Exhibit CAN-010). We note that due to Ontario's record-keeping system, Ontario reported Crown harvest volumes for fiscal year 2015-2016, but private harvest volume for fiscal year 2014-2015. *See* Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) at footnote 1 (Exhibit USA-021).

[215] Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) (Exhibit USA-021).

[216] *See* Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) (Exhibit USA-021).

141. When mixed wood and hardwood harvest volumes are added to the softwood harvest volumes, the percentage of Crown-origin timber drops to 91.56 percent.[217] In particular, Ontario reported the following harvest volumes for non-Crown lands: 391,836.84 cubic meters of softwood, 66,407.31 cubic meters of mixed wood, and 909,123.44 cubic meters of hardwood.[218] For Crown lands, Ontario reported the following volumes: 10,662,556.07 cubic meters of softwood, 886,238.84 cubic meters of mixed wood, and 3,286,898.47 cubic meters of hardwood.[219] Summing the total harvests for non-Crown and Crown lands reveals a total of 16,203,060.97 cubic meters harvested of all types of timber during this period. Dividing the Crown harvest of all types of timber (14,835,693.38 cubic meters) by the total harvest of all types of timber (16,203,060.97 cubic meters) demonstrates that Crown-origin timber of all types represented 91.56 percent of the harvest volume during the relevant period.

142. Because the USDOC was investigating whether softwood lumber was being subsidized via the provision of stumpage for less than adequate remuneration, the USDOC focused on government presence in the various provinces' softwood stumpage markets. In evaluating a related argument, the USDOC found that analyzing "other inputs that would not be used in the production of softwood lumber" (which would include hardwood and mixed wood timber) "would not reflect the market conditions for the producers of subject merchandise," i.e., softwood lumber.[220] Accordingly, the USDOC did not include hardwood or mixed wood harvested from Crown and non-Crown sources in its evaluation of whether the Ontario softwood stumpage market was distorted.

46. <u>To the United States</u>: At paragraph 343 of its first written submission, Canada asserts, in relevant part, that:

> **In *US – Countervailing Measures (China) (Article 21.5 – China)*, the compliance panel found that any decision to reject in-country prices must be supported by a reasoned and adequate explanation of how the alleged government intervention distorts the price as well as direct evidence of an effect on price. Here, there is no indication of any kind that the alleged**

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[217] *See* Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) (Exhibit USA-021).

[218] *See* Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) (Exhibit USA-021).

[219] *See* Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2) (Exhibit USA-021).

[220] Lumber Final I&D Memo, p. 81 (Exhibit CAN-010).

private market concentration distorted or had an effect on the price. (footnotes omitted)

Please respond to Canada's assertions.

Response:

143. Canada's statement at paragraph 343 of its first written submission regarding "direct evidence of an effect on price" has no basis in the text of Article 14(d) of the SCM Agreement or in the facts of this dispute. In the first place, Canada's legal approach is flawed because it is premised on a legal standard that does not, in fact, apply to in-country benchmarks.[221] As explained in the U.S. first written submission, Article 14(d) does not require a special showing of distortion as a prerequisite for using in-country benchmarks. The text of Article 14(d) provides that the adequacy of remuneration should be determined "in relation to the prevailing market conditions" for the good in question "in the country of provision."[222] In light of this language, prior reports have considered that in-country benchmarks reflect the approach of Article 14(d). The Appellate Body, for example, has stated that, "[t]o the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)."[223] Canada has pursued its claims in this dispute according to an invalid legal approach and, as a result, Canada has failed to demonstrate that the USDOC acted inconsistently with Article 14(d) when it relied on the in-country Nova Scotia benchmark to measure the benefit conferred by the provision of stumpage in Canada.

144. With respect to *US – Countervailing Measures (China) (Article 21.5 – China)*, the compliance panel in that dispute reached an erroneous conclusion based on misapplying the appropriate legal approach. The compliance panel's reasoning has no bearing on this or any other dispute. Canada's characterization of that erroneous reasoning further distorts the legal approach that was applied in *US – Countervailing Measures (China) (Article 21.5 – China)* by attempting to introduce an obligation ("direct evidence of an effect on price") that does not exist under the relevant provisions of Article 14.

145. In any case, as it relates to Ontario, the record is clear that prices are distorted by governmental intervention in the market. As discussed above, Crown-origin timber accounted for 96.5 percent of the harvest volume in Ontario during the fiscal year 2015-2016.[224] Under

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[221] *See* U.S. First Written Submission, paras. 81-85.

[222] Emphasis added.

[223] *US – Countervailing Measures (China) (AB)*, para. 4.46 (internal citations omitted; underline added).

[224] Lumber Final I&D Memo, p. 92 (Exhibit CAN-010).

these circumstances, that is, where the government has a predominant role as a supplier in the market, the government's predominance makes it "likely" that private prices for the good in question will be distorted.[225]

146. Although there is no market share threshold above which an investigating authority may conclude *per se* that price distortion exists, the more predominant a government's role in the market, the more likely it is that the government's role results in the distortion of private prices.[226] For example, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that China's predominant role in the input market shows that it is "likely that the government as the predominant supplier has the market power to affect through its own pricing strategy the pricing by private providers for the same goods, and induce them to align with government prices."[227]

147. The Appellate Body has explained that "[t]here may be cases . . . where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight."[228] Here, the Government of Ontario accounts for nearly the entire market and, based on an assessment of the full range of record evidence, the USDOC concluded that it was reasonable to find that actual transaction prices for private purchases of stumpage in Ontario were significantly distorted as a result of the provincial government's involvement in the stumpage market.

47. <u>To Canada</u>: The United States argues at paragraph 311 of its first written submission that:

> **Moreover, Canada's argument that the concentration of firms is a "prevailing market condition" does not speak to whether that arrangement is distortive in this case. As the USDOC explained, the "analysis of whether a proposed benchmark is market-determined <u>must precede</u> any analysis of how to account for prevailing market conditions in a benchmark comparison." Reversing the order of that analysis "would lead to the absurd result that the Department could never rely on anything other than [an in-country benchmark], regardless of**

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[225] *US – Softwood Lumber IV (AB)*, para. 102; *US – Anti-Dumping and Countervailing Duties (AB)*, para. 453; *US – Carbon Steel (India) (AB)*, para. 4.156; *US – Countervailing Measures (AB)*, para. 4.51.

[226] *US – Anti-Dumping and Countervailing Duties (AB)*, para. 444.

[227] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 454. *See also US – Softwood Lumber IV (AB)*, para. 100 ("Whenever the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods …").

[228] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

> **the level of distortion, because such benchmarks would <u>always</u> reflect 'prevailing market conditions' in the country of provision." That result "would effectively nullify" the language in Article 14(d) that guides the determination of adequate remuneration. (footnotes omitted; emphasis original)**

Please provide your views in regard to the United States' arguments.

<u>Response</u>:

148. This question is addressed to Canada.

48. <u>To both parties</u>: At paragraph 24 of its third-party written submission, the European Union states, in relevant part, that:

> **[A]rticle 14(d) does not call for perfectly competitive markets and perfectly competitive markets rarely exist in real life. The level of concentration of a market forms part of the prevailing competitive conditions and if prices reflect the higher concentration of a market, this does not automatically render those prices distorted. It is not high market concentration as such that causes price distortion. (footnotes omitted)**

Please provide your views on the European Union's statement.

<u>Response</u>:

149. The United States is responding to questions 48 and 71 together, as both questions relate to statements by the EU that suggest the EU is confused about the analysis the USDOC actually undertook and what the USDOC actually determined. In particular, the statements at paragraphs 24 and 32 of the EU third party submission suggest that the EU may be confused by the USDOC's reference to the phrase "market concentration" in the context of the price distortion analysis in this dispute. It is thus important to clarify in what context the phrase "market concentration" appears in the USDOC's analysis.

150. As addressed in the U.S. response to question 20, in the preliminary and final determinations, the USDOC found that the government in each province was the majority supplier during the period of investigation.[229] The USDOC explained that, in such circumstances, its approach is informed by the *CVD Preamble*:

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[229] *See supra*, U.S. Response to Question 20 (identifying level of government market share in each province).

> The *CVD Preamble* states that government involvement in the market "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market." However, the Department does not apply a *per se* rule that a government majority market share equates to government distortion of that market. Rather, the Department will consider any evidence on the record of other relevant factors or measures that may distort a market. As such, consistent with the *CVD Preamble* and our practice, while we have considered the share of [government] production as one factor in evaluating whether the . . . market is distorted, we have also evaluated other record information in making this determination, as discussed below.[230]

151. Here, because of the government's role as the majority supplier in each province, the USDOC undertook to further examine whether the remaining portion of the market operated independently such that private prices could be considered independent of the government price. The USDOC did not undertake to conduct a market concentration analysis *carte blanche*, but rather as a conditional exercise contingent upon having found the market to be predominantly supplied by the government. With respect to Alberta, for example, the USDOC explained in the preliminary decision memorandum that:

> Aggregate harvest data from the [Government of Alberta] indicate that Crown lands account for 98.48 percent of the harvest while the private forest accounts for approximately 1.52 percent. Thus, as a starting point, we find that the volume of the Crown-origin harvest accounts for nearly all of the standing timber harvest. As we found in the final determination in *Lumber IV*, where the market for a particular good or service is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price. In this sense, the analysis would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect.
>
> In our preliminary analysis, when analyzing whether the conditions exist for the use of a tier-one benchmark in a particular jurisdiction, the Department examined the direction of the causal link (*i.e.*, whether the reference market, in fact, sets stumpage

[230] Lumber Final I&D Memo, p. 81 (Exhibit CAN-010). We note that this excerpt appears in the discussion of New Brunswick stumpage, but similar statements appear as well in the discussions of the other provinces.

> prices in the Crown market, rather than the reverse). The [Government of Alberta] argues that TDA prices constitute viable, tier-one benchmarks. However, as discussed above, data from the [Government of Alberta] indicate that the harvest of standing timber from private lands is miniscule compared to the volume of standing timber harvested from Crown lands. Further, the relatively small volumes of standing timber harvested from private lands is mostly consumed by tenure-holding sawmills such that non-Crown origin standing timber would "benchmark" off the prices the [Government of Alberta] sets for standing timber in the Crown forest. Thus, given the disparities that exist between the private and Crown harvest volumes, we conclude that the direction of the causal link is such that TDA prices established between energy companies and tenure-holding companies would largely mirror the prices the [Government of Alberta] charges for stumpage on Crown lands rather than the other way around. For this reason, we preliminarily determine that TDA prices are not market-determined and do not constitute a viable, tier-one benchmark.[231]

152. The question of market concentration only arises in the context of examining the very small sliver of the market (1.52 percent) comprised of private suppliers and, within that context, is only relevant to the question of whether these "remaining private prices in the country in question [could] be considered to be independent of the government price."[232]

153. The USDOC even explained that, outside of this context (as described in the foregoing example), taking a general approach of market concentration would not likely be relevant to the price distortion question.[233] When Canadian parties argued for a general market concentration approach, the USDOC explained why that approach misplaced, stating, for example:

> [W]e question the relevance of this metric to our analysis [(referring to the Herfindahl-Hirschman (HHI) method of determining market concentration)]. The Department is not seeking to identify market conditions that would be anti-competitive in violation of U.S. or Canadian antitrust laws. Our analysis examines the features of the sector at issue to consider

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[231] Lumber Preliminary Decision Memorandum, pp. 29-30 (Exhibit CAN-008).

[232] Lumber Preliminary Decision Memorandum, pp. 29-30 (Exhibit CAN-008).

[233] *See, e.g.*, Lumber Final I&D Memo, pp. 51-52 (Exhibit CAN-010).

> whether it functions freely and generates market-determined prices.[234]

154. Thus, to be clear, the USDOC's reference to market concentration relates to the conditional subsidiary question of independence from government prices once it has been established that the government's market share is predominant. Neither the USDOC's approach nor the U.S. statements in this dispute have suggested that a general market concentration analysis serve as the starting point, or that perfectly competitive markets should be required.

4 THE USDOC'S REJECTION OF AUCTION PRICES IN QUÉBEC AS A STUMPAGE BENCHMARK

49. <u>To the United States</u>: At paragraph 438 of its first written submission, Canada asserts that:

> **Commerce's speculative and hypothetical statement that bids are limited to TSG prices can be tested against the record evidence, which shows aggressive bidding above TSG prices. In the same tariffing zone, the average price for timber sourced from auctions is higher for both TSG-holders and non-TSG-holders than the equivalent stumpage price, as demonstrated by Table 2 below. (Table and footnotes omitted)**

Please respond to Canada's assertions.

<u>Response</u>:

155. The statement in paragraph 438 of Canada's first written submission overlooks the main point of the market analysis, which is that the auction prices still track the TSG prices (i.e., at or near Crown timber prices). The auction prices and TSG prices need not be identical for this to be true, so long as they remain similar. As the United States has explained, the record evidence that was before the USDOC demonstrates that auction prices indeed remained at or marginally above TSG prices.[235]

156. With respect to the circumstances in Quebec, the USDOC explained that:

> evidence on the record leads us to conclude that the Quebec stumpage market is distorted because the auction prices for Crown timber track the prices charged for Crown timber allocated to TSG-holding sawmills. Importantly, in reaching our distortion finding,

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[234] Lumber Final I&D Memo, pp. 51-52 (Exhibit CAN-010).

[235] *See* U.S. First Written Submission, para. 261 (citing Lumber Final I&D Memo, pp. 105-106 (Exhibit CAN-010)).

> we are not determining that the prices of auctioned, or private-origin, timber are the same as the prices for TSG-sourced standing timber. Rather, in making the distortion finding, we conclude that the prices for standing timber in the auction and private forest track the prices charged for TSG-sourced timber. Although firms, such as Resolute, may ultimately purchase auction or private timber at prices that are higher than those charged for TSG-sourced timber, the evidence on the record indicates that the auctioned or private timber prices are not independent of the prices charged in the public forest.[236]

157. In reaching this conclusion, the USDOC did not find that bids are "limited to" TSG prices, as Canada suggests. Rather, the USDOC found that "auction prices for Crown timber track the prices charged for Crown timber allocated to TSG-holding sawmills and, thus, the auction prices for Crown timber are not viable tier-one benchmarks."[237]

158. Canada appears to argue that a pattern of consistent auction bids (or, for that matter, even some auction bids) at higher-than-TSG prices demonstrates that auction prices do not track Crown timber prices.[238] However, the existence of bids at or marginally above Crown timber prices does not establish that those bids are necessarily at market prices (*i.e.*, reflective of prices that would be observed absent government intervention in the market). It may be the case that these above-TSG bids are at market prices; or, it may be the case that these bids are merely 10 percent above the below-market TSG price, and thus still below market price. Canada's *post hoc* calculations illustrate nothing probative in this regard.

159. The USDOC identified this flaw in Canada's argument in the course of explaining how the structure of the provincial auction system gave "little incentive for the TSG-holding corporations [and non-TSG-holding corporations] to bid for Crown timber above the TSG administered price."[239] The USDOC did not rely on the premise that auction bids were never at or above TSG prices. Rather, the USDOC considered that the structure of the provincial stumpage market resulted in downward pressure on auction prices, such that "the reference market (here, the auction) does not operate independently of the administered market."[240]

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[236] Lumber Final I&D Memo, pp. 105-106 (Exhibit CAN-010).

[237] Lumber Final I&D Memo, p. 99 (Exhibit CAN-010).

[238] *See* Canada's First Written Submission, para. 183 (Table 2) (alleging that, on average, TSG-holders and non-TSG-holders bid at 10 percent above TSG prices).

[239] Lumber Final I&D Memo, p. 101 (Exhibit CAN-010).

[240] Lumber Final I&D Memo, p. 101 (Exhibit CAN-010).

160. The USDOC explained:

> Importantly, in reaching our distortion finding, we are not determining that the prices of auctioned, or private-origin, timber are the same as the prices for TSG-sourced standing timber. Rather, in making the distortion finding, we conclude that the prices for standing timber in the auction and private forest track the prices charged for TSG-sourced timber. Although firms, such as Resolute, may ultimately purchase auction or private timber at prices that are higher than those charged for TSG-sourced timber, the evidence on the record indicates that the auctioned or private timber prices are not independent of the prices charged in the public forest.[241]

161. Canada's argument relies on mischaracterizing the premise of the USDOC's analysis as depending on prices being identical. But, as the foregoing discussion demonstrates, the USDOC never relied on that erroneous premise.

50. To the United States: At paragraphs 460 and 461 of its first written submission, Canada asserts that:

> **The blue dots in the above figure identify auction block locations, with the size of the dot indicating the relative softwood volume offered for sale. The orange-shaded area indicates the region from which it is economically viable for U.S. mills to acquire logs (based on the 200 km "profitability circle"). Most of the land inside the profitability circles for U.S. sawmills is in the south of Québec, and is almost all privately-owned forest. Logs harvested on this private land are not subject to any processing regulations.**
>
> **Dr. Marshall observed that, in accordance with basic economics, if the overall supply of logs was artificially high in Québec, and the prices of private and Crown logs were therefore artificially low, one would expect U.S. sawmills to buy Québec's private logs. This situation is not occurring: there are negligible exports of private logs to the United States. In fact, as Figure 41 demonstrates, imports of logs from the**

[241] Lumber Final I&D Memo, p. 105 (Exhibit CAN-010).

United States into Québec far outstrip exports in the opposite direction. (figures omitted; footnotes omitted)

Please respond to Canada's arguments.

Response:

162. The statements in paragraphs 460 and 461 of Canada's first written submission are misleading. Canada suggests that the presence of export restraints does not impact pricing in Quebec.[242] Canada relies on Dr. Marshall's assessment of the quantity of imports and exports of private-origin logs to argue that there was a lack of export demand for Quebec-origin logs during the period of investigation. However, the USDOC expressed concern about the Marshall Report and other reports placed on the record by the Canadian interested parties and the petitioner:

> The GOQ, the GOC, and the petitioner have each placed purchased commissioned reports on the record with respect to the issue of government distortion. We first note that none of the interested parties have placed reports or studies that were conducted independently from the current lumber investigation or the previous lumber investigation, nor have they placed on the record reports or studies on the provincial stumpage markets that have been published in peer-reviewed journals. Although we consider all evidence on the record of a proceeding in reaching our determination, in determining the weight to be accorded to a particular piece of evidence, we consider whether the evidence in question was prepared in the ordinary course of business, or for the express purpose of submission in an adjudicatory administrative proceeding. Because these reports were prepared for the express purpose of submission in this investigation or the previous lumber investigation, we find that the reports are at "risk of litigation-inspired fabrication or exaggeration," which diminishes their weight.
>
> The reports put on the record by the respondents and the petitioner each reached separate conclusions. However, the determinations made in this investigation must be based upon the language and requirements of the statute and the CVD regulations. None of the cited studies that have been placed on the record cite to the statute or to the CVD regulations. The selection of a benchmark by the

[242] *See* Canada's First Written Submission, paras. 457-467.

> Department is based solely on the language set forth in both the statute and the CVD regulations.[243]

In the passage above, the USDOC was referring to the Kalt Report, the Stoner & Mercurio Report, and the Marshall Report.

163. With respect to the first two reports, the USDOC explained:

> Under the CVD regulations, while we recognize that some government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government constitutes a majority or, in certain circumstances, a substantial portion of the market. Neither the Kalt Report nor the Stoner & Mercurio Report provide any analysis of actual prices within the Quebec stumpage market, nor do these reports provide any analysis of the actual government presence and involvement within the Quebec market as required as part of any distortion analysis.[244]

164. Further, with respect to the Marshall Report, the USDOC explained:

> The Marshall Report does not reference the language and requirements of the statute and the CVD regulations, but rather provides an analysis of auction prices in Quebec. However, under [the USDOC's regulation], government auction prices can only be used as a benchmark if the auction is based solely on an open, competitively run process. As noted above, the GOQ auction does not meet the regulatory requirements of an open, competitively run auction because the GOQ requires that all timber sold at auction must be milled within Quebec. Therefore, the Marshall Report is also not relevant with respect to whether the Quebec auction can serve as a benchmark. Furthermore, the Marshall Report did not provide any analysis of Quebec auction prices to stumpage prices from markets that have previously been found not to be distorted such as private prices from the Atlantic Provinces in Canada and stumpage prices in the United States to support a statement that the auction prices are not distorted by the government presence within the Quebec market. Nor did the Marshall Report analyze all of the bid prices submitted in the auction, both losing and winning bids,

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[243] Lumber Final I&D Memo, p. 103 (Exhibit CAN-010) (footnotes omitted).

[244] Lumber Final I&D Memo, p. 103 (Exhibit CAN-010).

> with a comparison between TSG-holders and non-TSG-holders. The Marshall Report at paragraph 69 and footnote 72 states that the auctions are open to bidders from all regions and does not exclude or otherwise discriminate against potential exporters. However, as discussed above, the Department verified that harvested timber from the auction must be processed in Quebec; this restriction necessarily limits bidders.[245]

165. The USDOC concluded that, "[a]lthough Quebec's auction system displays several competitive features, the observations outlined above lead us to conclude that the prices paid for Crown timber allocated directly to TSG-holding corporations affects the prices paid in the auction system, such that the auction does not yield prices free of distortion."[246] As indicated in the passages quoted above, the USDOC determined that the reports of Canada's consultants did not warrant a different conclusion.

166. Canada's statement in paragraphs 460 and 461 of its first written submission fail to acknowledge that relatively little timber was harvested from private lands compared to Crown lands in Quebec during the period of investigation. Only 16.94 percent of timber harvested was from private woodlots, while 83.06 percent was from Crown-origin land, and thus not eligible to be exported out of the province.[247] Given how little of the Quebec timber harvest was of private origin eligible for export, it would be difficult for the USDOC to conclude that minimal exports of private-origin timber should be extrapolated to conclude that there was minimal export demand for Quebec timber.

167. Additionally, although the Marshall Report concluded there is a lack of demand for Quebec timber in the United States (on the basis of low volumes of private-origin log exports from Quebec to the United States), the Quebec log export restriction also prevents the export of Crown-origin auctioned logs to other Canadian provinces, including the neighboring provinces of Ontario and New Brunswick, for processing.[248] Although log processors from these provinces would be, effectively, barred from participating in the Quebec auction system, the report does not address inter-province export demand.[249] Canada's focus on the apparent lack of significant exports of private-origin logs from Quebec to the United States has failed to address the potential export of Crown-origin logs to other provinces.

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[245] Lumber Final I&D Memo, pp. 103-104 (Exhibit CAN-010) (footnotes omitted).

[246] Lumber Final I&D Memo, p. 104 (Exhibit CAN-010).

[247] *See* Lumber Final I&D Memo, p. 99 footnote 593 (citing Quebec Final Market Memorandum, Table 7.1 and Table 7.2) (Exhibit CAN-010).

[248] *See* Marshall Report, paras. 158-163 (Exhibit CAN-171 (BCI)).

[249] *See* Marshall Report, paras. 158-163 (Exhibit CAN-171 (BCI)).

51. To Canada: At paragraph 459 of its first written submission, Canada asserts that:

> **The Marshall Report cited a peer-reviewed U.S. study and data from the auction system showing that sawmills in the Northeastern United States and in Québec have a 200 km "profitability circle" (as-the-crow-flies), outside of which it is not economically viable to transport logs. Dr. Marshall examined the location of U.S. sawmills and determined that the vast majority of the volumes sold in BMMB auctions are located too far from U.S. sawmills to provide them economically viable sources of logs, as demonstrated in the map below.**

Please point on the record to information on the volume of logs sold in BMMB auctions that are, as Canada asserts, "located too far from U.S. sawmills to provide them economically viable sources of logs".

Response:

168. This question is addressed to Canada.

52. To the United States: At paragraph 462 of its first written submission, Canada asserts, in relevant part, that:

> **Commerce was aware of the significant demand in Québec for logs imported from the United States and the absence of log exports from private lands before it even initiated its investigation.**

In view of the above and Canada's arguments in paragraphs 462-467 of its first written submission, and Canada's argument that nothing had changed, on what basis did the USDOC conclude that the export restriction on Québec logs affected the auction price for stumpage in the POI?

Response:

169. The United States refers the Panel to the U.S. response to question 50, which addresses Canada's argument that the presence of export restraints does not impact pricing in Quebec.[250] As explained in that response, *inter alia*, Canada's argument is premised on the lack of demand

[250] *See* Canada's First Written Submission, paras. 457-467.

for Quebec-origin logs in the United States, but fails to address other possibilities for the export of logs, including to neighboring Canadian provinces.

170. Ultimately, the USDOC concluded that, "[a]lthough Quebec's auction system displays several competitive features, the observations outlined [in the final issues and decision memorandum] lead us to conclude that the prices paid for Crown timber allocated directly to TSG-holding corporations affects the prices paid in the auction system, such that the auction does not yield prices free of distortion."[251] As indicated in the passages quoted in the U.S. response to question 50, the USDOC determined that the reports of Canada's consultants did not warrant a different conclusion.

53. <u>To the United States</u>: At paragraph 442 of its first written submission, Canada asserts, in relevant part, that:

> **The record evidence shows that Commerce was wrong when it surmised that "there is little reason for non-sawmills […] to bid for timber in the auctions above the TSG administered price". As shown …… above, non-sawmills bid on average 8% higher for auction blocks than the equivalent TSG price in a tariffing zone.**

Please respond to Canada's assertion.

<u>Response</u>:

171. As discussed in the U.S. response to question 49, the existence of bids at or marginally above Crown timber prices does not establish that those bids are necessarily at market prices (*i.e.*, at what the price would be absent government intervention in the market). It may be the case that these above-TSG bids are at market prices; or, it may be the case that these bids are merely 10 percent above the below-market TSG price, and thus still below market price. Canada's *post hoc* calculations illustrate nothing probative in this regard.

172. The USDOC identified this flaw in Canada's approach in the course of explaining how the structure of the provincial auction system gave "little incentive for the TSG-holding corporations [and non-TSG-holding corporations] to bid for Crown timber above the TSG administered price."[252] The USDOC did not rely on the premise that auction bids were never at or above TSG prices. Rather, the USDOC considered that the structure of the provincial

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[251] Lumber Final I&D Memo, p. 104 (Exhibit CAN-010).

[252] Lumber Final I&D Memo, p. 101 (Exhibit CAN-010).

stumpage market resulted in downward pressure on auction prices, such that "the reference market (here, the auction) does not operate independently of the administered market."[253]

173. The USDOC explained:

> Importantly, in reaching our distortion finding, we are not determining that the prices of auctioned, or private-origin, timber are the same as the prices for TSG-sourced standing timber. Rather, in making the distortion finding, we conclude that the prices for standing timber in the auction and private forest track the prices charged for TSG-sourced timber. Although firms, such as Resolute, may ultimately purchase auction or private timber at prices that are higher than those charged for TSG-sourced timber, the evidence on the record indicates that the auctioned or private timber prices are not independent of the prices charged in the public forest.[254]

174. Canada's argument relies on mischaracterizing the premise of the USDOC's analysis as depending on prices being identical. But, as the foregoing discussion demonstrates, the USDOC never relied on that erroneous premise.

54. <u>To the United States</u>: At paragraph 435 of its first written submission, Canada argues, in relevant part, that:

> **[C]ommerce did not articulate why any auction participants would limit their bids to the TSG price. Participants have an incentive to win auctions, not to unilaterally suppress their bids and lose those auctions. Losing an auction would force a participant to source timber from other sources, including from independent harvesters who win auction blocks.**

Please respond to Canada's argument.

<u>Response</u>:

175. Canada's statement in paragraph 435 of its first written submission is incorrect. The USDOC did not find that auction participants would "limit" their bids to TSG prices. Rather, the USDOC found that "auction prices for Crown timber track the prices charged for Crown timber

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[253] Lumber Final I&D Memo, p. 101 (Exhibit CAN-010).

[254] Lumber Final I&D Memo, p. 105 (Exhibit CAN-010).

allocated to TSG-holding sawmills and, thus, the auction prices for Crown timber are not viable tier-one benchmarks."[255]

176. Further, the USDOC did, in fact, "articulate why" there is a tendency for auction bids to track TSG prices.[256] The USDOC found that TSG-holding corporations have an incentive not to bid at significantly above TSG prices at auction because alternative sources of timber are available to TSG-holders at or around the TSG price.[257] The USDOC explained that this is true for several reasons. First, additional Crown-origin timber is available to TSG-holders, including transfer timber and unharvested timber resold by the province.[258] Second, record evidence indicated that the surplus of Crown-origin timber – described as "more [public] wood than [TSG-holders] actually need" – depressed private timber prices.[259] The USDOC explained that:

> In such situations, it is the private forest that foots the bill by being offered barely viable prices and facing the threat of discontinuing orders if they refuse to oblige." Thus, not only do mills have a disincentive to bid competitively at auctions in Québec – as demonstrated by Parker's statement that mills have "more [public] wood than they actually need" – but, also, private prices are depressed by the surplus of wood available. Both of these facts undercut Resolute's argument that it has an incentive to not depress its bids, and that it pays a "premium" to purchase through non-TSG or non-tenure sources. Consequently, on the basis of the record evidence, we find no merit to Resolute's arguments.[260]

177. Canada's statement in paragraph 435 of its first written submission fails for the same reasons.

55. <u>To the United States</u>: At paragraphs 444 and 445 of its first written submission, Canada asserts that:

> **Non-sawmills would not have bid for timber above the TSG price if there were no market for the logs to be produced from that timber. The price TSG-holders pay to non-sawmills is**

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[255] Lumber Final I&D Memo, p. 99 (Exhibit CAN-010).

[256] *See* Lumber Final I&D Memo, pp. 105-106 (Exhibit CAN-010).

[257] Lumber Final I&D Memo, p. 105 (Exhibit CAN-010).

[258] Lumber Final I&D Memo, p. 102 (Exhibit CAN-010).

[259] Lumber Final I&D Memo, pp. 105-106 (Exhibit CAN-010).

[260] Lumber Final I&D Memo, pp. 105-106 (Exhibit CAN-010) (referring to statement of Mr. Yvon Parker, a representative of Quebec's private forest landowners).

> **whatever price that allows them to operate their sawmills economically and is market-determined.**
>
> **Moreover, as a factual matter, Commerce cited no evidence to support its speculation that non-sawmills sold only to TSG-holding mills when there are dozens of mills in Québec with little to no TSG volume. (footnote omitted)**

Please respond to Canada's assertions.

Response:

178. As addressed in the U.S. responses to questions 49, 50, 52, 53, and 54, the USDOC did not find that auction participants would "limit" their bids to TSG prices. Rather, the USDOC found that "auction prices for Crown timber track the prices charged for Crown timber allocated to TSG-holding sawmills and, thus, the auction prices for Crown timber are not viable tier-one benchmarks."[261] The USDOC determined that TSG prices informed the prices at which TSG-holding sawmills and non-sawmills were willing to bid at auction, such that auction prices were not independent of TSG prices.[262]

179. With respect to Canada's statement in paragraph 444 of its first written submission, Canada cites no evidence that the "price TSG-holders pay to non-sawmills is whatever price that allows them to operate their sawmills economically and is market-determined."[263]

180. Finally, it may be the case that non-sawmills could sell timber purchased at auction to non-TSG-holding mills in Quebec. However, data provided by Quebec demonstrate that TSG-holders dominate the need for timber in Quebec, whether as standing timber or logs, as indicated by mill operating permit size. For fiscal year 2015-2016, TSG-holders accounted for **[[BCI]]** m^3 – that is, **[[BCI]]** percent of the province-wide cumulative **[[BCI]]** m^3 operating permit size; non-TSG-holders accounted only for the remaining **[[BCI]]** percent (that is, **[[BCI]]** m^3).[264] It follows, as a logical consequence, that the predominant buyers of such timber sold by non-sawmills would be TSG-holders.

56. To both parties: At paragraph 455 of its first written submission, Canada asserts, in relevant part, that:

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[261] Lumber Final I&D Memo, p. 99 (Exhibit CAN-010).

[262] *See* Lumber Final I&D Memo, pp. 99, 105-106 (Exhibit CAN-010).

[263] Canada's First Written Submission, para. 444.

[264] *See* Government of Quebec Verification Minor Corrections (June 17, 2017), Exhibit QC-STUMP-MC-1 (revised table 4) ("Softwood Sawmills - Operating Permit Size 2015-16") (Exhibit USA-042 (BCI)).

> **Moreover, there is little incentive for sawmills to use sections 92 and 93 for the ends suggested by Commerce. It is only economical for the transferring mill to use sections 92 and 93 in limited circumstances. Under sections 92 and 93, transferred timber remains part of the transferring mill's allocated timber for that year and the transferring mill pays the stumpage fees on that timber. (footnote omitted)**

Pointing to record evidence, please confirm whether the transferring sawmills recovered, from the receiving sawmill, any stumpage fees paid on timber transferred to another sawmill under sections 92 and 93 of the Sustainable Forest Development Act, or any transportation costs incurred in that transfer.

Response:

181. There is no record evidence to indicate whether the transferring sawmills recovered, from the receiving sawmill, any stumpage fees paid on timber transferred to another sawmill under sections 92 and 93 of the Sustainable Forest Development Act, or any transportation costs incurred in that transfer.

57. To the United States: At paragraph 475 of its first written submission, Canada asserts, in relevant part, that:

> **Commerce incorrectly found that Dr. Marshall did not analyze both the losing and winning bids or analyze bids by TSG-holders and non-TSG-holders. Dr. Marshall did, in fact, conduct a detailed analysis of winning and losing bids and presented that analysis in his report. In particular, he examined all bids placed on auction blocks in order to discern whether bids falling below the estimated price set by the BMMB represent rational behaviour or could cast doubt on whether winning bids represent fair market value. After analysing both winning bids and losing bids, Dr. Marshall concluded that auction participants are behaving rationally. (footnotes omitted)**

Please respond to Canada's assertions.

Response:

182. Canada's statement in paragraph 475 of its first written submission is incomplete. It is correct that the Marshall Report evaluated the distribution of bids relative to the estimated price

for certain auctions, and found that certain bids were submitted well below the estimated price.[265] However, Canada's statement omits the context of the USDOC's determination. Specifically, the USDOC found that the Marshall Report did not "analyze all of the bid prices submitted in the auction, both losing and winning bids, with a comparison between TSG-holders and non-TSG-holders."[266] The discussion in the Marshall Report to which Canada cites, although evaluating all bids, does not differentiate between the bidding behavior of TSG-holders and non-TSG-holders.

58. To the United States: At paragraph 471 of its first written submission, Canada asserts that:

> **Even more importantly, Dr. Marshall's report placed on the record all of the data he used to draw his conclusions, including all of the winning and losing bids and bidder information from the auction system, bid prospectuses, Crown harvest data, information on mill consumption, and other data. Commerce provided no explanation as to why it disregarded this data, which was placed on the record with the report and formed part of Québec's initial questionnaire response. If Commerce questioned the empirical economic analysis of that data, it could have analyzed it, or compared it to other evidence and data.**

Please respond to Canada's assertion.

Response:

183. Canada's statement in paragraph 471 of its first written submission appears to refer to the raw data contained in 254 separate datasets attached to the Marshall Report.[267] The 254 datasets accompanying this single report do not appear to be identified in the manner Canada suggests, nor did the parties discuss or rely upon the data for their arguments. The public record index for the investigation appears to contain over 1,800 electronically submitted files, many of which comprised individual filings containing hundreds of exhibits and extensive datasets for the USDOC's subsidy calculations.[268] Canada's suggestion that the USDOC should have focused on these data, or *sua sponte* conducted its own analyses of these data, when even the interested parties did not do so, is unavailing.

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[265] Marshall Report, p. 56 fig. 30 (Exhibit CAN-171 BCI).

[266] Lumber Final I&D Memo, p. 103 (Exhibit CAN-010) (emphasis added).

[267] Marshall Report (Exhibit CAN-171 BCI), pp. 101-105.

[268] Public Record Index (Exhibit USA-034).

59. To the United States: At paragraph 141 of its opening statement (Day 1), Canada argues that:

> **The word "observation" was appropriate. Commerce and the United States defend the rejection of the competitive auction benchmark by speculating about how auction participants *might* act; rather than the positive record evidence of how they *did* act. Commerce referred to firms' "incentives", "motivations", and what they "may" be doing. These speculative "observations" do not show a causal link between the government presence in the market and any, unproven, distortion. No unbiased and objective investigating authority would rely on speculation to discount actual evidence. (footnotes omitted)**

Please respond to Canada's arguments.

Response:

184. Canada mischaracterizes the logic and reasoning of the USDOC's determination. The USDOC's logic and reasoning in this regard is supported by record evidence that shows how the Quebec stumpage market was distorted. The USDOC relied upon information supplied by Quebec regarding the amount of timber supplied to firms through the TSG system, as reflected in mills' actual usage;[269] the concentration of certain TSG-holders in the province, as reflected in their actual purchases;[270] the ability of TSG-holders to transfer timber pursuant to sections 92 and 93 of the *Sustainable Forest Development Act* and evidence that they did so;[271] the export restriction on Crown-origin logs for milling outside of the province;[272] the significant percentage of auctioned timber that did not sell;[273] and sawmills' actual purchases of additional timber at TSG prices.[274] Each of these findings was based on actual record evidence, which was verified by USDOC officials, regarding the behavior of stumpage purchasers in the province.

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[269] Lumber Final I&D Memo (Exhibit CAN-010), pp. 99-100; Government of Quebec Initial Questionnaire Response, Exhibit QC-STUMP-9 (Table 18) (Exhibit USA-044 (BCI)); Government of Quebec Initial Questionnaire Response (Exhibit CAN-170), pp. 44-45; and Quebec Final Market Memorandum (Exhibit USA-027 (BCI)), Table 20.3.

[270] Lumber Final I&D Memo (Exhibit CAN-010), p. 100; citing Quebec Final Market Memorandum (Exhibit USA-027 (BCI)), Table 20.2.

[271] Lumber Final I&D Memo (Exhibit CAN-010), p. 102; GOQ Verification Report (Exhibit CAN-184), p. 15.

[272] Lumber Final I&D Memo (Exhibit CAN-010), p. 102; GOQ Verification Report (Exhibit CAN-184), p. 18.

[273] Lumber Final I&D Memo (Exhibit CAN-010), p. 99; GOQ Verification Report (Exhibit CAN-184), pp. 9, 12-13.

[274] Lumber Final I&D Memo (Exhibit CAN-010), p. 102; GOQ Verification Report (Exhibit CAN-184), p. 11.

Accordingly, Canada's contention that the USDOC merely speculated about the operation of the provincial stumpage market is baseless.

60. At paragraph 145 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **Commerce never said it needed this analysis. It could have asked Québec to perform the analysis, and Dr. Marshall would have done so. In fact, the data required to perform this simple analysis was already on the record before Commerce…. The data directly contradict Commerce's speculative claim that bidders will limit their bids to the TSG price.**

i. <u>To the United States</u>: Please respond to Canada's assertions.

<u>Response</u>:

185. As addressed in the U.S. responses to questions 49, 50, 52, 53, 54 and 55, the USDOC did not find that auction participants would "limit" their bids to TSG prices. Rather, the USDOC found that "auction prices for Crown timber track the prices charged for Crown timber allocated to TSG-holding sawmills and, thus, the auction prices for Crown timber are not viable tier-one benchmarks."[275] The USDOC determined that TSG prices informed the prices at which TSG-holding sawmills and non-sawmills were willing to bid at auction, such that auction prices were not independent of TSG prices.[276]

186. However, the existence of bids at or marginally above Crown timber prices does not establish that those bids are necessarily at market prices (i.e., reflective of prices that would be observed absent government intervention in the market). It may be the case that these above-TSG bids are at market prices; or, it may be the case that these bids are merely 10 percent above the below-market TSG price, and thus still below market price. Canada's *post hoc* calculations illustrate nothing probative in this regard.

187. The USDOC identified this flaw in Canada's argument in the course of explaining how the structure of the provincial auction system gave "little incentive for the TSG-holding corporations [and non-TSG-holding corporations] to bid for Crown timber above the TSG administered price."[277] The USDOC did not rely on the premise that auction bids were never at or above TSG prices. Rather, the USDOC considered that the structure of the provincial

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[275] Lumber Final I&D Memo, p. 99 (Exhibit CAN-010).

[276] *See* Lumber Final I&D Memo, pp. 99, 105-106 (Exhibit CAN-010).

[277] Lumber Final I&D Memo, p. 101 (Exhibit CAN-010).

stumpage market resulted in downward pressure on auction prices, such that "the reference market (here, the auction) does not operate independently of the administered market."[278]

188. The USDOC explained:

> Importantly, in reaching our distortion finding, we are not determining that the prices of auctioned, or private-origin, timber are the same as the prices for TSG-sourced standing timber. Rather, in making the distortion finding, we conclude that the prices for standing timber in the auction and private forest track the prices charged for TSG-sourced timber. Although firms, such as Resolute, may ultimately purchase auction or private timber at prices that are higher than those charged for TSG-sourced timber, the evidence on the record indicates that the auctioned or private timber prices are not independent of the prices charged in the public forest.[279]

189. Canada's argument relies on mischaracterizing the premise of the USDOC's analysis as depending on prices being identical. But, as the foregoing discussion demonstrates, the USDOC never relied on that erroneous premise.

190. With respect to Canada's characterization of the data available to the USDOC on the record, we refer to the U.S. response to question 58. Canada's statement in paragraph 145 of its opening statement on the first day of the first substantive meeting also appears to refer to the raw data contained in 254 separate datasets attached to the Marshall Report.[280] The 254 datasets accompanying this single report do not appear to be identified in the manner Canada suggests, nor did the parties discuss or rely upon the data for their arguments. The public record index for the investigation appears to contain over 1,800 electronically submitted files, many of which comprised individual filings containing hundreds of exhibits and extensive datasets for the USDOC's subsidy calculations.[281] Canada's statement in paragraph 145 of its opening statement on the first day of the first substantive meeting does not appear to specify which dataset is relevant to Canada's assertion.

ii. To Canada: Please explain why Québec did not voluntarily seek to undertake and place the "analysis" in question before the USDOC.

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[278] Lumber Final I&D Memo, p. 101 (Exhibit CAN-010).

[279] Lumber Final I&D Memo, p. 105 (Exhibit CAN-010).

[280] Marshall Report, pp. 101-105 (Exhibit CAN-171 BCI).

[281] Public Record Index (Exhibit USA-034).

Response:

191. This question is addressed to Canada.

61. At paragraph 164 of its opening statement (Day 1), Canada asserts that:

> **While the United States points to the fact that Québec allows "up to 10%" of a mill's allocated Crown timber to be transferred under section 92, of its legislation, it ignores the fact that, in financial year 2015/2016, only 3.7% of non-auction Crown softwood volumes were actually transferred. The fact that the transfers are hardly used makes sense. The transferring mill pays the stumpage fees, and yet loses access to its allocation when it makes a transfer. (footnotes omitted)**

i. To the United States: Please respond to Canada's assertions.

Response:

192. With respect to the evidence of transfer volumes, the USDOC found that it was not the amount of timber actually transferred under the Sustainable Forest Development Act, but rather the ability of firms to transfer timber (in amounts up to 10 percent of their TSG) that provided those firms flexibility in procuring Crown timber.[282]

193. Moreover, the USDOC verified that sawmills transferred a total of **[[BCI]]** m^3 of softwood under section 92 of the Sustainable Forest Development Act, and **[[BCI]]** m^3 of softwood under section 93 of the same Act, during fiscal year 2015-2016.[283] Thus, although the amount of timber transferred in any given fiscal year may vary,[284] TSG-holders are aware that they have the option to transfer up to 10 percent of their TSG obligation, and make purchasing decisions based on this fact.[285] The USDOC found that "the ability of a TSG-holder to obtain an additional 10 percent of its TSG volume from another TSG-holder indicates that the auctions may not be a competitive source for wood. The ability of corporations to shift allocations among sawmills provides TSG-holding corporations flexibility in terms of their supply sources, and reduces their need to source timber from non-Crown sources."[286]

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[282] *See* Lumber Final I&D Memo, p. 102 (Exhibit CAN-010).

[283] *See* Lumber Final I&D Memo, p. 102 (Exhibit CAN-010).

[284] *See* Lumber Final I&D Memo, p. 102 (Exhibit CAN-010).

[285] *See* Lumber Final I&D Memo, p. 102 (Exhibit CAN-010).

[286] *See* Lumber Final I&D Memo, p. 102 (Exhibit CAN-010).

194. While the transferring mill pays the stumpage fees, neither section 92 nor section 93 of the *Sustainable Forest Development Act* prohibit the transferring mill from seeking compensation from the receiving mill to recover the paid stumpage fees.[287]

ii. <u>To Canada</u>: Considering Canada's assertion above that the "transferring mill pays the stumpage fees, and yet loses access to its allocation when it makes a transfer", please explain why transferring mills make the transfers in question, in the instances that they do.

<u>Response</u>:

195. This question is addressed to Canada.

62. <u>To the United States</u>: At paragraph 180 of its opening statement (Day 1), Canada asserts that:

> **The United States also notes that the processing restriction applies to other Canadian provinces. However, as we previously mentioned, there was an authorization in place along the Ontario border. So, if we see here those two regions that were referenced in the earlier proclamation, Abitibi and Outaouais, are right up against the Ontario border. If we look at the outside boundary of Québec, we can see just how much area from which logs could have been exported. So, this rationale that the processing requirement could have restricted exports is contradicted by the record evidence. (footnote omitted)**

Please respond to Canada's assertions.

<u>Response</u>:

196. Canada's assertions at paragraph 180 of its opening statement on the first day of the first substantive meeting are unavailing. An examination of the relevant document Canada to which refers (*i.e.*, Decree 259-2015) demonstrates that it was not a blanket authorization permitting the export of all timber from the specified regions in Quebec.[288] Rather, the export of timber was permitted only when "no operator of a wood processing plant located in Quebec has shown interest in purchasing these volumes of timber," and "in the absence of an opportunity to send

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[287] Government of Quebec Initial Questionnaire Response (March 13, 2017), Exhibit QC-STUMP-20 ("Sustainable Forest Development Act") (Exhibit USA-057).

[288] *See* Decree 259-2015 (Exhibit CAN-500), pp. 1-2.

these volumes of timber to one or more wood processing plants outside of Quebec, they would have to remain in the felling areas and would hamper forest development activities."[289]

197. Because a harvester wishing to export logs for milling outside of Quebec must first demonstrate that the harvester could "not find a buyer,"[290] sawmills located outside of Quebec would be disincentivized from purchasing timber in Quebec at auction. A sawmill purchasing Crown timber at auction would not have any guarantee, at the time of bid, that it would "not [be able to] find a buyer" in Quebec, and thus could not guarantee that timber purchased at auction could be milled by the sawmill outside of Quebec. As the USDOC explained in the final issues and decision memorandum:

> More importantly with respect to the Québec auction, under 19 CFR 351.511(a)(2)(i), the Department will only use actual sales prices from competitively run government auctions as a tier-one benchmark. The Department verified that timber purchased at the auctions must be milled within Québec. This is a substantial restriction that demonstrates that the Québec auction is not an open, competitively run auction. This restriction effectively excludes potential bidders that would mill the timber outside of Québec, and would exclude bidders that would want to sell the timber (either harvested, or the harvested logs) for milling outside of the province. Furthermore, limiting bidders suppresses auction bids, because bidders understand that there are fewer parties against which their bid will compete. Thus, instead of implementing an auction based solely on an open, market-based competitive process, the [Government of Quebec] created an auction based upon a government-implemented policy to ensure that the timber is milled within the province. Therefore, even if the Québec stumpage market was not distorted, the Québec auction prices would not meet the regulatory criteria as an appropriate benchmark as set forth under 19 CFR 351.511(a)(2)(i).[291]

198. Moreover, even once a harvester wishing to export logs for milling outside of Quebec has demonstrated that it could "not find a buyer," the maximum volume of timber permitted to be

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[289] Decree 259-2015 (Exhibit CAN-500), pp. 1-2.

[290] Decree 259-2015 (Exhibit CAN-500), p. 2.

[291] Lumber Final I&D Memo, pp. 102-103 (Exhibit CAN-010) (footnotes omitted).

exported out of the province for milling is capped to an "annual quantity of up to 50,000 m^3 of pine, 26,000 m^3 of hemlock, 86,000 m^3 of thuya (cedar), and 238,000 m^3 of hardwood."[292]

199. Accordingly, the decree does not eliminate the export restriction, but rather merely modifies it. That modification continues to disincentivize participation in the auctions by those who wish to mill the purchased timber outside of Quebec, and forces those who would otherwise harvest and export timber to instead sell to millers inside Quebec if available (or if over the annual export cap). In light of continued restrictions on the export of timber even from the two regions subject to the decree, the USDOC's determination that auction participation is disincentivized by the export restriction remains supported by positive evidence on the record before the USDOC.

5 THE USDOC'S REJECTION OF PRIVATE MARKET STUMPAGE PRICES IN NEW BRUNSWICK AS A STUMPAGE BENCHMARK

63. <u>To the United States</u>: At paragraph 488 of its first written submission, Canada asserts that:

> **Commerce has historically found New Brunswick to have market-determined prices for Crown standing timber. In fact, Commerce even relied on private prices in New Brunswick as part of the benchmark for other Canadian provinces in previous administrative reviews relating to softwood lumber. New Brunswick continues to maintain the same system for setting the price of Crown standing timber that it had in those reviews. (footnotes omitted)**

Please respond to Canada's assertions.

<u>Response</u>:

200. Canada's statement at paragraph 488 of its first written submission fails to take into account any of the USDOC's findings and analysis from the underlying investigation. It may be the case that in prior investigations of softwood lumber from Canada, the USDOC has found that New Brunswick had market-determined prices for Crown timber.[293] It may also be the case that New Brunswick maintains the same system for setting the price of Crown standing timber as in

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[292] Lumber Final I&D Memo, pp. 102-103 (Exhibit CAN-010).

[293] *See, e.g.*, *First Administrative Review of the Countervailing Duty Order on Certain Softwood Products from Canada – Issue and Decision Memorandum*, dated December 13, 2004 (Exhibit CAN-222); *Second Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada*, dated December 12, 2005 (Exhibit CAN-223).

those prior proceedings – *i.e.*, surveying stumpage prices in the private market.[294] However, other significant changes have occurred.

201. Positive record evidence in this investigation demonstrated that New Brunswick's intervention in the Crown stumpage market has changed since 2005 (the time when the most recent of the prior proceedings concluded, in which the USDOC determined that New Brunswick had market-determined prices for Crown timber). In particular, the record of this investigation demonstrated that during the period of investigation, the provincial government supplied roughly 50 percent of timber harvested in the province. During the 2004-2005 fiscal year, timber harvested from Crown forests accounted for 37.4 percent of timber consumed.[295] Moreover, New Brunswick officials recognized a concerning trend in the provincial stumpage market: the leverage of private mills as dominant consumers, which suppressed prices from private woodlots, in turn leading to an artificially low Crown stumpage price.[296]

202. In particular, the *Report of the Auditor General – 2008* concluded that:

> The fact that the mills directly or indirectly control so much of the source of the timber supply in New Brunswick means that the market is not truly an open market. In such a situation it is not possible to be confident that the prices paid in the market are in fact fair market value. … [T]he royalty system provides an incentive for processing facilities to keep prices paid to private land owners low.[297]

203. New Brunswick officials continued to have similar concerns about the trends in the stumpage market in 2012. The *2012 PFTF Report*, for example, concurred with the Auditor General's 2008 findings:

> New Brunswick's forest products market combines aspects of a bilateral monopoly (a single dominant seller, the Crown; and a single dominant buyer, J.D. Irving, Ltd.) and an oligopsony (many small sellers, the private woodlot owners; and a few buyers, the mills, which purchase from both private woodlot owners and the Crown.) Two parties dominate the transactions, and prices for a

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[294] Government of New Brunswick Initial Questionnaire Response, pp. 10-11 (Exhibit CAN-240).

[295] Lumber Final I&D Memo, pp. 80 and footnote 478, 81 (Exhibit CAN-010); *Report of the Auditor General – 2008*, Chapter 5, p. 152 (Exhibit CAN-282).

[296] Lumber Final I&D Memo, p. 81 (Exhibit CAN-010).

[297] Lumber Final I&D Memo, p. 81 (Exhibit CAN-010); *see also Report of the Auditor General – 2008*, Chapter 5, p. 151 (Exhibit CAN-282).

> large proportion of the total harvest are set administratively. Thus it is difficult to establish fair market value.[298]

204. Moreover, in 2015, the period of investigation, New Brunswick officials still could not guarantee that its private stumpage prices were fair, market-determined prices. In fact, the *Report of the Auditor General – 2015* concludes that the provincial government has contributed to the ongoing divergence between private woodlot sales and Crown harvest. The report notes that the government has "potentially conflicting interests" because "the most significant source of departmental revenue is Crown timber royalties, [and thus] any increase in Crown timber supports the Department's efforts to balance budgets."[299]

205. The Auditor General in 2015 additionally found that New Brunswick had "failed to ensure private wood supplied to mills is proportionate," in violation of the *Crown Lands and Forests Act*, which required that New Brunswick "ensure the wood supply from private woodlots is proportional to that from Crown land and the yield can be sustained."[300] Although the provincial government had mechanisms available to it to address shortfalls in purchases of wood from private woodlots, the Auditor General found that the provincial government has "never taken action under these sections of the Crown Lands and Forests Act."[301]

206. In sum, although the USDOC has historically found New Brunswick to have market-determined prices for Crown standing timber, information on the record of this investigation, discussed above and in USDOC's final issues and decision memorandum,[302] indicated that those prices were no longer market-determined.

64. <u>To the United States</u>: At paragraph 543 of its first written submission, Canada asserts that:

> **The volume of unharvested Crown supply did not and could not cap private market stumpage prices because timber purchasing decisions are based on the full, delivered cost of a log to a mill, not the stumpage cost alone. That is, as discussed in the introduction to part III, as a residual price, private**

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[298] "New Approaches for Private Woodlots – Reframing the Forest Policy Debate, Private Task Force Report" ("*2012 Private Forest Task Force Report*" or "*2012 PFTF Report*"), pp. 32-33 (Exhibit CAN-245).

[299] "Report of the Auditor General – 2015, Volume II, Chapter 4: Department of Natural Resources Private Wood Supply" (Petition Exhibit 224) ("*Report of the Auditor General – 2015*"), p. 197 (Exhibit CAN-235).

[300] *Report of the Auditor General – 2015*, pp. 176 and 181 (Exhibit CAN-235) (recommending that New Brunswick "comply with the *Crown Lands and Forests Act* and regulations in meeting their responsibilities related to proportional supply and sustained yield.").

[301] *Report of the Auditor General – 2015*, p. 199 (Exhibit CAN-235).

[302] *See* Lumber Final I&D Memo, pp. 78-86 (Exhibit CAN-010).

> **market stumpage prices are determined by the variable cost of the delivered log, not the stumpage price being charged for other standing timber that the mill might harvest. Commerce's analysis ignored this and, in doing so, ignored the way that the market for standing timber functions in New Brunswick.**

Please respond to Canada's assertions.

Response:

207. Canada's assertion at paragraph 543 of its first written submission is unavailing. The USDOC determined, based on ample record evidence, that "private stumpage prices in New Brunswick are distorted, and are not suitable for use as tier-one benchmarks."[303] Specifically, the USDOC found that the flexible supply of Crown timber, in conjunction with the market dominance of a few firms, yielded private stumpage prices that were not market-determined.[304] This determination was consistent with conclusions reached by New Brunswick officials, as discussed above in the U.S. response to question 63.

208. Notably, Canada supports its assertion that "private market stumpage prices are determined by the variable cost of the delivered log, *not* the stumpage price being charged for other standing timber that the mill might harvest" by relying upon the Kalt Report.[305] The Government of New Brunswick and JDIL did not rely on the Kalt Report to support their position, so the USDOC did not address the argument Canada now makes to the Panel, nor did the USDOC discuss the Kalt Report in connection with its assessment of whether private stumpage prices in New Brunswick should be used as tier-one benchmarks.[306] Nevertheless, elsewhere in the final issues and decision memorandum, the USDOC found that, because the Kalt Report was commissioned for the purpose of the investigation, it carried only limited weight given its potential for bias, and data and conclusions that were tailored to generate a desired result.[307] In contrast, the USDOC was presented with reports commissioned by New Brunswick in its ordinary course of business, and these official reports contradict the conclusions in the Kalt Report on which Canada relies. Accordingly, it was appropriate for the USDOC to accord greater weight to the reports prepared in the ordinary course of business than to the Kalt Report,

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[303] Lumber Final I&D Memo, p. 78 (Exhibit CAN-010). *See also ibid.,* pp. 78-86.

[304] Lumber Final I&D Memo, pp. 78-86 (Exhibit CAN-010).

[305] Canada's First Written Submission, para. 543 (italics in original) and footnote 998.

[306] *See* Lumber Final I&D Memo, pp. 78-86 (Exhibit CAN-010).

[307] *See, e.g.,* Lumber Final I&D Memo, p. 145 (Exhibit CAN-010).

which was commissioned specifically for the purpose of the investigation, and to which the Government of New Brunswick and JDIL did not refer.[308]

65. <u>To the United States</u>: At paragraph 202 of its first written submission, the United States asserts that:

> **In terms of government market share, the USDOC found that, based on relevant evidence from New Brunswick's Report of the Auditor General – 2008, the 2012 PFTF Report, and the Report of the Auditor General – 2015, "private Forest accounted for 38.1 percent; First Nation accounted for 3.25 percent; and log imports (from the United States another Canadian Provinces) accounted for 8.7 percent." (footnotes omitted)**

At paragraph 165 of its first written submission, the United States asserts that:

> **Regardless of the limitation to particular Registered Buyers, however, the USDOC found that the approximately 36 percent of the private softwood volume represented by the Nova Scotia survey was "sufficiently robust and representative" of the stumpage market in the province. Moreover, Canada points to no evidence supporting a conclusion that the prices reported in the survey were skewed because they were not geographically representative of harvest volumes in Nova Scotia. (footnotes omitted)**

Please explain on what basis "approximately 36 percent of the private softwood volume" in Nova Scotia referred to above was deemed sufficient as a basis for the benchmark whereas the private market share in New Brunswick was not deemed sufficient.

<u>Response</u>:

209. Paragraph 202 of the U.S. first written submission discusses the market share attributable to each category of supplier (*e.g.*, government, private, etc.) in New Brunswick.[309] As discussed

[308] *See, e.g.,* Lumber Final I&D Memo, p. 146 (Exhibit CAN-010).

[309] U.S. First Written Submission, para. 202.

in paragraph 202 (and in the final issues and decision memorandum at page 79), the USDOC found that 38.1 percent of logs consumed in New Brunswick came from private land.[310]

210. Paragraph 165 of the U.S. first written submission, by contrast, refers to "36 percent of the private softwood volume" in Nova Scotia in describing the size of the sample captured by the Deloitte survey.[311] Paragraph 165 does not describe the market share or the proportion of Nova Scotia's market that is supplied by private suppliers. Those numbers would be much higher.

211. During calendar year 2015, the total volume of timber harvested in Nova Scotia was 2,989,540 m^3, and the total volume of timber consumed in the province during the same period was approximately **[[BCI]]** m^3.[312] Of this, 1,941,156 m^3 were harvested from private woodlots.[313] Accordingly, during calendar year 2015, approximately 65 percent of all timber harvested in Nova Scotia was of private origin, and approximately **[[BCI]]** percent of all timber consumed in the province was of private origin.[314] Thus, the percentage of private timber consumed in Nova Scotia is significantly larger than the 38.1 percent of private timber consumed in New Brunswick.

66. To the United States: On the one hand, the USDOC argues that New Brunswick should have enforced more private holding purchases, as Crown and private purchases should have remained aligned. On the other hand, the USDOC argues that the market is distorted because buyers could have bought a lot more from the Crown. Please indicate how these two arguments can be reconciled.

Response:

212. There is no inconsistency between the two USDOC findings summarized in the Panel's question. The apparent tension is the result of the New Brunswick stumpage system failing to operate in conformity with the provincial system design. The USDOC took into account that

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[310] *See* Lumber Final I&D Memo, p. 79 and footnotes 473 and 475 (Exhibit CAN-010); Lumber Preliminary Decision Memorandum, p. 34 (Exhibit CAN-008) ("data from the GNB for FY 2015-2016 indicate that that softwood harvest volume breaks down as follows: 49.9 percent from Crown lands, 38.1 percent from the private forest, 3.25 percent from First Nations sources, and 8.7 percent of logs imported into the province from the United States and other Canadian provinces").

[311] Lumber Final I&D Memo, p. 123 (Exhibit CAN-010).

[312] *See* NS Aggregate Harvest, NS-1 (Exhibit USA-035 (BCI)). Because the total volume of logs sourced from the United States or other Canadian provinces is proprietary information, but all other categories of timber harvested from Nova Scotia contain public volumes, revealing the total volume of timber harvested from and consumed in Nova Scotia would reveal the proprietary volume of logs sourced from the United States and other Canadian provinces.

[313] *See* NS Aggregate Harvest, NS-1 (Exhibit USA-035 (BCI)).

[314] NS Aggregate Harvest, NS-1 (Exhibit USA-035 (BCI)).

there was a disparity between the intended functioning of a provincial policy and the functioning of that policy in practice. When the New Brunswick Auditor General and the Forest Task Forces examined similar questions, they concluded that significant disparities could be observed, and that the process of implementing the intended reforms had not yet changed the conditions in the stumpage market as planned.

213. The USDOC found that the excess availability of Crown timber to harvesters in New Brunswick diminished their need for private timber.[315] As the Panel's question puts it, "buyers could have bought a lot more from the Crown." That is, sawmills' ability to purchase additional Crown timber at administered prices diminished their need to rely upon private timber to meet their processing needs. The resulting increase in sawmills' purchases of Crown timber and decrease in purchases of private timber necessarily altered the proportion of timber sourced by sawmills from Crown and private land. Thus, the percentage of sawmills' Crown and private purchases did not remain aligned, or proportional, as required by the *Crown Lands and Forests Act*.[316]

214. The USDOC concluded that:

> the evidence on the record established that [New Brunswick] held a majority share of the market for stumpage in New Brunswick, and that it restricted eligibility for Crown stumpage rights to companies that operate pulp and paper or lumber mills. Moreover, the Department found that the evidence established that private woodlot owners supplied a much smaller share of the New Brunswick stumpage market than the government, and that the mills' status as the dominant consumers of stumpage creates an oligopsony effect, such that both private woodlot owners and the Crown are responsive to price-setting behavior by the dominant mills. Further, the Department found that private woodlots were a supplemental source of supply for the tenure-holding mills in New Brunswick because an "overhang" existed with regard to the volume of Crown-origin standing timber allocated to tenure holders. As such, the Department concluded that tenure-holding mills could harvest additional Crown timber if needed and, thus, given this additional supply of Crown-origin standing timber,

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[315] Lumber Final I&D Memo, p. 83 (Exhibit CAN-010).

[316] "Report of the Auditor General – 2015, Volume II, Chapter 4: Department of Natural Resources Private Wood Supply" (Petition Exhibit 224) ("*Report of the Auditor General – 2015*"), pp. 176 and 181 (Exhibit CAN-235) (recommending that New Brunswick "comply with the *Crown Lands and Forests Act* and regulations in meeting their responsibilities related to proportional supply and sustained yield.").

> private woodlot owners served mainly as a supplemental source of supply to the large mills and, consequently, could not expect to charge prices higher than Crown stumpage prices.[317]

215. The USDOC based this finding in part on statements from the New Brunswick Auditor General. In the first place, the New Brunswick Auditor General found that "the leverage of private mills as dominant consumers suppresses prices from private woodlots, and that those suppressed private prices lead to an artificially low 'market-based' price for Crown stumpage."[318] Second, the New Brunswick Auditor General explained the following:

> The fact that the mills directly or indirectly control so much of the source of the timber supply in New Brunswick means that the market is not truly an open market. In such a situation it is not possible to be confident that the prices paid in the market are in fact fair market value...the royalty system provides an incentive for processing facilities to keep prices paid to private land owners low.[319]

216. The USDOC also "credited the conclusion in the *Report of the Auditor General – 2015*" that:

> [New Brunswick] has not complied with its responsibilities under the *Crown Lands and Forests Act*, because it has not enforced that *Act's* requirement that private woodlots maintain their proportional supply of the market over time (*i.e.*, that private woodlot owners had not sold a sufficient volume of standing timber relative to Crown-origin standing timber).[320]

217. The USDOC noted the Auditor General's conclusion that although New Brunswick "has mechanisms available to it to address shortfalls in purchases of wood from private woodlots . . . [New Brunswick] has 'never taken action under these sections of the *Crown Lands and Forests*

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[317] Lumber Final I&D Memo, p. 79 (Exhibit CAN-010).

[318] Lumber Final I&D Memo, p. 79 (Exhibit CAN-010) (citing *Report of the Auditor General – 2008*).

[319] Lumber Final I&D Memo, p. 81 (Exhibit CAN-010) (citing *Report of the Auditor General – 2008*).

[320] Lumber Preliminary Decision Memorandum, pp. 21-22 (Exhibit CAN-008) (citing *Report of the Auditor General – 2015* (Exhibit CAN-235) and *Memorandum to Ronald K. Lorentzen from Gary Taverman subject Issues and Decision Memorandum for the Final Results of Expedited Review of the Countervailing Duty Order on Supercalendered Paper from Canada* (April 17, 2017) ("*SC Paper from Canada – Expedited Review*, Final I&D Memo") (Exhibit USA-038)).

Act.'"[321] In other words, as the Panel's question puts it, "New Brunswick should have enforced more private holding purchases, as Crown and private purchases should have remained aligned." Again, this was the conclusion of the New Brunswick Auditor General.

218. In sum, once again using the phrasing of the Panel's question, New Brunswick's market is distorted "because buyers could have bought a lot more from the Crown", and it was possible for buyers to do so because "New Brunswick should have enforced [but failed to enforce] more private holding purchases, as Crown and private purchases should have remained aligned" to achieve the stated goals of the New Brunswick stumpage system.

67. <u>To the United States</u>: At paragraph 208 of its first written submission, the United States asserts, in relevant part, that:

> **Specifically, the USDOC found that:**
>
> **Crown tenure holders harvested significantly less than their allocated volume of Crown-origin standing timber during calendar year 2014: on average, tenure holders harvested only approximately 47 percent of their Crown-origin standing timber allocation during calendar year 2014.**

The USDOC also indicated that the overhang in New Brunswick was also 47%. Please indicate how these two figures can be reconciled.

<u>Response</u>:

219. In the passage of the final issues and decision memorandum quoted at paragraph 208 of the U.S. first written submission, the USDOC inadvertently misstated the percentage of Crown timber harvested and the relevant year of harvest. The correct figures are as follows: during fiscal year 2015-2016, New Brunswick tenure holders harvested 53 percent of their Crown-origin stumpage volume, leaving a 47 percent overhang.[322] This is reflected correctly in the preliminary decision memorandum and the New Brunswick Market Memorandum. The United States regrets the confusion this error has caused.

68. <u>To Canada</u>: At paragraph 549 of its first written submission, Canada asserts, in relevant part, that:

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[321] Lumber Preliminary Decision Memorandum, pp. 21-22 (citing *Report of the Auditor General – 2015* (Exhibit CAN-235) and *SC Paper from Canada – Expedited Review* and *Report of the Auditor General – 2015*) (Exhibit CAN-008).

[322] Lumber Preliminary Decision Memorandum, p. 35 (Exhibit CAN-008). *See also* Market Memorandum, New Brunswick attachment, Table 1.1 (Exhibit USA-036 (BCI)).

> **It is entirely plausible that the unharvested volume of Crown timber in New Brunswick in 2015 existed because its delivered cost (variable costs plus Crown stumpage cost) exceeded the value of the log to mills, making it uneconomic to harvest.**

Please identify record evidence showing that the unharvested volume of Crown timber in New Brunswick in 2015 was uneconomic to harvest. In particular, please point to record evidence showing that the "delivered cost (variable costs plus Crown stumpage cost)" of the unharvested volume of Crown timber in New Brunswick in 2015 "exceeded the value of the log to mills".

Response:

220. This question is addressed to Canada.

69. To Canada: At paragraph 547 of its first written submission, Canada asserts that:

> **On balance, the greater distance of Crown land to mills increases the variable cost of Crown timber, decreasing the amount that timber purchasers will be willing to pay for stumpage. The same principle holds true for other variable costs—as harvesting costs go up, stumpage prices will go down.**

Please identify record evidence showing that proximity to mills influences consumers' purchasing decisions.

Response:

221. This question is addressed to Canada.

70. To Canada: At paragraph 234 of its first written submission, the United States argues, in relevant part, that:

> **Specifically, the USDOC (and the New Brunswick Auditor General) determined that dominant consumers can source cheaper timber from Crown lands, and have an incentive to source only cheap timber – not close-by timber – from private woodlots. In other words, the USDOC found that the availability of additional supply is indeed sufficient to influence the relative demand. (footnotes omitted)**

Please respond to the United States' argument.

Response:

222. This question is addressed to Canada.

71. <u>To both parties</u>: At paragraph 32 of its third-party written submission, the European Union states, in relevant part, that:

> **The EU also does not agree with the USDOC's argument that the small number of consumers (i.e. a concentrated private market) would be evidence that these consumers align more easily with government prices or that prices are necessarily suppressed. The EU fails to see the logic behind that argument. If the private market share is large enough to be "independent" of the government market, the fact that the private market is made up of a smaller or larger number of companies should in principle not be of particular relevance. Even if prices in a market with only a few private buyers of standing timber are suppressed, this does not necessarily mean that those prices are not market determined. The lower prices simply reflect the higher market power of the purchasers and hence are a function of supply and demand in that market. (footnotes omitted)**

Please provide your views on the European Union's position.

<u>Response</u>:

223. The United States has addressed questions 48 and 71 together in the U.S. response to question 48.

72. <u>To the United States</u>: At paragraph 191 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **When harvested pulpwood is properly accounted for, the true volume of unharvested Crown timber available falls to 13.8%. That is a vastly different number than Commerce's 47. (footnotes omitted)**

Please respond to Canada's assertion.

<u>Response</u>:

224. The basis for Canada's assertion is unclear. In any case, the investigation in this dispute was concerned with investigating subsidies to softwood lumber, not pulpwood. Accordingly, the USDOC's analysis evaluated the inputs for softwood lumber, including softwood sawables. Pulpwood is not an input to softwood lumber, and thus the USDOC found it irrelevant whether

tenure holders harvested more pulpwood than softwood sawable timber. Specifically, the USDOC found that "other inputs that would not be used in the production of softwood lumber, such as pulpwood or chips, would skew the results, and would not reflect the market conditions for the producers of subject merchandise."[323]

73. To the United States: At paragraph 201 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **No explanation is offered as to how mills could successfully suppress Crown prices when they have no control over the North America lumber Price Indexes on which New Brunswick relies. There is no reason to believe this could be a successful strategy for mills, and there is no evidence to suggest that they attempted it.**

Please respond to Canada's assertion.

Response:

225. Canada's assertion is misleading. Crown stumpage prices in New Brunswick are set using a survey of private stumpage transactions, and merely adjusted from the year of the survey to the present year by means of the North American Lumber Price Index.[324] Accordingly, the price indices are only one component of the Crown stumpage price. The USDOC made no suggestion that mills might have control over the North American lumber price indices. Although participants in the New Brunswick stumpage market may not have control over those indices, they do have control over the private stumpage transaction prices to which the indices are applied.

74. To the United States: At paragraph 202 of its opening statement (Day 1), Canada asserts that:

> **[T]he evidence shows that mills did not carry out most private stumpage purchase transactions. Independent harvesters**

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[323] Lumber Final I&D Memo, p. 81 (Exhibit CAN-010).

[324] *See* Government of New Brunswick Initial Questionnaire Response, pp. 4-11 (Exhibit CAN-240); *see also Report of the Auditor General – 2008*, Chapter 5, pp. 149-150 (Exhibit CAN-282) ("To set the royalty rates, the Department uses a two-part process. The first part of the process is based on a price survey. The Department hires a consulting firm periodically to survey the stumpage values of timber harvested from private woodlots…. Since the stumpage surveys are not annual, the Department applies a second process in years when surveys are not conducted. The Department monitors changes in the selling prices of timber products that are bought and sold in formal markets; they determine the change in the selling price indices of these products and apply them to the previous year's royalty schedule.").

> **purchase the vast majority of the standing timber in New Brunswick. Mills, in contrast, purchase most of their timber as delivered logs from independent harvesters. The standing timber purchase transaction most frequently occurs between private landowners and independent harvesters, not mills. Neither Commerce nor the United States explain how mills could suppress private stumpage prices when they do not participate in most stumpage transactions. (footnotes omitted)**

Please respond to Canada's assertion.

Response:

226. Canada fails to take into account the explanation provided by the USDOC regarding the pricing dynamics in New Brunswick.[325] Regardless of whether the majority of private timber was purchased by independent harvesters, rather than by mills directly, the USDOC found that because private woodlot owners supplied a much smaller share of the New Brunswick stumpage market than the government, an overhang existed with regard to the unharvested volume of Crown-origin timber allocated to tenure holders, and certain mills were the dominant consumers of stumpage, so "private woodlot owners … could not expect to charge prices higher than Crown stumpage prices."[326] This would also be true of harvesters purchasing private timber to sell to mills. Because mills had an additional, untapped supply of Crown-origin standing timber (*i.e.*, the overhang amount), they had no incentive to purchase from independent harvesters at prices that were significantly above Crown prices. This would, in turn, suppress the prices independent harvesters were willing to pay to private landowners for stumpage.[327]

227. Canada essentially argues that there is no link between the mills' behavior, the Crown prices, and the private transactions. But the USDOC's final issues and decision memorandum explains the link quite clearly. The USDOC found that the significant percentage of allocated Crown timber left un-harvested provided a fallback supply for tenure-holding mills when private prices exceeded Crown stumpage prices.[328] Because these mills were the predominant consumers of private-origin timber, by not purchasing sawlogs harvested from private woodlots by middlemen when those sawlog prices were more expensive than harvesting additional allocated Crown timber, those mills could exert downward pressure on the stumpage prices paid by those middlemen. These observations are also consistent with the *2012 Private Forest Task*

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[325] *See* Lumber Final I&D Memo, p. 83 (Exhibit CAN-010). *See also* U.S. First Written Submission, para. 222.

[326] Lumber Final I&D Memo, p. 79 (Exhibit CAN-010).

[327] *See* U.S. First Written Submission, para. 222.

[328] Lumber Final I&D Memo, p. 83 (Exhibit CAN-010).

Force Report and the reports by the Auditor General.[329] Therefore, record evidence supported the USDOC's conclusion that these dominant mills could suppress stumpage prices through both their direct purchases of stumpage from private woodlots and their indirect purchases of stumpage.[330]

75. To the United States: At paragraph 204 of its opening statement (Day 1), Canada asserts that:

> **[T]he 2008 report claimed that mills "would" have an incentive to "keep the prices paid to private landowners low since those prices affect royalties". The report did not say that mills "do" or "did" have an incentive to suppress prices. Nor did it cite any evidence of mill behaviour, whether empirical or anecdotal, to support its statement. It simply just made an *assumption* of how mills behaved. (footnotes omitted)**

Please respond to Canada's assertion.

Response:

228. Canada's assertion lacks merit. Examining the underlying documents makes clear that Canada's selective quotations do not convey an accurate representation of the Auditor General's findings. The USDOC addressed this argument in the final issues and decision memorandum,[331] and the U.S. first written submission addresses this argument as well.[332]

229. The role of the private mills is not merely based on assumption. Rather, the reports that New Brunswick commissioned itself "provide[d] reliable analyses of facts pertaining to private stumpage prices in the province" and were prepared by "individuals who were familiar with the stumpage market in New Brunswick."[333] The analysis in the reports speaks for itself and directly demonstrates that the conclusions reached by the Auditor General (and the forest task force) are not simply assumptions.

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[329] *See* U.S. First Written Submission, paras. 222-223.

[330] *See* U.S. First Written Submission, para. 222.

[331] Lumber Final I&D Memo, pp. 81-82 (Exhibit CAN-010).

[332] *See* U.S. First Written Submission, paras. 223-231.

[333] Lumber Final I&D Memo, pp. 81-82 (Exhibit CAN-010).

230. Canada's characterization of the 2008 Auditor General report, in particular, is not credible and is contradicted in several respects by the report itself.[334] Indeed, the Auditor General stated in the "Conclusions" section of its report that "the flaws in the [timber royalty] system mean that the royalties do not reflect fair market value."[335] The report's conclusion that "the royalties do not reflect fair market value" took into account the fact that timber royalty rates in the province are set based on private prices in the province and thus is directly relevant to the USDOC's analysis. For example, the Auditor General stated that "[t]he fact that the mills directly or indirectly control so much of the source of timber supply in New Brunswick means that the market is not truly an open market."[336] This language is, plainly, stating facts (the mills control of the source of timber supply) and drawing conclusions (that the market is not truly open). Further, that this statement draws conclusions from facts is unsurprising, because this statement, and others upon which the USDOC relied were "in the 'Analysis' section of the report," and "were provided following a presentation of key facts (in the 'Understanding Royalty Timbers' section of the report) about the New Brunswick market. These key facts included details regarding the percentage of land holdings, the total harvest volume, the royalty fees paid, as well as a discussion of the process to set royalty rates."[337]

231. Paragraphs 5.35. 5.36, and 5.37 of the 2008 Auditor General report, read together, further demonstrate that Canada's assertion is wrong. In paragraph 5.35 of the report, the Auditor General states:

> As we have already described, timber royalties are based on a survey of the stumpage prices received by private landowners – a segment of the market that supplied 11.6% of the timber consumed by mills in New Brunswick in the fiscal year ended 31 March 2007. The price that is paid to the private landowners determines the price the mills will pay to the Province for timber harvested from Crown land which represents 41.5% of their source of supply. This would provide an incentive for the mills to keep the prices paid to private landowners as low as possible since those prices affect the royalties that would have to be paid in the future.[338]

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[334] *See* Canada's First Opening Statement (Day 1), para. 204; Canada's First Written Submission, para. 566 and paras. 567-573, 575, 581, and 582-587.

[335] *Report of the Auditor General – 2008*, para. 5.14 (Exhibit CAN-282).

[336] Lumber Final I&D Memo, p. 81 (Exhibit CAN-010) (underline added).

[337] Lumber Final I&D Memo, p. 82 (Exhibit CAN-010).

[338] *Report of the Auditor General – 2008*, para. 5.35 (Exhibit CAN-282) (underline added).

232. This paragraph illustrates that, in the "Analysis" section of the report, the Auditor General is taking facts (the setting of timber royalties and mills' percentage of Crown supply) and drawing conclusions (that the timber royalty system, in conjunction with the percentage of timber that mills sourced from Crown land, would incentivize mills to keep prices for private timber low).

233. In paragraph 5.36, the Auditor General concludes that, because "the mills directly or indirectly control so much of the source of timber supply in New Brunswick . . . it is not possible to be confident that the prices paid in the market are in fact fair market value."[339]

234. Paragraph 5.37 then reads:

> This flaw in the design of the system for establishing timber royalties could create a second problem. Under subsection 3(2) of the *Crown Lands and Forests Act*, "The Minister shall encourage the management of private forest lands as the primary source of timber for wood processing facilities in the Province..." If however the royalty system provides an incentive for processing facilities to keep prices paid to private land owners low, the result may be fewer private land owners who are willing to supply timber to New Brunswick mills. Crown land would then become a greater source of supply thereby creating an obstacle to the Minister in attempting to encourage private sources as the primary source of supply.[340]

235. Thus, this paragraph takes two conclusions already reached by the Auditor General – that "it is not possible to be confident that the prices paid in the market are in fact fair market value,"[341] and that "the royalty system provides for an incentive for processing facilities to keep prices paid to private landowners low," discussed at paragraph 5.35 – and further concludes that, because of those two market dynamics, "Crown land would [in the future] . . . become a greater source of supply," thereby impeding the provincial authority in executing its statutory directive to encourage private stumpage as the primary source of timber.[342]

236. When the USDOC quoted the report's conclusion in paragraph 5.37 that "the royalty system provides an incentive for processing facilities to keep prices paid to private land owners

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[339] *Report of the Auditor General – 2008*, para. 5.36 (Exhibit CAN-282) (underline added).

[340] *Report of the Auditor General – 2008*, para. 5.37 (Exhibit CAN-282) (underline added).

[341] *Report of the Auditor General – 2008*, para. 5.36 (Exhibit CAN-282).

[342] *Report of the Auditor General – 2008*, para. 5.37 (Exhibit CAN-282).

low," the USDOC was quoting a conclusion that mirrors the very same conclusion reached only two paragraphs earlier in paragraph 5.35.[343] The USDOC reasoned, accordingly, that the *Report of the Auditor General – 2008* reached conclusions that stumpage prices paid in the province could not be "confident[ly]" deemed to be fair market value, and that "[t]he royalty system provides an incentive for processing facilities to keep prices paid to private landowners low."[344] This analysis by the USDOC and the analysis contained in the Auditor General's report go far beyond mere assumption.

76. <u>To the United States</u>: At paragraph 206 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **[T]he contrary and more current evidence regarding participation rates, price indexing, independent harvesters, and the high price elasticity of private woodlot supply shows that mills did not, and could not, distort private market prices.**

Please respond to Canada's assertion.

<u>Response</u>:

237. Canada's assertion lacks evidentiary support. Canada provides no citations in this paragraph to any evidence, and provides no further basis upon which to rely on Canada's conclusory statement. The USDOC addressed in detail why the sources on which Canada relies to support its arguments concerning New Brunswick were either deficient in their own right or inferior to the official reports of the New Brunswick Auditor General. The United States has addressed the issues with the sources on which Canada relies in the U.S. responses to questions 73-75, 63, 64, and 66. The United States refers the Panel to those responses.

77. <u>To the United States</u>: At paragraph 578 of its first written submission, Canada asserts, in relevant part, that:

> **[I]n particular, Commerce relied on a statement in the 2008 AG Report that, "the fact that the mills directly or indirectly control so much of the source of the timber supply in New Brunswick means that the market is not truly an open market." However, the record evidence suggests the opposite, as there were a significant volume of private sector suppliers of standing timber in 2015, a significant number of independent**

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[343] *See* Lumber Final I&D Memo, p. 81 (Exhibit CAN-010) (quoting *Report of the Auditor General – 2008*, para. 5.37).

[344] Lumber Final I&D Memo, p. 81 (Exhibit CAN-010).

> **harvesters who directly purchased standing timber, and a significant volume of exports and imports. (footnotes omitted)**

Please respond to Canada's assertions above. In providing your response, please also consider Canada's assertion, in paragraph 584 of its first written submission, regarding the share of sales that private woodlots owners made directly to private mills in comparison to the share of their sales to independent harvesters in New Brunswick.

Response:

238. With respect to Canada's statement in paragraph 584 of its first written submission, which relies on a New Brunswick survey report, the U.S. responses to questions 74 and 75 have addressed Canada's assertions.

239. Canada's statement in paragraph 578 of its first written submission relies on a report by Dr. Kelly, which the USDOC considered and found to be unpersuasive, as explained in the final issues and decision memorandum.[345] Canada's statement in paragraph 578 suggests that the USDOC did not consider the 2008 Auditor General report in its "full context," but this is demonstrably false, as the U.S. response to question 75 shows. As a response to all of the findings of the 2008 Auditor General, Canada, in paragraph 578, offers Mr. Kelly and his expertise, *ad hominem*, based on a single assertion, in which Canada states: "In fact, after having turned his mind specifically to the question, Dr. Kelly concluded that the market was open."[346] Canada's assertion in paragraph 578 is without merit.

240. The USDOC specifically addressed and explained the deficiencies in the Kelly Report in the course of the investigation. First, with respect to evidence New Brunswick had submitted from Mr. Kelly in New Brunswick's initial and supplemental questionnaire responses, the USDOC requested the provincial government to be prepared to address the following at verification:

> Be prepared to discuss the study conducted by Professor Brian Kelly on behalf of the GNB, provided in NB-STUMP-13 of the FIS, including any guidelines Mr. Kelly followed in conducting this study.

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[345] *See* Lumber Final I&D Memo, pp. 82-83 (Exhibit CAN-010). *See also* Canada's First Written Submission, para. 578 (citing Kelly Report, pp. 8, 9, and 11 (Exhibit CAN-265 (BCI))). Canada's statement in paragraph 584 of its first written submission relies on a New Brunswick survey report. *See also* Canada's First Written Submission, para. 584 (citing New Brunswick Exhibit NB-STUMP-29 ("Distribution of Private Woodlot Stumpage to Mills for Two Survey Periods") (Exhibit CAN-243 (BCI))).

[346] Canada's First Written Submission, para. 578 (citing Kelly Report, pp. 8, 9, and 11 (Exhibit CAN-265 (BCI))).

> On pages 6 and 7 of the SQR1, the GNB states that Mr. Kelly relied upon information by the New Brunswick Forest Products Commission and the Forestry Division of the Government of New Brunswick. Please have all information provided to Dr. Kelly available at verification.
>
> On page 10 of the SQR1, the GNB indicates that an analysis concerning the effects of two marketing boards (not included in the Woodlot Survey) was not included in Mr. Kelly's report. Please be prepared to discuss this analysis, as well as any other analysis the results of which were not included in Mr. Kelly's final report.[347]

241. At verification, the provincial government provided responses to the foregoing questions, but with respect to the Kelly Report, the USDOC noted:

> The Department was told that all communication between Mr. Kelly, the GNB, and the GNB's counsel was subject to attorney-client privilege. As such, the GNB did not provide the requested correspondence for our review.[348]

242. The USDOC took note of the foregoing and completed the verification. In the final issues and decision memorandum, the USDOC addressed the parties' various arguments relating to the Kelly Report. The USDOC explained:

> Finally, the GNB points to a report prepared by Professor Brian Kelly (i.e., the Kelly Report), that "dispels the speculative concern that a small number of large New Brunswick mills, do, or can, artificially suppress prices." However, as noted in the GNB's case brief, the Kelly Report was commissioned by the GNB for the purposes of this investigation. The Federal Circuit, in evaluating whether a party's claim had been sufficiently corroborated with evidence in a patent case, opined that "contemporaneous documentary evidence provides greater corroborative value" in determining whether a party's litigation "story is credible." This is because evidence preceding the litigation eliminates "the risk of litigation-inspired fabrication or exaggeration" that may come

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[347] GNB Verification Report, p. 4 (Exhibit CAN-268 (BCI)) (italics removed).

[348] GNB Verification Report, p. 10 (discussing attempts to obtain further explanation and information from Mr. Kelly during verification) (Exhibit CAN-268 (BCI)). *See also* New Brunswick, Kelly Report, (Exhibit CAN-265 (BCI)).

> from later-developed evidence, intended to corroborate the party's story. We find that the Federal Circuit's concerns are equally applicable to evidence created for the purpose of an adjudicatory administrative proceeding such as this one. Although we consider all evidence on the record of a proceeding, in determining the weight to be accorded to a particular piece of evidence, we consider whether the evidence in question was prepared in the ordinary course of business, or for the express purpose of submission in the ongoing administrative proceeding. Because the Kelly Report was prepared for the express purpose of submission in this investigation, we find that it is at "risk of litigation-inspired fabrication or exaggeration," which diminishes its weight. Further, at verification, the GNB was unable to provide the Department with the guidelines or parameters that it provided to Mr. Kelly which would detail the goals or objectives of, and reveal the assumptions behind, the report. Accordingly, we have been unable to verify that, in directing Mr. Kelly to prepare this report, the GNB sought to avoid "litigation-inspired fabrication or exaggeration." In contrast with the Kelly Report, the reports discussed in the preceding paragraphs—the *Report of the Auditor General – 2008*; the *Report of the Auditor General – 2015*; and the *2012 PFTF Report*—were prepared in the GNB's ordinary course of business prior to this investigation, and, thus, are not tainted by the "risk of litigation-inspired fabrication or exaggeration." Thus, the Department continues to give greater weight to the *Report of the Auditor General – 2008*; the *Report of the Auditor General – 2015*; and the *2012 PFTF Report* than it does to the Kelly Report.[349]

243. With respect to whether or not independent harvesters directly purchased standing timber (as discussed in the U.S. response to question 74 above), the USDOC's analysis found that "private woodlot owners … could not expect to charge prices higher than Crown stumpage prices" because (1) private woodlot owners supplied a much smaller share of the New Brunswick stumpage market than the government, (2) an overhang existed with regard to the unharvested volume of Crown-origin timber allocated to tenure holders, and (3) certain mills were the dominant consumers of stumpage.[350] This would also be true of harvesters purchasing private timber to sell to mills. Because mills had an additional, untapped supply of Crown-origin standing timber (*i.e.*, the overhang amount), they had no incentive to purchase from independent

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[349] Lumber Final I&D Memo, pp. 82-83 (Exhibit CAN-010) (footnotes omitted).

[350] Lumber Final I&D Memo, p. 79 (Exhibit CAN-010).

harvesters at prices significantly above Crown prices. This would, in turn, suppress the prices independent harvesters were willing to pay to private landowners for stumpage.

244. Finally, the USDOC found the significant volume of exports and imports to be indicative of market distortion in the province. In particular, the USDOC found that the ability of mills to import logs provides the mills with even more leverage over the New Brunswick private stumpage market, because a significant volume – 53.6 percent – was JDIL's imports of logs from its own privately-held land in Maine.[351] In a prior determination, the USDOC found that JDIL is the largest landholder in Maine.[352] Thus, the USDOC found that, rather than indicating an open market, the ability of JDIL to import significant amounts of timber from Maine was "another indication that the large mills can obtain timber from several sources other than private woodlot owners in New Brunswick (including, in JDIL's case, from its own private holdings in other jurisdictions) if private woodlot owners in New Brunswick do not price their timber at sufficiently low prices."[353]

6 THE USDOC'S REJECTION OF AUCTION PRICES IN BRITISH COLUMBIA AS A STUMPAGE BENCHMARK

78. To the United States: At paragraph 395 of its first written submission, the United States asserts, in relevant part, that:

> **Thus, Canada's focus on the application approval rate is misleading, as the record evidence indicates that log suppliers negotiate side agreements with mills before they initiate an application for export.**

Please identify, on the record of these proceedings, the evidence referred to in the statement above.

Response:

245. The USDOC explained that "record information indicates that a 'blocking' system operates in the province . . . which creates an environment in which log sellers are forced into

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[351] Lumber Final I&D Memo, pp. 83-84 (Exhibit CAN-010); *see also* NB-STUMP-22, Part II (Exhibit CAN-238). A total of 334,253 m^3 of softwood lumber-inputs (SPF sawlogs, SPF studwood, cedar sawlogs, hemlock sawlogs, and white pine sawlogs) were imported by four corporations during 2015. Of that, 257,203 m^3 (76.9 percent) was imported by JDIL. Of JDIL's imports, 179,214 m3 was imported from Maine.

[352] *See SC Paper from Canada – Expedited Review*, Final I&D Memo, p. 84 (Exhibit USA-038).

[353] Lumber Final I&D Memo, p. 84 (Exhibit CAN-010).

informal agreements that lower export volumes and domestic prices."[354] The record information the USDOC relied upon included an article by Eric Miller, Global Fellow at the Woodrow Wilson International Center for Scholars' Canada Institute and former representative of the Business Council of Canada, which was submitted to the agency record by the petitioners but prepared independent of the investigation, in November 2016.[355] Mr. Miller provided the following explanation of the blocking process:

> British Columbia's timber processors have the ability to stop exports by objecting to the granting of export licenses for B.C. logs. Under the regime, a processor merely has to make an offer on an export application in order to bring the process to a halt; hence the application is blocked.
>
> So what do the timber harvesters do? They negotiate informal supply arrangements at discounted prices with key B.C. log processors in exchange for their agreement not to block exports.
>
> Many of the largest timber harvesters make a substantial share of their profits from exports for which they can receive world market price. According to a number of industry players that spoke on the condition of anonymity, some harvest operations are forced to sell logs at or below their cost of production to the domestic processors. In other words, the net effect of B.C. policy is to force timber harvesters to make next to nothing (or worse) on the domestic side of their business in order to safeguard their profitable export operations.
>
> Because the side agreements are informal, they cannot be litigated or taken to arbitration if they are not respected. Processors can change the terms at any time, demanding more product or a different price as it suits their needs. The only leverage the harvesters have is to refuse to cut their trees, which suits nobody's interests. The trick for the processors is to exert just enough pressure to keep the harvesters producing timber.

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[354] Lumber Final I&D Memo, p. 139 (Exhibit CAN-010) (citing Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibits 11, 12, 13, 32 (Exhibit USA-019); Petition, Exhibit 244 (Exhibit USA-010)); *see also* Lumber Final I&D Memo, pp. 143-44 (citing Petition, Exhibit 252 (Exhibit USA-010)).

[355] Lumber Final I&D Memo, pp. 139-41 (Exhibit CAN-010); Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 11, pp. 1, 18 (providing background on the author) (Exhibit USA-019).

> When government policy results in such extreme distortions it needs to be overhauled. Beyond the profitability question, one of the key impacts of the blocking threat is that B.C. timber harvesters cannot enter into long-term supply agreements with international customers. Nor can they take long positions on ocean freight transport. Because they do not have certainty due to the constant threat of blocking, they are forced to sell on the spot market. This moves B.C. timber further away from receiving the true world price and diminishes B.C.'s competitiveness overall.
>
> In 2002, Canada told the World Trade Organization that it granted 97% of applications to export from Crown land in British Columbia. This is hardly surprising. Almost every timber harvester has negotiated side agreements to keep its exports from being blocked. If not, this number would have been substantially lower.
>
> The real question is not what percentage of exports is formally approved. Rather, one should ask what percentage of B.C. timber production can be said to be legitimately available for export. Because blocking agreements between harvesters and processors are informal, one may never know precisely, but it is certainly much less than 97%.[356]

246. In addition, the USDOC relied upon evidence from log exporter Merrill & Ring submitted in investment arbitration against the government of Canada demonstrating that the company had been subject to the "blocking" process. Merrill & Ring stated that the governments of Canada and British Columbia are aware of the practice but have not taken any action to prohibit it.[357] The company explained that, "Merrill & Ring regularly receives such blocking letters and must negotiate agreements whereby the domestic processor agrees to lift blocks on certain private logs in return for the sale of other private log sorts."[358] Furthermore,

> Merrill's applications are only granted because Merrill has been forced to pre-arrange or negotiate agreements with domestic processors in order to prevent its export product from being blocked. Therefore, by the time the GOC receives a log export

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[356] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 11, pp. 8-9 (internal footnote omitted) (Exhibit USA-019).

[357] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibits 12, 13 (Exhibit USA-019).

[358] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 12 (Exhibit USA-019).

> application, Merrill has already suffered a loss because it has been forced to sell additional logs at below market prices to a domestic processor in order to prevent the domestic processor from blocking their application.[359]

247. The petition contained extensive additional information, including a report prepared for the British Columbia Minister of Forests and Range, which is consistent with Merrill & Ring's explanation of blocking. That report, entitled "Generating More Wealth from British Columbia's Timber: A Review of British Columbia's Log Export Policies," states:

> Many of the small land holders believe the provisions of the surplus test and the ability of local mills to block the approval process for their export proposals are intimidating, and that these factors force their logs into a sometimes lower valued domestic market.
>
> We heard from interior log producers about sawmills that block the producers' exports even when that sawmill does not utilize the grades or species in question. The blocking provisions do not require the blocker or the proposed exporter to consummate a sale of logs.
>
> Large landowners complained of having to provide domestic mills with alternate logs to keep domestic buyers from blocking their proposed exports.[360]

248. Finally, the USDOC relied upon a September 2014 article in a timber industry publication by BC logging company TimberWest, which, citing the surplus criterion and the ability of processors to block its exports, explained the firm sells over 50 percent of its production to the domestic market at a loss merely to retain the ability to export at a profit a smaller fraction of its production.[361]

249. The United States notes that the U.S. response to the Panel's question 125 also discusses the "blocking" system. The United States refers the Panel to the U.S. response to that question.

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[359] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 32 (Exhibit USA-019).

[360] Petition, Exhibit 242, p. 5 (Exhibit USA-010). *See also ibid.*, Exhibit 249 (Exhibit USA-010).

[361] Lumber Final I&D Memo, pp. 143-44 and footnote 860 (Exhibit CAN-010) (citing Petition, Exhibit 252 (Exhibit USA-010)). *See also id.*, Exhibit 253 (Exhibit USA-010).

79. <u>To both parties</u>: Please specify, pointing to record evidence, the share of the total volume of the Crown harvest of standing timber in British Columbia that was sold through the BCTS auctions in the period of investigation. Please also specify how you arrive at that figure.

<u>Response</u>:

250. The USDOC verified that 15.4 percent of the Crown timber during the period of investigation was harvested under licenses won at unrestricted BCTS auctions, which are the only BCTS auctions used in setting MPS prices.[362] As set forth in the Final Determination, this figure is derived by dividing the BCTS coastal and interior harvest volumes of 1,827,097 cubic meters[363] and 7,421,341 cubic meters, respectively, by the overall crown harvest volume of 60,177,813 cubic meters.[364] Although the government of British Columbia initially reported that "[r]oughly 20 percent of the annual BC harvest is sold by auction,"[365] this was not accurate, in part because it includes restricted auctions that accounted for approximately 1.5 percent of the Crown harvest.[366] The Crown harvest from both types of auctioned licenses amounted to 16.85 percent of the total.

80. <u>To both parties</u>: Please specify, pointing to record evidence, (i) the share of non-BCTS Crown-origin timber in the total volume of standing timber harvested in British Columbia in the period of investigation; and (ii) the share of Crown-origin timber that was sold through BCTS auctions in the total volume of standing timber harvested in British Columbia in the period of investigation. In addition, please also specify how you reach those figures.

<u>Response</u>:

251. The data sought by the Panel are summarized in chart form at page 117 of Verification Exhibit VER-6, as provided by the government of British Columbia. Limiting the response to softwood timber, as opposed to the other product categories of deciduous timber or special forest products, the BCTS portion of the Crown harvest is 16.85 percent (1,918,168 m^3 coast +

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[362] Lumber Final I&D Memo, p. 54 and footnote 330 (Exhibit CAN-010); Verification of the Government of British Columbia, p. 11 (Exhibit CAN-088) ("Ministry officials explained that BCTS auctions are separated into Category 1 (unrestricted) and Category 2 (restricted to small operators) – only Category 1 sales are used in MPS pricing.").

[363] In an apparent typographical error, the Final Determination cited this figure as 1,827,087 cubic meters.

[364] Lumber Final I&D Memo, p. 54 and footnote 330 (Exhibit CAN-010) (citing GBC Verification Exhibits VE-6, p. 117 (revised BC-SUPP3-12) (Exhibit USA-054 (BCI)). *See also* GBC Supplemental QR, Exhibit BC-Supp3-12 (publicly disclosing the figures found in the verification exhibit) (Exhibit USA-053).

[365] GBC QR, p. I-138 (Exhibit CAN-018 (BCI)).

[366] *See* GBC VER-6, p. 117 (revised BC-SUPP3-12) (Exhibit USA-054 (BCI)); GBC Supplemental QR, Exhibit BC-Supp3-12 (Exhibit USA-053).

8,220,944 m^3 interior of 60,177,813 m^3 total), whereas the non-BCTS portion of the Crown harvest is 83.15 percent (10,988,222 m^3 + 39,050,480 m^3 of 60,177,813 m^3 total). This percentage reflects both the restricted and unrestricted auctions, as separately addressed in the U.S. response to question 79 above.

81. To the United States: At footnote 341, page 57 of its final determination, the USDOC found that:

> **Specifically, five companies account for 64.8% of cruise-based auction volume and 43.6% of the scale-based auction volume.**

Please explain the terms "cruise-based" and "scale-based" auction volumes and the distinction between the two.

Response:

252. Scale-based sales are those where timber grade is assessed, and licensees are charged based on the log volume scaled after harvest.[367] Cruise-based sales are those where an entire timber stand is billed, whether or not harvested, and irrespective of grade.[368]

253. The USDOC's report regarding the verification of the government of British Columbia explains the meaning of the terms "scaling" and "cruising." Weigh scaling is a sampling method where the logs at issue are subdivided into groups with similar qualities (strata), and only a portion of the timber in a given group is measured and then attributed to the larger population.[369] Cruising is an appraisal method used to "generate representative, explanatory data on a particular stand (such as net cruise volume, species mix, tree height, slope, percentage of red/gray (i.e., dead) timber, etc.)."[370] All logs in a cruise-based stand are charged the same stumpage rate regardless of grade or species, because the stumpage fee is based on the land area harvested rather than the volume of timber scaled after the harvest.[371] Cruise-based billing was first introduced between 2008 and 2010, in response to widespread Mountain Pine Beetle infestation.[372]

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[367] *See* GBC QR, pp. I-4, 6, 141 (Exhibit CAN-018 (BCI)).

[368] *See* GBC QR, pp. I-4, 6, 142 (Exhibit CAN-018 (BCI)).

[369] Verification of the Government of British Columbia, p. 9 (Exhibit CAN-088).

[370] Verification of the Government of British Columbia, p. 10 (Exhibit CAN-088).

[371] Verification of the Government of British Columbia, pp. 10-11 (Exhibit CAN-088).

[372] Verification of the Government of British Columbia, p. 10 (Exhibit CAN-088).

82. <u>To the United States</u>: At paragraph 165 of its first written submission, Canada asserts, in relevant part, that:

> **Whatever level of competition that is "prevailing" in the B.C. Interior is a result of factors such as geographical constraints, transportation costs, economies of scale, and mill technologies—the same factors that would influence the degree of market concentration and competition even if all B.C. timber were privately owned. (footnotes omitted)**

Please comment.

<u>Response</u>:

254. The United States disagrees that the USDOC's analysis was based upon the prevailing "level of competition." Rather, the USDOC's finding that the BCTS auction prices were not a viable benchmark relied on three distinct grounds, including that auction prices were limited by the Crown stumpage prices paid by dominant tenure-holding firms. The USDOC considered together the level of competition and overall market structure. The USDOC did not analyze whether the government of British Columbia's predominant ownership of stumpage created the concentration of market power among BC sawmills, or whether such market concentration distorted prices for stumpage in BC by itself.

255. Rather, the USDOC sought to analyze whether the BCTS auction prices were competitive and open and independent, such that they could provide a benchmark market price for BC stumpage that was not distorted by the government's ownership of the vast majority of harvestable forest land. The USDOC concluded that BCTS auction prices were not competitive, open, and independent because the same dominant firms consumed auctioned timber, and purchased the comparatively much larger share of their Crown stumpage inputs under their long-term tenures at prices set by the results of those same auctions. Thus, the USDOC explained that, although the participants in BCTS auctions are primarily independent loggers, the prices paid by these loggers key off prices that the dominant tenure-holding sawmills are willing to pay. Accordingly, BCTS prices are effectively limited by what those tenure holders pay for timber harvested from their tenures.[373]

256. Canada's premise that the USDOC relied upon the prevailing level of competition, which purportedly reflected aspects of the BC economy other than the government's predominant ownership of stumpage, therefore misses the mark. In fact, the USDOC analyzed the entire structure of the market, and explained the specific relevance of the prevailing level of

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[373] Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 57-58 (Exhibit CAN-010).

competition. This is consistent with prior Appellate Body reports, in which the Appellate Body has explained further that the "examination may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers," or "the behaviour of the entities operating in that market."[374]

83. To Canada: Please explain how the "three-sale limit" affected the degree of market concentration and competition in the timber auction market in British Columbia. Please provide your response in light of the USDOC's finding at page 57 of its final determination that in introducing the three-sale limit, "[t]he GBC imposes an artificial barrier to participation in the BCTS auctions; while no companies are *per se* excluded from the auction system as a whole, the three-sale quota means that, to the extent some companies have already reached the quota, any given auction will find fewer bidders that could otherwise participate".

Response:

257. This question is addressed to Canada.

84. Referring to Dr. Athey's findings, Canada asserts at paragraph 177 of its first written submission that:

> **[I]n order to affect stumpage prices, mills would have to make a credible commitment, in coordination with others, to refrain from purchasing auctioned logs over an extended period into the future where auction logs would inevitably be available at lower prices.**

i. To the United States: Please comment.

Response:

258. Canada's statement reflects Dr. Athey's finding that "large forest companies ha[ve] a distinctly limited ability to reduce bids."[375] Furthermore, Dr. Athey opined, "[i]t would be costly for [mills] to seek to manipulate log demand in order to affect bids; and without collusion among many mills such attempts would likely not be successful."[376] The basis for her findings is not set

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[374] *US – Carbon Steel (India) (AB)*, para. 4.157, footnote 754.

[375] Athey Report, p. 49 (Exhibit CAN-023).

[376] Athey Report, p. 5 (Exhibit CAN-023).

forth in her report for this investigation, but rather cites her "original work for the Ministry [of Forests, Lands & Natural Resource Operations]."[377]

259. The USDOC's analysis is not based upon whether mills make a "commitment" to lower prices, or "coordinate" towards that end.[378] Rather, as Dr. Athey herself observes, a key issue given the structure of the BC timber market is the "thickness" of the consuming market:

> In our original work for the Ministry we paid special attention to "market thickness" in order to ensure that the market environment resulting from the reforms would not be vulnerable to strategic behavior designed: (a) to reduce BCTS bids directly; so as (b) to also produce "feedback" effects through the MPS system that would lower MPS stumpage rates. In a "thick" market, any individual mill would find it difficult—and costly—to influence BCTS bids by strategically withholding demand for BCTS logs.[379]

260. Dr. Athey's report does not define the level of "thickness" necessary to eliminate feedback effects in the MPS system of mills' strategic behavior with respect to purchases of auctioned logs or stumpage. Contrary to Dr. Athey's assertions that British Columbia's reforms following the *Lumber IV* investigation led to a more robust, "thick" market, the USDOC found that "several distortive characteristics relied upon by the Department in *Lumber IV* to find price distortion continued to exist during the [period of investigation]."[380] The level of large firm dominance was similar to that in *Lumber IV*, with the same large firms dominating both the allocation of timber sold under long-term licenses and consuming the majority of auctioned timber. Thus, the USDOC disagreed with Dr. Athey's premise that the market had meaningfully changed, explaining that:

> Data from the GBC also continue to indicate that while non-sawmill operators (*e.g.*, independent loggers) account for most of the BCTS auction purchases, tenure-holding sawmills continue to be the largest source of BCTS consumption volume. In its response, the GBC provided the volume of cruise-based and scale-based BCTS auction volumes that was delivered to company-owned scaling sites during calendar year 2015 . . . The data in the two tables indicate that, consistent with *Lumber IV*, a handful of

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[377] Athey Report, pp. 17, 49 (Exhibit CAN-023).

[378] *See* Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

[379] Athey Report, p. 17 (Exhibit CAN-023).

[380] *See* Lumber Preliminary Decision Memorandum, pp. 37-38 (Exhibit CAN-008).

> tenure-holding sawmills account for the majority of Crown-origin standing timber acquired via the BCTS auctions. For example, the five companies referenced above as dominating the direct allocation and harvest of standing timber from Crown lands account for 64.8 percent of cruise-based auction volume and 43.6 percent of the scale-based auction volume. Therefore, consistent with *Lumber IV*, we continue to conclude that the prices paid for logs in the BCTS auctions, prices that are primarily paid by loggers, key off the price that tenure-holding sawmill companies are willing to pay.[381]

261. Thus, the USDOC's findings were based upon its evaluation of the government's market share and other aspects of the BC market structure. It is significant that even Dr. Athey concedes that dominant sawmills may influence BCTS prices,[382] albeit she describes certain caveats with which the USDOC did not agree.

ii. <u>To Canada</u>: Please explain how the "three-sale limit" affected stumpage prices. In particular, how is the impact of the "three-sale limit" on stumpage prices any different from the impact of the arrangement described in the statement above.

<u>Response</u>:

262. This question is addressed to Canada.

85. <u>To the United States</u>: At paragraph 189 of its first written submission, Canada argues, in relevant part, that:

> **Furthermore, Commerce's assertion that BCTS bids "do not reflect the full value of the timber" is contrary to basic economic logic. If cutting rights fees led bidders to bid less than they otherwise would, it would only open the door to another bidder at a higher price.**

Please respond to Canada's argument.

<u>Response</u>:

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[381] Lumber Preliminary Decision Memorandum, p. 38 (Exhibit CAN-008).

[382] *See* Athey Report, pp. 17 (and footnote 9), 50 (and footnote 34) (Exhibit CAN-023).

263. Canada's statement presumes acceptance of its view of BCTS auction prices as competitive and market-determined. However, the USDOC found that the prices independent loggers paid were effectively limited by the prices that sawmills were willing to pay.[383] Consistent with the USDOC's finding that prices are limited in this fashion, it is not true that "another bidder at a higher price" would emerge.

264. The three-sale limit requires firms with three licenses won at auction to use proxies or middle-men to obtain additional licenses, which is the basis for Commerce's finding that BCTS bids would not "reflect the full value of the timber."[384] Absent the three-sale limit, a large firm could acquire an additional license through BCTS directly and offer the full amount it is willing to pay. With the three-sale limit, a middle-man must build its own margin into its bid by bidding lower than the amount for which it will resell the license to the large firm buyer. Accordingly, the entire value of the license to its ultimate holder is not captured by BCTS.[385]

265. This type of distortion is not theoretical. The three-sale limit applies to all auctioned licenses currently being harvested. Canada has mischaracterized the three-sale limit as if it had no bearing on firm decisions in the industry, but in reality the three-sale limit imposes very real constraints on the operations of license holders. Under the applicable licenses, firms have up to four years to complete the harvest, and data provided by the government of British Columbia indicate that the average time to harvest an auctioned license during the period of investigation was 1.72 years.[386] Record evidence demonstrates that firms routinely turn to middlemen and proxies to avoid this constraint. For instances, one mandatory respondent operating in British Columbia **[[BCI]]**.[387]

86. At paragraph 400 of its first written submission, the United States asserts, in relevant part, that:

> **With respect to Canada's argument that any price impact would be limited to the subset of Coastal species, the USDOC**

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[383] Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

[384] Lumber Final I&D Memo, p. 58 (Exhibit CAN-010).

[385] *See* Lumber Final I&D Memo, p. 58 (Exhibit CAN-010).

[386] GBC QR, pp. I-171, 178 (Exhibit CAN-018) (BCI)).

[387] *See* Canfor Corporation Verification Exhibits VE-3, p. 20 (Exhibit USA-055 (BCI)). *See also* Canfor Corporation QR, pp. 104-05 ("CFP cannot hold more than 3 TSLs at one time and based upon CFP's timber needs, CFP must purchase the majority of CFP's TSL volumes from these contractors and hence indirectly . . . If CFP is bidding directly, it calculates its anticipated logging, hauling and any on-block road costs to access the standing timber. If CFP is bidding indirectly, it works with contractors to establish their expectations for their logging and hauling cost and profit expectations in any successful bid which would deliver the logs to one or more of CFP's sawmills.") (Exhibit CAN-051 (BCI)).

> **explained that some species overlapped between the Coast and Interior harvest and others were substitutable for each other and are used to produce similar products, including lumber. (footnotes omitted)**

i. <u>To the United States</u>: Please identify, on the record of these proceedings, the evidentiary basis for the USDOC's findings referred to in the above paragraph.

<u>Response</u>:

266. The USDOC identified the evidentiary basis for this statement at pages 146-47 of the final issues and decision memorandum:

> While the Department does not dispute that the logs in the BC coast and interior are not identical in their species composition, the record shows that the logs harvested in the two regions are interchangeable, and thus a government action (such as an export restraint) that directly impacted one type of log species would impact the market for other log species in the province. The record shows that both the coast and interior had significant volumes of balsam, cedar, fir and hemlock.[388]

Balsam, cedar, and hemlock were overlapping species because, as cited in footnote 874 of the final issues and decision memorandum, the record indicated that 1,516,498 m^3 of balsam, 3,170,139 m^3 of cedar, and 4,871,426 m^3 of hemlock were harvested from the coast during the period of investigation, whereas 24,488,870 m^3 of balsam, 3,170,139 m^3 of cedar, and 4,871,426 m^3 of hemlock were harvested from the interior.[389]

267. Furthermore, the USDOC explained that record information indicates that lodgepole pine, the dominant species in the interior, "falls within the SPF group of products, and that the hemlock and fir species (which had significant harvest volumes on the coast during the POI) are substitutable for SPF."[390] Finally, the USDOC indicated that that multiple of the species present in the coast and interior are interchangeable

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[388] Lumber Final I&D Memo, p. 146 (Exhibit CAN-010).

[389] GBC QR, Exhibit S-2 (Exhibit CAN-055).

[390] Lumber Final I&D Memo, p. 146 (Exhibit CAN-010) (citing GBC QR, p. I-58 (Exhibit CAN-018) (BCI)); GBC QR, Exhibit S-2 (Exhibit CAN-055); GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 4 (Exhibit CAN-020 **(**BCI))).

because they may be used to produce lumber which, for instance, would be appropriate for general construction.[391]

ii. <u>To Canada</u>: Please respond to the United States' assertion.

<u>Response</u>:

268. This question is addressed to Canada.

87. <u>To the United States</u>: At paragraph 142 of its first written submission, Canada asserts, in relevant part, that:

> **In addition, Commerce performed no coherent or logical analysis to explain how the market shares of the five largest companies that consume BCTS-auctioned logs had the ability to distort, or in fact distorted, the bids submitted by the actual bidders.**

Please respond to Canada's argument.

<u>Response</u>:

269. Canada's statement misapprehends the nature of the USDOC's inquiry. In the underlying investigation, the USDOC was required to examine whether BCTS auction prices provided a viable benchmark to measure the adequacy of remuneration for British Columbia's provision of stumpage. The USDOC explained that BCTS prices, which were the only benchmark proposed by the respondent parties, would present a viable benchmark if the auction mechanism is open and competitive, and thus "actually functions as a market price, and functions independently of the government-set price."[392]

270. The USDOC determined that BCTS auction prices were not a suitable benchmark because (1) BCTS prices were not independent of prices for timber on the administered portion of GBC-owned land, because the tenure-holding sawmills were also the predominant purchasers of BCTS-harvested timber; (2) BCTS prices were not set by competitive bid procedures because the three-TSL limit inhibits competition and suppresses prices; and (3) the GBC's and GOC's restraints on the exportation of BC-origin logs contribute to an overabundant supply of logs and suppresses standing timber prices.[393]

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[391] Lumber Final I&D Memo, p. 147 (Exhibit CAN-010) (citing GBC QR, pp. I-58-63 (Exhibit CAN-018) (BCI)).

[392] Lumber Preliminary Decision Memorandum, p. 36 (Exhibit CAN-008).

[393] *See* Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

271. With respect to the first finding, the five largest companies' market share demonstrated, as part of the USDOC's analysis of the BC market's structure, that auction prices were not independent of the provincial government's financial contribution. The USDOC explained that the companies had leverage to influence auction prices, given the government's control of 90 percent of the standing timber market and the companies' dual-role as consumers of the majority of auctioned timber and harvesters of the majority of the comparatively much larger share of timber from long-term tenures sold at administered rates.[394] Thus, the ability of dominant firms to influence auction prices precluded a finding that such prices were market-based.

272. To the extent that Canada suggests that evidence of the margin of distortion is required, Canada's argument finds no support in the SCM Agreement. Moreover, it is unclear what such evidence could be, given that it would appear to require a counterfactual comparison market in British Columbia that does not exist.

88. <u>To the United States</u>: At paragraph 50 of its opening statement (Day 1), Canada asserts that:

> **Furthermore, Dr. Athey's report contained both her analysis and the underlying data from the BCTS auctions. The United States offers no explanation for Commerce's failure to address that underlying *data*. The data do not represent an "opinion" that could lack "objectivity." They are *facts* and show that Commerce's theory that the auction prices are not competitively determined is wrong. The failure to address these essential data, or Dr. Athey's analysis, is irreconcilable with Commerce's obligation to take "proper account of the complexities of data before it" and to explain "why it rejected or discounted alternative explanations and interpretations of record evidence". (footnotes omitted)**

i. Please respond to Canada's assertions, particularly as regards the USDOC's treatment of the "underlying data" in Dr. Athey's report.

ii. Pointing to the record, please indicate where the USDOC examined the content of Dr. Athey's report?

<u>Response</u>:

273. The United States is responding to the two subparts of the Panel's question together. To understand how the USDOC addresses evidence, it is helpful to summarize the general

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[394] *See* Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

administrative process that the USDOC follows. After initiating an investigation based upon a sufficient petition, the USDOC identifies respondents and provides opportunities for all interested parties to submit factual information. The USDOC will then issue a preliminary determination for comment from the interested parties through case and rebuttal briefs, as well as a hearing if requested. Under the USDOC's regulations, "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the [USDOC's] final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results."[395] The USDOC responds to the parties' comments in its final determination, along with making any appropriate adjustments.

274. That the USDOC does not mention specific evidence in its final determination does not indicate that it did not consider the evidence. It may simply relate to the way the parties in their case briefs, or the USDOC in its final determination, have organized and narrowed the issues. Thus, for instance, the USDOC's discussion of the Mason, Bruce & Girard report – the only report commissioned for the underlying investigation that was submitted by the petitioners – reflects the fact that the report presented the Forest2Market dataset, and the question of whether to select that data as a cross-border benchmark to measure the adequacy of remuneration was a discrete issue before the USDOC.[396]

275. That, by contrast, the USDOC did not mention Dr. Athey's report by name does not indicate that the USDOC failed to consider that report. Indeed, the report featured prominently in the briefs of the interested parties to which the USDOC directly responded.[397] In particular, the joint case brief of the government of British Columbia and the British Columbia Lumber Trade Council cited extensively to Dr. Athey's report, arguing, for instance, "the record and Dr. Athey confirm that almost all the unused [annual allowable cut of timber on long-term tenures] is dead pine, which is not economic to harvest."[398] In the final issues and decision memorandum, the USDOC addressed these arguments on an issue-by-issue basis, explaining why it disagreed, or, in the case of its finding of "supply overhang" of dead pine timber, agreed and therefore reversed its preliminary finding.[399] The USDOC did not mention Dr. Athey's report by name, nor did it need to.

276. Canada's contention that an investigating authority must address every specific item of evidence by name to provide an adequate explanation of its decision is both incorrect and

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[395] 19 C.F.R. § 351.309(c)(2) (Exhibit USA-056).

[396] *See* Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010).

[397] *See* Lumber Final I&D Memo, pp. 55-58 and footnotes 332, 333 (identifying the portions of the respondents' case briefs to which the USDOC was responding) (Exhibit CAN-010).

[398] GBC and BCLTC Case Br., Vol. V, pp. 19-26 (Exhibit CAN-295).

[399] Lumber Final I&D Memo, pp. 56-57 (Exhibit CAN-010).

untenable. Dr. Athey's report was Exhibit 182 to a questionnaire response – the first of multiple questionnaire responses devoted to a single alleged subsidy provided by a single province (British Columbia's provision of stumpage) – that, with exhibits, spanned approximately 10,000 pages.[400] Similarly, Dr. Athey's was one of nine "expert reports" submitted by the Government of British Columbia alone.[401]

277. Although Canada insists that Dr. Athey's report had unique probative value, Canada is wrong. Dr. Athey's report suffered from an obvious conflict of interest. Dr. Athey was retained to opine on whether British Columbia's "auction based pricing system is a sound market-based system,"[402] notwithstanding her role as a principal designer of that very system.[403] This conflict was known to the USDOC, which recorded in the report of its verification of the government of British Columbia that "Ministry officials noted that the BCTS auction system was designed by 'world-leading experts in auction design,' including Dr. Susan Athey, to address the concerns outlined in the [USDOC's] 2003 Policy Bulletin."[404] This conflict of interest, as well as Dr. Athey's direct responses to the petitioners' arguments in the underlying investigation and her near exclusive reliance upon her own prior work and that of Canada's other commissioned experts, make clear that her report was advocacy and not an unbiased study.[405] Notably, the USDOC sought, and the government of British Columbia refused to provide, its correspondence with Dr. Athey and other paid experts "with respect to the purpose, parameter, and/or conclusions of the study."[406]

278. With respect to the "underlying data" that Canada referenced in its opening statement, none of it merited special attention. Canada highlighted Dr. Athey's chart indicating that in some instances BCTS winning bids exceed the "expected winning bid" and that BCTS bids generally exceed the 70 percent upset rate, or required minimum bid, that is typically employed.[407] But such an analysis is circular, because the "expected winning bid" is set by the

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[400] *See generally* GBC QR, including Exhibits 1-184 (totaling 9,990 pages) (Exhibit CAN- 018 (BCI)).

[401] GBC Supplemental QR, pp. BC-Supp3-2-3 (addressing nine expert reports commissioned by the GBC alone) (Exhibit CAN-082).

[402] Athey Report, p. 3 (Exhibit CAN-023).

[403] Athey Report, pp. 9-10 ("I and my colleague Prof. Peter Cramton were engaged in 2001 to advise the government as it planned and designed the new system.") (Exhibit CAN-023).

[404] *See* Verification of the Government of British Columbia, p. 12 (Exhibit CAN-088).

[405] *See, e.g.*, Athey Report, p. 59 (citing references) (Exhibit CAN-023).

[406] *See* GBC Supplemental QR, p. BC-Supp3-1 (Exhibit CAN-082).

[407] *See* PowerPoint Presentation accompanying Canada's First Opening Statement (Day 1), p. 27 (citing Canada's First Written Submission, Figure 21, p. 69) (Exhibit CAN-525).

MPS equation, which itself is based upon prior BCTS auctions.[408] Similarly, Canada displayed a chart showing that BCTS auction prices roughly tracked U.S. lumber prices.[409] Of course, the USDOC did evaluate the adequacy of remuneration paid to British Columbia for its stumpage by comparing those prices to U.S. log prices, undertaking a far more detailed analysis than that presented in the single chart included in Dr. Athey's report. Moreover, consistent with Canada's arguments regarding U.S. lumber prices, the Canadian parties could have proposed their own benchmarks for a cross-border comparison of stumpage prices that, taking Canada's premise as true, could demonstrate that no subsidy benefit, or a minimal subsidy benefit, was conferred. However, the Canadian parties did not do so, as their premise is unsound.

89. To the United States: At paragraph 202 of its first written submission, Canada argues that:

> **[The 30% of log exports from British Columbia] is a significantly higher percentage than in the neighbouring coastal Oregon and Washington regions, where only 18% of the harvest was exported in the same time-period (footnote omitted).**

Please explain on what basis the USDOC found that the export ban in British Columbia affected market prices in that province, while the export ban in Washington did not, when a significantly higher percentage of logs was exported from British Columbia than from Washington.

Response:

279. The issue is not whether the proportion of exports in two jurisdictions is determinative of market orientation; rather, the issue is whether an objective and unbiased investigating authority could have found that the prices in British Columbia could not serve as benchmarks. Here, the log export restrictions in British Columbia formed one piece of evidence. These log export restrictions were relevant because of how they affected BC prices, not because of the proportion of export sales to domestic sales.

280. The proportion of exports in the U.S. states of Oregon and Washington do not undermine that conclusion. In the first place, the USDOC selected WDNR log price data as its benchmark that reflected prices for logs in the Washington interior, excluding the coast.[410] The export

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[408] *See* GBC QR, pp. I-138-39 (Exhibit CAN-018 (BCI)).

[409] PowerPoint Presentation accompanying Canada's First Opening Statement (Day 1), p. 28 (citing Canada's First Written Submission, Figure 22, p. 70) (Exhibit CAN-525).

[410] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

restrictions that Canada refers to did not apply to timber harvested from this land. Moreover, Canada's argument regarding Washington and Oregon coastal export regulations did not form the basis for its arguments before the USDOC. Nor does it take into account the fact that Crown-origin timber constituted 90.5 percent of the softwood timber harvest in British Columbia.[411] There is no evidence (or argument by interested parties) that coastal log export restrictions affect these prices.

281. At the first substantive panel meeting, Canada cited to a page from one of Dr. Kalt's reports, which states, "[l]ike BC, the U.S. PNW exports substantial volumes of logs overseas, primarily to China and Japan. Unlike BC, however, log exports from Federal and State public lands in Oregon and Washington (which represent 21% of the coastal harvest in 2015) are effectively banned."[412] Dr. Kalt provides annual data for 2011 through 2015, indicating that the proportion of the Washington and Oregon coastal harvest that was exported fluctuated between 18.1 and 28.1 percent.[413] The data is exclusive of exports to Canada, which are not specified.[414]

282. Thus, the record regarding the Oregon and Washington policies is incomplete. The information Canada refers to regarding the Washington and Oregon log export policies, such as the regulations themselves, does not appear to be a part of the record of the proceeding. Furthermore, comparison of the exportation rates for the PNW and BC is misleading without correcting for differences in the respective domestic markets, among other variables. For instance, U.S. loggers have a much larger domestic market. Additionally, as noted, the U.S. export data reported by Dr. Kalt exclude exports to Canada.

283. The log export restrictions in Oregon and Washington apply to the subset of public lands only, and purportedly impact 21 percent of the coastal harvest. It is unclear what proportion of the overall harvest in either state might be affected. By contrast, the BC and Canada log export restraints encompass logs harvested on public or private land, whether under provincial or federal jurisdiction.[415] As noted, the USDOC selected WDNR log price data as its benchmark that reflected prices for logs in the Washington interior, excluding the coast.[416]

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[411] *See* Lumber Preliminary Decision Memorandum, p. 20 (Exhibit CAN-008). British Columbia reported that the coniferous timber harvest from Crown land was 60,445,847 cubic meters, while private land accounted for 6,346,285 cubic meters, out of a province total of 66,811,415 cubic meters. *See* British Columbia, "Timber Harvest in Calendar Year 2015" (Exhibit BCS-2) (Exhibit CAN-055). As noted, the remaining 19,283 cubic meters is attributable to other federal harvest. *Ibid.*

[412] Kalt Report, p. 48 (Exhibit CAN-016) (BCI).

[413] Kalt Report, p. 49 (Exhibit CAN-016) (BCI).

[414] Kalt Report, p. 49 (Exhibit CAN-016) (BCI).

[415] Lumber Preliminary Decision Memorandum, p. 57 (Exhibit CAN-008).

[416] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

284. In sum, the record contains no basis to conclude that the USDOC's treatment of the WDNR benchmark was inconsistent with its findings regarding distortion in British Columbia. For the reasons explained above, an objective and unbiased investigating authority could have found that the WDNR prices could serve as the basis for a market-determined benchmark.

90. To the United States: At paragraph 68 of its opening statement (Day 1), Canada asserts, in relevant part, that:

> **It's also worth noting that Commerce treated a complete export ban from public lands in Washington as having no bearing on the market-determined nature of its benchmark prices. It cannot be true that a complete export ban in Washington causes *no* price distortion, while a process in which 99% of applications are approved causes *substantial* price distortion. Commerce should have applied the same logic that applies to its Washington benchmark to the far less restrictive LEP process in British Columbia.**

Please respond to Canada's assertions.

Response:

285. The United States refers the Panel to the U.S. response to the question 89 above. Canada's premise is flawed, because the BC and Canada log export restraints are not "far less restrictive." The Canadian restraints cover the entire harvest, rather than a minor subset of the harvest.[417] Moreover, through application of the surplus test, the BC and Canada log export restraints provide substantial power to mill operators to "block" exports, as discussed in the U.S. responses to questions 78 and 125.

91. To Canada: At paragraph 393 of its first written submission, the United States argues that:

> **Canada states that the USDOC failed to draw a causal link between the presence of log export restraints and BCTS auction prices. However, the USDOC explained that the governments of Canada and British Columbia "impose restraints on the exportation of BC-origin logs and that these restraints contribute to an overabundance of log supply that, in turn, depresses the prices that auction participants are**

[417] Lumber Preliminary Decision Memorandum, p. 57 ("Logs harvested in British Columbia fall under either federal or provincial jurisdiction. Exports of logs under provincial jurisdiction are regulated under the Forest Act. Exports of logs under federal jurisdiction are regulated under Federal Notice to Exporters No. 102.") (Exhibit CAN-008).

> **willing to pay, as well as the log prices that loggers can charge tenure-holding companies in the province." Furthermore, the log and stumpage markets are closely linked, and the log export policy "prevents log sellers from seeking the highest prices in all markets, and thus creates additional downward pressure on the log prices in the province." (footnotes omitted)**

Please comment.

Response:

286. This question is addressed to Canada.

7 THE USDOC'S USE OF THE WASHINGTON STATE LOG PRICE BENCHMARK FOR BRITISH COLUMBIA

92. To Canada: Please explain the inconsistency between the following two pieces of data.

At paragraph 195 of its first written submission, Canada submits that:

> **[W]hen Commerce used Washington State Department of Natural Resources ("WADNR") timber prices as a benchmark in the Lumber IV investigation, Commerce explained that even though the export of logs from all public lands was banned in the state of Washington, WADNR timber prices "represent market prices" because they "are set at competitive auctions". (footnote omitted)**

While at paragraph 202 of its first written submission, Canada also argues that:

> **[The 30% of log exports from British Columbia] is a significantly higher percentage than in the neighbouring coastal Oregon and Washington regions, where only 18% of the harvest was exported in the same time-period. (footnote omitted)**

Response:

287. This question is addressed to Canada.

93. To the United States: Please address Canada's argument at paragraph 196 of its first written submission:

Commerce treated the export ban in the U.S. Pacific Northwest as a prevailing market condition that had no bearing on the market-determined nature of its benchmark, and should have applied the same logic to the far less restrictive LEP process in British Columbia.

Response:

288. The United States refers the Panel to the U.S. responses to questions 89 and 90. The issue is not whether export policies in two jurisdictions are determinative of market orientation; rather, the issue is whether an objective and unbiased investigating authority could have found that the prices in British Columbia could not serve as benchmarks. Here, the log export restrictions in British Columbia formed one piece of evidence. These log export restrictions were relevant because of how they affected BC prices (in a province where Crown-origin timber constituted 90.5 percent of the softwood timber harvest). The existence of export policies for public lands in the U.S. states of Oregon and Washington (where public lands are not the predominant source of timber by any count) do not undermine that conclusion. Moreover, there is no evidence (or argument by interested parties) that coastal log export restrictions in the U.S. states of Oregon and Washington affect these prices.

289. Again, as noted, the United States' ability to respond is constrained because the information Canada refers to regarding the purported "export ban in the U.S. Pacific Northwest", such as the regulations themselves, does not appear to be a part of the record of the proceeding. The Canadian parties did not make an argument regarding treatment of the purported U.S. PNW export ban as a prevailing market condition in their relevant case brief before the USDOC.[418] Canada cannot point to any determination by the USDOC treating the U.S. PNW policies as a prevailing market condition; the issue was not raised, so the USDOC's analysis does not address it. However, as summarized in the prior responses to questions 89 and 90, the record evidence indicates that the U.S. PNW policies are readily distinguishable from the Canadian and BC log export restraints.

290. As explained, the record contains no basis to conclude that the USDOC's treatment of the WDNR benchmark was inconsistent with its findings regarding distortion in British Columbia. An objective and unbiased investigating authority could have found that the WDNR prices could serve as the basis for a market-determined benchmark.

94. To Canada: At paragraph 681 of its first written submission, Canada argues "the 2016 Dual-Scale Study did employ a statistically valid sampling methodology: stratified random sampling." Please confirm pointing to record evidence.

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[418] *See generally* GBC and BCLTC Case Br., Vol. V (Exhibit CAN-295).

Response:

291. This question is addressed to Canada.

95. To the United States: At paragraph 439 of its first written submission, the United States submits that the USDOC sought in its calculations to convert the Washington-priced benchmark in board feet to cubic meters, and that price would be based upon the cubic meters of the tree in Washington state, not British Columbia. Why does the Spelter Study better serve this purpose that the Dual-Scale Study? How does the United States reconcile this argument with its argument in paragraph 411 that the forests of eastern Washington and the BC Interior feature the same species and growing conditions?

Response:

292. The Spelter Study measured the volume of trees in the Washington interior, and thus provided a conversion factor specific to that region,[419] which was also the location of the WDNR Eastside log price data that the USDOC used to derive a benchmark to measure the adequacy of remuneration paid to British Columbia for stumpage.[420] The statement in paragraph 411 of the U.S. first written submission that the forests of eastern Washington and the BC Interior feature the same species and growing conditions is consistent with the view expressed earlier in paragraph 439 of the U.S. first written submission that the Spelter conversion factor "has particular relevance because it relates to the species and growing conditions likely to appear in the WDNR log price survey data, which conditions the USDOC found to be comparable to those of British Columbia."

293. The USDOC set forth the reasons why it determined that the Spelter Study was better suited than the BC Dual Scale Study to serve as the source of the conversion factor in the final issues and decision memorandum. The USDOC explained that:

> In instances where parties have presented a self-commissioned study conducted specifically in anticipation of an investigation for the Department's consideration, the Department must carefully examine the study to ensure that it is based on sound methodologies that guard against any study bias. That is, the Department must evaluate whether any study or report placed on the record of a proceeding by an interested party is free of data and

[419] Henry Spelter, Conversion of Board Feet Scaled Logs to Cubic Meters in Washington State, USDA Forest Service, pp. 3-5 (June 2002) (producing conversion factors specific to the Washington coast (6.76 cubic meters per MBF) and Washington interior (5.93 cubic meters per MBF)) (Exhibit CAN-287).

[420] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

conclusions that were tailored to generate a desired result. Therefore, the essential issue here is whether the BC Dual Scale Study produced conversion factors that were based upon a valid sampling methodology.

The BC Dual Scale Study conducted by Mr. Jendro and Mr. Hart was commissioned by the BC MFLNRO. While we do not question the qualifications of Mr. Jendro and Mr. Hart, or the scaling professionals used by Jendro & Hart LLC, we have serious concerns about the methodology used to identify the selected scaling sites. Given the volume of lumber products being produced by the BC respondents, it is unclear why only 13 scaling sites were selected by Mr. Jendro and Mr. Hart for purposes of the BC Dual Scale Study. Further, although these sites were purportedly selected based upon the historic knowledge of the trees that are harvested and scaled at these 13 sites, there is no evidence that either the GBC or Mr. Jendro and Mr. Hart selected these sites using any statistically valid sampling methodology. While the data in the BC Dual Scale Study may be "valid" in the sense that they are based upon the actual measurement of trees in BC, our concern arises when this data is subsequently characterized to be representative of all interior BC trees. We find that this concern may be alleviated if the BC Dual Scale Study was conducted using a statistically valid sampling methodology, which could then better represent the large area of BC interior trees or possibly all trees in BC. The BC Dual Scale Study does not explain how and whether different types of sampling were considered, or even selected: random, stratified, or composite, etc. The structure of a sampling methodology is a key decision point of any sound sampling methodology because how a sample is conducted can minimize bias, maximize the representativeness of the sample result, and inform the statistical relevance to the population. Instead, the researchers of the BC Dual Scale Study note that in order to have study results relatable to the BC Interior harvest, "the study team distributed study samples among the forest types represented by the BC interior harvest." Therefore, because there is no evidence that the study used statistically valid sampling methodologies in selecting these 13 sites, the Department cannot determine that the information in the study provides a representative sample.

The absence of such evidence is particularly concerning, because the GBC acknowledges that the BC Dual Scale Study was commissioned by the BC MFLNRO in anticipation of this

investigation. The Federal Circuit, in evaluating whether a party's claim had been sufficiently corroborated with evidence in a patent case, opined that "contemporaneous documentary evidence provides greater corroborative value" in determining whether a party's litigation "story is credible." This is because evidence preceding the litigation eliminates "the risk of litigation-inspired fabrication or exaggeration" that may come from later-developed evidence, intended to corroborate the party's story. We find that the Federal Circuit's concerns are equally applicable to evidence created for the purpose of an adjudicatory administrative proceeding, such as this one. Although we consider all evidence on the record of a proceeding, in determining the weight to be accorded to a particular piece of evidence, we consider whether the evidence in question was prepared in the ordinary course of business, or for the express purpose of submission in the ongoing administrative proceeding. Because the BC Dual Scale study was prepared for the express purpose of submission in this investigation, we find that it is at "risk of litigation-inspired fabrication or exaggeration," which diminishes its weight.

By contrast, the USFS study upon which we relied in the *Preliminary Determination* was produced by a U.S. governmental entity that is not a party to this investigation. Therefore, we presume it to be unbiased, and respondents have presented no argument or evidence to undermine that conclusion here. Further, we have found this source to be reliable in a prior lumber proceeding, as well as in the recently-completed *SC Paper from Canada – Expedited Review*.

In addition to the above concerns, we note that the BC Dual Scale Study is only based on trees in BC, not in Washington state, while the USFS study is based on trees in Washington state. The benchmark used for this analysis is the price of a log in the state of Washington. The GBC has stated on the record that "the relationship of volumes using BC Metric and Scribner scaling rules is complex and varies substantially depending on log diameter, shape and defect." On this record, we have a Washington state-priced benchmark that is in board feet and we need to convert that price to cubic meters. The Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not BC. Therefore, we do not agree with the proposal that it would be more accurate to convert the Washington state benchmark prices using a conversion factor derived from trees in

> BC, especially given that we have a conversion factor on the record that is based on trees in Washington state.
>
> Therefore, given our concerns with the lack of a valid sampling methodology used to produce the data in the BC Dual Scale Study and the applicability of a conversion factor based on BC trees used on a price for Washington trees, we have not relied on the information in the BC Dual Scale Study and continue to use the conversion factor of 5.93 m^3/MBF for the final determination. And because we have no basis for concluding that the BC Dual Scale Study generated unbiased conversion factors, we have not addressed the parties' specific arguments regarding the relative merits of the BC Dual Scale Study as compared with the USFS study.[421]

96. <u>To the United States</u>: At paragraph 24 of its opening statement (Day 2), Canada indicates that "the conversion factors used to translate B.C. log volumes needed to reflect the characteristics of B.C. Interior logs. After all, B.C. Interior stumpage is the good for which Commerce was attempting to measure adequacy of remuneration. But the Spelter Study conversion factor reflects the characteristics of eastern Washington logs." Please comment.

<u>Response</u>:

294. As explained above in the U.S. response to question 95, in addition to other concerns, the USDOC noted that:

> [T]he BC Dual Scale Study is only based on trees in BC, not in Washington state, while the USFS study is based on trees in Washington state. The benchmark used for this analysis is the price of a log in the state of Washington. The GBC has stated on the record that "the relationship of volumes using BC Metric and Scribner scaling rules is complex and varies substantially depending on log diameter, shape and defect." On this record, we have a Washington state-priced benchmark that is in board feet and we need to convert that price to cubic meters. The Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not BC. Therefore, we do not agree with the proposal that it would be more accurate to convert

[421] Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010) (footnotes omitted).

> the Washington state benchmark prices using a conversion factor derived from trees in BC, especially given that we have a conversion factor on the record that is based on trees in Washington state.[422]

295. Additionally, the Spelter Study conversion factor was appropriate because the forests of eastern Washington and the BC Interior feature the same species and growing conditions.[423]

97. <u>To the United States</u>: At paragraph 27 of its opening statement (Day 2), Canada indicates that "Spelter's use of 1984 data meant that neither the time period, nor the species the study examined, accounted for the devastation caused by the Mountain Pine Beetle epidemic. The Spelter Study did not even include lodgepole pine, let alone beetle-killed lodgepole pine." Please comment.

<u>Response</u>:

296. The Spelter Study conversion factor the USDOC utilized was published in 2002 by the U.S. Forest Service. The 2002 publication updated the original 1984 Cahill Study to account for the substantially decreased proportion of old growth, large diameter trees in the Washington harvest.[424] Although the original study did not include lodgepole pine or beetle-killed lodgepole pine, it included comparable species, and specifically another SPF species, Engelmann spruce.[425] For further discussion of how the USDOC selected the Spelter Study conversion factor, please see the U.S. response to question 98.

98. <u>To both parties</u>: Bearing in mind that the Spelter Study considered data from 1984, please indicate to which extent that data correlated to the data in B.C Interior in the POI.

<u>Response</u>:

297. As explained above in the U.S. response to question 95, in reviewing the available conversion factors, the USDOC determined that the BC Dual Scale Study conducted during the pendency of the investigation by the Government of British Columbia's researchers, Jendro and

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[422] Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010) (footnotes omitted).

[423] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008); Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[424] Henry Spelter, Conversion of Board Feet Scaled Logs to Cubic Meters in Washington State, USDA Forest Service, p. 1 (June 2002) (Exhibit CAN-287).

[425] GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 52 (Exhibit CAN-020 **(**BCI)).

Hart, was not useable because the authors did not use a statistically valid sampling methodology for selecting the limited number of scaling sites included in the study.[426] The absence of such a sampling methodology was of particular concern because the BC Dual Scale Study was commissioned specifically for use in this investigation; demonstrating an arm's-length approach to site selection was therefore relevant to the USDOC's evaluation of the reliability of the report.[427] Instead, the USDOC relied upon the only viable conversion factor study on the record, the USFS study, which was prepared by an impartial government agency in the ordinary course of business, and which the USDOC had also found reliable and used in the prior *Lumber IV* investigation and *Supercalendared Paper from Canada – Expedited Review*.[428]

298. The USDOC noted the Canadian parties' argument that the Spelter Study was "outdated."[429] However, the USDOC did not reach this argument because it reasonably based its selection of the conversion factor upon the impartiality of the source and the reliability of the source's methodology. Specifically, the USDOC explained that "because we have no basis for concluding that the BC Dual Scale Study generated unbiased conversion factors, we have not addressed the parties' specific arguments regarding the relative merits of the BC Dual Scale Study as compared with the USFS study."[430]

299. Although there is a lack of contemporaneity between 2002 Spelter Study, which updated the 1984 study, and the 2015 period of investigation, the USDOC determined, as an objective and unbiased investigating authority could have determined, that this and other factors did not outweigh the USDOC's "concerns with the lack of a valid sampling methodology used to produce the data in the BC Dual Scale Study and the applicability of a conversion factor based on BC trees used on a price for Washington trees".[431]

300. The United States observes that the USDOC exhibited the same focus on reliability in explaining its concerns with unreliable summary price data submitted by the petitioners. In addressing the Forest2Market benchmark data compiled by Mason, Bruce & Girard, the petitioners' consultant, the USDOC explained that:

> [S]ince the data and search parameters underlying the prices reported by Forest2Market (for a study conducted specifically for this investigation) are not on the record of this investigation and are otherwise unverifiable, we cannot find those reported U.S. log

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[426] Lumber Final I&D Memo, p. 59 (Exhibit CAN-010).

[427] Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

[428] Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

[429] Lumber Final I&D Memo, p. 58 (Exhibit CAN-010).

[430] Lumber Final I&D Memo, p. 61 (Exhibit CAN-010).

[431] Lumber Final I&D Memo, p. 61 (Exhibit CAN-010).

> prices to be complete, representative, or reliable. In contrast, the U.S. PNW log prices published by WDNR are collected on a monthly-basis, in the ordinary course of business by a government agency, and are in that sense reliable. Moreover, the prices reflected in the data are market-based and representative of species purchased by the BC respondents during the POI.
>
> The petitioner does not appear to dispute that the Mason, Bruce & Girard study is based on unverifiable data, but apparently believes that this flaw is outweighed by the fact that the WDNR data include price quotes. We disagree. While the Department may generally prefer actual transaction prices, where available, we do not consider the Forest2Market log prices to be a reliable alternative for reasons set forth above.[432]

The USDOC explained some of the very same reasons for concern regarding the data submitted by the petitioners that it explained with regard to certain data submitted by the Canadian respondents.

99. <u>To the United States</u>: At paragraph 30 of its opening statement (Day 2), Canada indicates that:

> **Commerce only raised these concerns in its Final Determination, despite the fact that Jendro and Hart provided detailed explanations of their methodology and findings at verification.**

At paragraph 32 of its opening statement (Day 2), Canada also states that:

> **[N]o Commerce officials asked questions or raised concerns regarding the Dual-Scale Study's methodology. The concerns the United States now proclaims Commerce had were all questions the authors could have addressed and resolved during their presentation, had Commerce raised them.**

Likewise, at paragraph 17 of its opening statement (Day 2), the United States indicates that:

> **[I]n reviewing the available conversion factors, the USDOC determined that the BC Dual Scale Study was not useable <u>because the authors failed to explain a key component of their</u>**

[432] Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010).

> **methodology in their report. (footnote omitted, emphasis added)**
>
> **Please indicate record evidence were the US concerns were raised during the course of the investigation and to which Canadian interested parties had an opportunity to respond.**
>
> **Response:**

301. Canada's reference to "[t]he concerns the United States now proclaims Commerce had" erroneously suggests that the basis for the USDOC's determination was not previously explained. This is incorrect. The final issues and decision memorandum is very clear:

> While we do not question the qualifications of Mr. Jendro and Mr. Hart, or the scaling professionals used by Jendro & Hart LLC, we have serious concerns about the methodology used to identify the selected scaling sites. Given the volume of lumber products being produced by the BC respondents, it is unclear why only 13 scaling sites[433] were selected by Mr. Jendro and Mr. Hart for purposes of the BC Dual Scale Study. Further, although these sites were purportedly selected based upon the historic knowledge of the trees that are harvested and scaled at these 13 sites, there is no evidence that either the GBC or Mr. Jendro and Mr. Hart selected these sites using any statistically valid sampling methodology.[434]

302. Canada's insinuation that the USDOC withheld its concerns during the investigation is baseless. In the *Preliminary Determination*, the USDOC indicated that, in its preliminary calculations of the benefit from British Columbia's provision of stumpage, it had converted between MBF and cubic meters using the USFS study, but that it would "continue to evaluate the appropriate conversion factor to be used when converting from MBF to cubic meters."[435] Accordingly, the USDOC had not formed a view of the Dual Scale Study as of the April 24, 2017 *Preliminary Determination*. This reflects the volume of information the Canadian respondents filed in their initial questionnaire responses on March 14, which included the Dual Scale Study, and the additional information provided by both the respondents and the petitioners leading up to preliminary determination.

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[433] The Final Determination mistakenly refers to thirteen scaling sites; Jendro & Hart only selected twelve. Dual Scale Study, p. 9 (Exhibit CAN-020 (BCI)).

[434] Lumber Final I&D Memo, p. 59 (Exhibit CAN-010).

[435] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

303. Similarly, it is of no moment that USDOC staff conducting verification did not articulate concerns with respect to Jendro & Hart's selection of scaling sites for their Dual Scale Study. The purpose of the Commerce officials' visit to British Columbia's Ministry of Forests, Lands and Natural Resource Operations was "to conduct verification of the GBC's questionnaire responses."[436] The outline requested, among other things, that BC Ministry officials: "Be prepared to provide explanations of all the conversion factors used in measuring harvests during the POI (i.e., tons to cubic meters, etc.). Be prepared to provide supporting documentation regarding the conversion factors used when calculating the harvest volume and royalties."[437] Moreover, the verification report specifies that, "[t]his report does not draw conclusions about whether the reported information was successfully verified, and further, does not make findings or conclusions regarding how the facts obtained at verification will ultimately be treated in the Department's analysis."[438]

304. Although the Dual Scale Study was relevant to the verification because it provided the Canadian parties' proposed conversion factors, the USDOC's objective was not, and could not be, to verify the Dual Scale Study itself, which had already been concluded months prior. Furthermore, the information presented by Jendro & Hart at verification did not resolve the USDOC's questions and concerns about the origin and the reliability of the study, nor did it preclude the USDOC from finding the Dual Scale Study to be deficient in its final analysis.[439]

305. Finally, Canadian parties availed themselves of the opportunity to submit written argument to the USDOC concerning the Dual Scale Study after issuance of the preliminary determination and completion of the verification. The joint administrative case brief of the GBC and the B.C. Lumber Trade Council devoted over ten percent of its content to advocating on behalf of the Dual Scale Study.[440] Case briefs submitted to the USDOC by respondent companies Canfor, Tolko, and West Fraser also addressed the Dual Scale Study.[441] Canada's argument that they did not have opportunity to comment is without merit.

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[436] Verification of the Government of British Columbia, p. 1 (Exhibit CAN-088).

[437] Verification of the Government of British Columbia, p. 15 (Exhibit CAN-088).

[438] Verification of the Government of British Columbia, p. 1 (Exhibit CAN-088).

[439] *See* Verification of the Government of British Columbia, p. 1 (Exhibit CAN-088).

[440] Case Brief of the GBC and B.C. Lumber Trade Council (Volume V), pp. V-57-V-71 (July 28, 2017) (Exhibit CAN-295).

[441] Case Brief of Canfor Corporation, pp. 28-29 (July 27, 2017) (Exhibit CAN-137 (BCI)); Case Brief of Tolko Marketing and Sales Ltd. and Tolko Industries Ltd., pp. 11-14 (July 27, 2017) (Exhibit CAN-138 (BCI)); Case Brief of West Fraser Mills Ltd., pp. 40-42 (July 27, 2017) (Exhibit CAN-139 (BCI)).

100. To Canada: At paragraph 31 of its opening statement (Day 2), Canada refers to the following issues that it considers the USDOC did not take into consideration in its investigation:

- **the authors outlined their methodology;**
- **the methodology required the selection of "representative strata" which reflected the "variability of B.C. Interior logs";**
- **the representativeness was based on "[the Harvest Billing System], or HBS scaling data"—a B.C. government database with information on the species and grade of the entire provincial harvest;**
- **major scale sites were chosen in different regions of the B.C. interior; and**
- **"sample loads" were "randomly selected" right out of Commerce's verification report.**

Please point to record evidence where these issues were raised before the USDOC.

Response:

306. This question is addressed to Canada.

101. To the United States: At paragraph 39 of its opening statement (Day 2), Canada argues that "the United States either expressly conceded or does not contest the following key facts:

- **grading systems in the B.C. Interior and eastern Washington do not correspond with one another—certain lower-quality logs that are used to make lumber in the B.C. Interior would not be used to make lumber in eastern Washington;**
- **portions of the logs consumed by B.C. companies would have been categorized as "utility-grade" under eastern Washington grade rules; and**
- **utility-grade logs were priced significantly lower than sawlogs." (footnotes omitted)**

Please comment on each of the issues raised above to show how and where the USDOC took these issues into consideration.

Response:

307. With respect to the first issue, the USDOC agreed that the grading systems in British Columbia and Washington State do not align.[442] The WDNR data includes two sawlog grades, Camprun and Chip-N-Saw (CNS), and one non-sawlog grade, Utility.[443] British Columbia uses four principal grades: 1, premium sawlog; 2, sawlog; 4, lumber reject; and 6, undersized log.[444] The USDOC stated:

> [T]he U.S. log data from the WDNR contain prices for various grades within each species category. We find that these grades do not correspond to the grades contained in the B.C. stumpage data provided by the mandatory respondents. Thus, due to the inability to match by grade and in order to calculate a benchmark that is representative of all grades, we have relied upon the overall unit price listed for each species, which we find is reflective of all grades of logs contained in the WDNR survey.[445]

In the final issues and decision memorandum, the USDOC explained that it continued to find that "the record does not contain a reliable means by which the Department could account for any differences in grading systems between the U.S. PNW and British Columbia."[446]

308. The USDOC did not find, and the United States does not concede, that lower-quality sawlogs in British Columbia are not considered sawlogs in Washington State.[447] Rather, as quoted above, the USDOC found as a general matter that the grades did not match and that, accordingly, its analysis would be species-specific but not grade-specific. Thus, the USDOC used the WDNR benchmark data for all Washington grades.

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[442] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[443] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284).

[444] Dual Scale Study, Attachment A (Exhibit CAN-020 (BCI)). BC also has a grade "Z" for firm wood reject, and two additional grades not addressed in the Dual Scale Study but which apply on cruise-based tenures, grade 7 for (green/alive) and 8 (dead), and which contain a mixture of sawlogs and pulplogs. GBC QR, pp. I-6-7 (Exhibit CAN-018 (BCI)).

[445] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[446] Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

[447] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

309. With respect to the second issue, the United States does not contest that some logs consumed by the mandatory respondents would have been graded "utility" under Washington grade rules. Across the majority of species, each company's harvest was estimated to include **[[BCI]]** utility-grade logs.[448] But even if Canada's data were reliable, those data do not necessarily establish a basis for the USDOC to recalculate the WDNR benchmark, which already reflects Washington timber of all grades.

310. As noted above, the WDNR data the USDOC utilized as its benchmark reflect two sawlog grades, Camprun and Chip-N-Saw (CNS), and one non-sawlog grade, Utility.[449] All three of these grades – including Utility grade – were included in the benchmark. The USDOC explained that, "in order to calculate a benchmark that is representative of all grades, we have relied upon the overall unit price listed for each species, which we find is reflective of all grades of logs contained in the WDNR survey."[450] This methodology was unchanged in the final determination.[451] These monthly, species-specific unit prices reported by WDNR combined the quotes it received, including a limited number of Utility grade log quotes.[452]

311. With respect to the third issue, the United States does not contest that the WDNR prices for utility-grade logs were significantly lower than WDNR prices for other grades.[453] However, there was an insufficient basis in the record for the USDOC to increase the relative weight of Utility grade pricing in its WDNR benchmark. The USDOC appropriately utilized the data as reported by WDNR, in which WDNR combined the price quotes it received for all grades, including Utility.

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[448] *See* Canfor Case Brief, Att. 2 (Exhibit CAN-137 (BCI)); Tolko Case Brief, Att. 1 (Exhibit CAN-138 (BCI)); West Fraser Case Br., Att. 2 (Exhibit CAN-139 (BCI)).

[449] *See generally* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284).

[450] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[451] Lumber Final I&D Memo, pp. 64, 75-76 (Exhibit CAN-010).

[452] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284). WDNR appears to have used a simple average of the quotes received for all grades to derive the species-specific price. However, WDNR reported the number of quotes underlying its prices in ranges rather than providing the specific number. For most species, including lodgepole pine, the Eastside data include Utility prices for two months of the year, but the price data typically reflects a smaller number of quotes. Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285). The exception is the basket category "Conifer," which contains Utility grade data for nine months of the period of investigation. *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

[453] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

312. With respect to the second and third issues, Canada's arguments are beside the point. As noted above, the USDOC explained that "the record does not contain a reliable means by which the Department could account for any differences in grading systems between the U.S. PNW and British Columbia", though the USDOC "duly adjusted for B.C. market conditions to the extent the record reasonably allow[ed]."[454]

102. To the United States: At paragraph 42 of its opening statement (Day 2), Canada indicates that:

> **[T]he average benchmark price used by Commerce closely reflected sawlog prices and were nearly double utility log prices. It simply cannot be said that Commerce's benchmarks reflected prices of all grades. Its benchmarks would be significantly lower if they had accounted for portions of the B.C. Interior harvest that would have been graded as "utility".**

Please comment.

Response:

313. Canada presents a misleading comparison. The USDOC utilized the entirety of the WDNR dataset, including all of the utility grade price quotes, in its species-specific benchmark prices. Canada argues that the utility grade price quotes were insufficiently numerous, but this reflects the limitations of the record data, *not* a decision by the USDOC that utility-grade prices should be excluded from its benchmark. WDNR appears to have used a simple average of the quotes received for all grades to derive the species-specific price. However, WDNR reported the number of quotes underlying its prices in ranges rather than providing the specific number. For most species, including lodgepole pine, the WDNR Eastside data include utility grade prices for two months of the year, but the price data typically reflects a smaller number of quotes.[455] The exception is the basket category "Conifer," which contains utility grade data for nine months of the period of investigation.[456] As explained, the USDOC fully utilized the entirety of the WDNR dataset available.

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[454] Lumber Final I&D Memo, p. 64 (Exhibit CAN-010). *See also ibid.*, pp. 75-76.

[455] Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

[456] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

314. The United States addresses the further issue of whether the benchmark would be lower if the USDOC had adjusted for the ratio of the respondents' utility grade inputs in the U.S. response to question 103, below.

103. <u>To the United States</u>: At paragraph 46 of its opening statement (Day 2), Canada indicates that the United States attempts to argue "*ex post* that the ratios of utility grade logs that the B.C. respondent companies processed were not high enough to warrant a recalculation of Commerce's benchmark." Please indicate record evidence to show where and how the USDOC took this issue into consideration.

<u>Response</u>:

315. As summarized in the U.S. response to question 101, the USDOC determined there was no record evidence that would allow it to make a grade adjustment to the WDNR benchmark, because the record did not provide a reliable means of converting between Washington State and British Columbia grades.[457]

316. In addition to explaining this USDOC finding, the U.S. first written submission addresses Canada's assertion about portions of the B.C. Interior harvest that would have been graded as "utility." In support of its assertion, Canada cited a single statistic – that, using Jendro & Hart's estimate, Canfor Corporation's lodgepole pine harvest would have been **[[BCI]]** utility applying the Washington State grading system.[458] The United States indicated that, even accepting for the sake of argument the Dual Scale Study's ratios, this statistic was misleading.[459] A simple average of the proportion of the three BC-based respondents' harvest, among eight different species, indicates that **[[BCI]]** would have been graded utility.[460] Notwithstanding the paucity of utility data in the WDNR benchmark, the relatively small share of the B.C. harvest that would have been utility grade supports the USDOC's finding that its chosen benchmark reasonably reflected the BC mandatory respondents' timber inputs.[461] More fundamentally, Canada's analysis is premised upon acceptance of the Dual Scale Study, which the USDOC reasonably

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[457] *See* Lumber Final I&D Memo, pp. 64, 75-76 (Exhibit CAN-010).

[458] Canada's First Written Submission, para. 704.

[459] U.S. First Written Submission, para. 451.

[460] *See* Canfor Case Brief, Att. 2 (Exhibit CAN-137 (BCI)); Tolko Case Brief, Att. 1 (Exhibit CAN-138 (BCI)); West Fraser Case Br., Att. 2 (Exhibit CAN-139 (BCI)).

[461] Lumber Final I&D Memo, p. 64 (finding with respect to log grade that the USDOC has "duly adjusted for B.C. market conditions to the extent the record reasonably allows") (Exhibit CAN-010).

concluded was flawed and unusable for reasons the USDOC gave in the final issues and decision memorandum.[462]

104. <u>To the United States</u>: At paragraph 52 of its opening statement (Day 2), Canada indicates that:

> **Since the Washington surveys reported prices for two sawlog grades and utility grade separately, no objective observer would conclude that prices reported for the highest quality sawlogs would somehow include prices for logs that sold for less than a utility-grade log.**

Please comment.

<u>Response</u>:

317. Canada's statement addresses prices obtained by Jendro & Hart for beetle-killed timber. Jendro & Hart's report contains eight price quotes for beetle-killed logs, which, apart from one exception, are all lower than the WDNR prices for utility logs.[463]

318. The USDOC found these data to be unreliable. The USDOC indicated that Jendro and Hart did not explain how their survey participants were selected or provide the query that they distributed.[464] Nor was it possible for the USDOC to determine, for example, whether the authors had included all of the prices reported to them.[465] These methodological issues were of particular importance because Jendro and Hart were commissioned to compile the information for the underlying investigation.[466]

319. Moreover, the petitioners submitted rebuttal evidence in the form of an affidavit from a representative of Idaho Forest Group, which accounted for five of the eight price quotes Jendro & Hart reported, in which the affiant stated that the lower prices for beetle-killed logs relate to those mills specializing in appearance-grade products and thus discouraging delivery of beetle-

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[462] *See* Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010). *See also, e.g.,* U.S. responses to questions 95, 96, 98, 99.

[463] *See* GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 (BCI))).

[464] Lumber Final I&D Memo, p. 76 (Exhibit CAN-010).

[465] Lumber Final I&D Memo, p. 76 (Exhibit CAN-010).

[466] Lumber Final I&D Memo, p. 76 (Exhibit CAN-010).

killed logs.[467] With respect to another mill, Jendro & Hart themselves state that the mill reported it pays less for lodgepole pine and spruce, the two species affected by beetle infestation, because it prefers to process certain other species.[468] This evidence is consistent with the USDOC's concern regarding whether Jendro & Hart's collection of price quotes was representative and reliable.[469]

320. Finally, Canada's premise that beetle-killed logs are not sawlogs, and command lower prices than even utility-grade logs, is belied by its own consultants' data. Specifically, with respect to the two species impacted by beetle infestation, Jendro & Hart found that 72.6 percent of beetle-killed lodgepole pine and 82 percent of beetle-killed spruce were BC grade 2 sawlogs.[470] Thus, according to Canada's proffered evidence, beetle-killed logs are typically of higher quality and price than utility-grade, non-sawlogs.

105. To both parties: At paragraphs 54-55 of its opening statement (Day 2), Canada submits that:

> **Finally, the onus was on Commerce—not the respondents—to ensure that its own benchmark accurately reflected the prevailing quality of logs in the B.C. Interior. Simply put, Commerce had a duty to *investigate*. Any questions about whether, and to what extent, its benchmarks included beetle-killed log prices could have been answered by making a simple inquiry to the Washington Department of Natural Resources, or, by requesting further information from the Petitioner with respect to the benchmark it advocated.**
>
> **Deliberately avoiding this inquiry, and then blaming the Canadian parties for failing to prove a counterfactual, does not reflect the behaviour of an objective investigating authority. Commerce failed to investigate, and failed to make a critical**

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[467] *See* Petitioner Comments on Primary Questionnaire Responses, Exhibit 26, paras. 7-8 (Exhibit USA-052). By contrast, one of the mills in the Idaho Forest Group produced industrial studs, and thus its price offer was for beetle-killed logs was double that of other mills in the group. *See* Petitioner Comments on Primary Questionnaire Responses, Exhibit 26, para. 8 (Exhibit USA-052); GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 (BCI)).

[468] GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 ("The low prices reported for Tri-Pro Forest Products lodgepole pine and spruce reflect that mill's preference for other species, specifically red cedar, Douglas-fir, larch, Ponderosa pine and white fir.") (Exhibit CAN-020 (BCI)).

[469] *See* Lumber Final I&D Memo, p. 76 (Exhibit CAN-010).

[470] Dual Scale Study, p. 41, Table 8 (Exhibit CAN-020 (BCI))).

adjustment on the basis of a mere assumption that was not supported by *any* record evidence.

Please indicate who had the burden to establish "whether, and to what extent" the Washington benchmark included beetle-killed log prices, and why this is the case.

Response:

321. Canada's mischaracterizes the USDOC as "[d]eliberately avoiding this inquiry, and then blaming the Canadian parties for failing to prove a counterfactual, does not reflect the behaviour of an objective investigating authority." Canada's assertion is inaccurate, inflammatory, and fails to aid the Panel in its task. Canada's contention that the WDNR data did not include beetle-killed prices is not merely speculative, but contrary to the relevant evidence. Undisputed record evidence establishes that beetle infestation exists in the U.S. PNW among the same species as in British Columbia, although those species are less prevalent,[471] and Canada's own consultants obtained price quotes for beetle-killed logs from several mills in the United States.[472] Beetle-killed condition, like other quality issues, relates to log grade, and the WDNR benchmark did distinguish between three Washington State grades.[473] Accordingly, the USDOC's explanation that a beetle-killed condition adjustment was inappropriate, in part because the Canadian parties "ha[d] not provided evidence that blue-stained timber prices are not already included in the U.S. PNW log price benchmarks," reflects the illogical nature of Canada's argument that the WDNR dataset is entirely without prices for beetle-impacted logs.[474]

322. Under Article 12.1 of the SCM Agreement, investigating authorities "require," *i.e.*, solicit, information from Interested Members and all interested parties to the countervailing duty investigation, and are to provide Interested Members and interested parties ample opportunity to present responsive evidence in writing. The SCM Agreement does not require an investigating authority to obtain information from non-parties, such as the Washington Department of Natural Resources. Here, the Canadian parties were the proponents of the counterintuitive proposition that the WDNR data contained no prices for beetle-killed lodgepole pine or spruce logs, and they bore the burden of providing an evidentiary basis for their theory.

106. To the United States: Canada argues at paragraph 622 of its first written submission that the USDOC disregarded the expert reports of Professor Leamer,

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[471] GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, pp. 38-40 (Exhibit CAN-020 (BCI)).

[472] GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 (BCI)).

[473] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

[474] Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

Dr. Kalt, and Messrs. Jendro and Hart for the reason that they were prepared for purposes of the underlying investigation, without reference to the content of these expert reports. Is the probative value of a report prepared for the investigation necessarily lower than the probative value of a report prepared independent of the investigation?

Response:

323. An investigating authority should assess the probative value of any piece of evidence on a case-by-case basis. With regard to reports prepared for the investigation, the USDOC expressed, *inter alia*, the following concerns in the final issues and decision memorandum:

> [T]he GBC acknowledges that the BC Dual Scale Study was commissioned by the BC MFLNRO in anticipation of this investigation. The Federal Circuit, in evaluating whether a party's claim had been sufficiently corroborated with evidence in a patent case, opined that "contemporaneous documentary evidence provides greater corroborative value" in determining whether a party's litigation "story is credible." This is because evidence preceding the litigation eliminates "the risk of litigation-inspired fabrication or exaggeration" that may come from later-developed evidence, intended to corroborate the party's story. We find that the Federal Circuit's concerns are equally applicable to evidence created for the purpose of an adjudicatory administrative proceeding, such as this one. Although we consider all evidence on the record of a proceeding, in determining the weight to be accorded to a particular piece of evidence, we consider whether the evidence in question was prepared in the ordinary course of business, or for the express purpose of submission in the ongoing administrative proceeding. Because the BC Dual Scale study was prepared for the express purpose of submission in this investigation, we find that it is at "risk of litigation-inspired fabrication or exaggeration," which diminishes its weight.[475]

Elsewhere in the final issues and decision memorandum, the USDOC expressed concerns about reports placed on the record by both respondents and the petitioners:

> The GOQ, the GOC, and the petitioner have each placed purchased commissioned reports on the record with respect to the issue of government distortion. We first note that none of the interested

[475] Lumber Final I&D Memo, p. 60 (Exhibit CAN-010) (footnotes omitted).

> parties have placed reports or studies that were conducted independently from the current lumber investigation or the previous lumber investigation, nor have they placed on the record reports or studies on the provincial stumpage markets that have been published in peer-reviewed journals. Although we consider all evidence on the record of a proceeding in reaching our determination, in determining the weight to be accorded to a particular piece of evidence, we consider whether the evidence in question was prepared in the ordinary course of business, or for the express purpose of submission in an adjudicatory administrative proceeding. Because these reports were prepared for the express purpose of submission in this investigation or the previous lumber investigation, we find that the reports are at "risk of litigation-inspired fabrication or exaggeration," which diminishes their weight.[476]

324. The USDOC, in assessing the probative value of reports that had been submitted by the interested parties, also reasoned that reports commissioned solely for the purposes of a countervailing duty investigation "carry only limited weight given their potential for bias and conclusions that were tailored to generate a desired result."[477] The reports at issue are not merely presentations of fact, *e.g.*, to demonstrate the distance between a particular mill and a particular woodlot. Rather, the reports at issue present the judgments and conclusions of the author-advocates, *e.g.*, that something is "representative" or that it "disproves" some other contention.

325. The USDOC explained that these commissioned reports warrant careful scrutiny before the agency could rely upon any judgments or conclusions contained in such reports. As the USDOC explained, "[i]n instances where parties have presented a self-commissioned study conducted specifically in anticipation of an investigation for the Department's consideration, the Department must carefully examine the study to ensure that it is based on sound methodologies that guard against any study bias."[478]

326. As indicated in the passages above, the USDOC evaluated and considered all record evidence, including the reports to which it gave limited weight. Canada's assertion that the USDOC disregarded the reports of its commissioned experts Jendro and Hart, Leamer, and Kalt is false.

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[476] Lumber Final I&D Memo, p. 103 (Exhibit CAN-010) (footnotes omitted).

[477] Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

[478] Lumber Final I&D Memo, p. 59 (Exhibit CAN-010).

327. If, for instance, the USDOC had intended to discount the Jendro and Hart Dual Scale Study merely because it was prepared for the investigation, it would have been unnecessary for the USDOC to analyze the study's methodology. Yet, as discussed in the U.S. responses to questions above, the USDOC did examine the study's methodology, and the USDOC concluded, after reviewing the record evidence regarding the study's sampling methodology, that it could not confirm that the study generated unbiased conversion factors.[479]

328. Similarly, the USDOC addressed the substance of Kalt's and Leamer's opinion that log markets are inherently localized,[480] as well as Kalt's view on multiple other issues, such as whether it is economically feasible to export logs from the BC interior[481] and whether export premia are a normal feature of log markets.[482] The USDOC employed the same rigorous approach to the petitioners' consultant's report and its proposed benchmark after identifying issues with its reliability.[483] Accordingly, Canada's contention that its reports were not adequately considered is meritless.

107. <u>To the United States</u>: Could the United States clarify its argument at paragraphs 461-462 that "selling timber by the stand may in itself be inconsistent with market principles", and indicate whether, how, and where on the record the USDOC reached this conclusion.

<u>Response</u>:

329. In the final issues and decision memorandum, the USDOC explained that the market value of standing timber, and the logs that may be produced from that standing timber, is dependent upon its species. "The species of a tree largely determines the downstream products that can be produced from a tree; the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is in turn derived from the demand for the type of lumber produced from these logs."[484]

330. Furthermore, "a main condition for determining stumpage is the demand of the logs from that tree. As such, the Department would not accurately assess the adequacy of remuneration for

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[479] *See* Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010).

[480] *See* Lumber Final I&D Memo, pp. 145-46 (Exhibit CAN-010).

[481] *See* Lumber Final I&D Memo, pp. 147-48 (Exhibit CAN-010).

[482] *See* Lumber Final I&D Memo, pp. 143-44 (Exhibit CAN-010).

[483] *See* Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010). *See also* U.S. Response to Question 98.

[484] Lumber Final I&D Memo, pp. 67-68 (Exhibit CAN-010).

stumpage from a weighted-average combined species benchmark, considering how its value is evaluated according to market principles."[485]

331. In selling timber "by the stand," the British Columbia government's approach combines the full range of species present in the stand in a single sale. The Canadian parties therefore proposed that the USDOC compare a single weighted-average "all species" benchmark to a single weighted-average "all species" stumpage rate.[486] However, because merging consideration of all species together in a single benchmark was inconsistent with how the stumpage's "value is evaluated according to market principles," the USDOC declined that proposal in favor of employing a transaction- and species-specific approach.[487]

108. To Canada: At paragraph 467 of its first written submission, the United States submits that:

> **Here, the "good or service in question" is standing timber provided by British Columbia, and not the numerous downstream products that may be created after British Columbia has provided the standing timber.**

Please comment.

Response:

332. This question is addressed to Canada.

109. To the United States: Please respond to Canada's argument at paragraph 670 of its first written submission:

> **The Cahill Study conversion factors are derived from the dual-scaling of 2,078 softwood logs from the U.S. Pacific Northwest composed of only larch, Douglas-fir, Engelmann spruce, and grand fir—species that represented less than 25% of the B.C. Interior harvest in 2015. Log species that collectively account for more than 75% of the B.C. Interior sawlog usage are not represented in this conversion factor. (footnote omitted)**

Response:

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[485] Lumber Final I&D Memo, p. 68 (Exhibit CAN-010).

[486] Lumber Final I&D Memo, p. 67 (Exhibit CAN-010).

[487] Lumber Final I&D Memo, p. 68 (Exhibit CAN-010).

333. The United States does not dispute Canada's factual assertions, which are reproduced in the Panel's question. The United States refers the Panel to the U.S. response to question 98. The Cahill Study, as updated by Spelter, was the best available – and only usable – conversion factor on the record of the investigation, given the lack of reliable methodology and potential for bias in the Dual Scale Study.

110. To the United States: At paragraph 675 of its first written submission, Canada argues that:

> **Even the Spelter Study, upon which Commerce relied, specifically cautioned against the use of a standard factor in situations, like the one in this investigation, where valuations require precision:**
>
> > **The appropriateness of a standard conversion factor then has to be weighed according to the purposes for which it is used. For illustrating short-term trends in trade, the use of a standard factor may do little harm. However, longer term trends can become considerably biased. *And for situations involving valuations requiring precision, the use of a standard factor irrespective of the particular circumstances is least appropriate*. (footnote omitted, emphasis original)**

Please comment.

Response:

334. As we have in the U.S. responses to questions 98 and 109, the United States emphasizes that the Spelter Study provided the best available information for the USDOC to complete a volumetric conversion. Spelter's observation that "[t]he appropriateness of a standard conversion factor has to be weighed according to the purposes for which it is used" is exactly the point Canada fails to recognize. The standard conversion factor was appropriate in the context of this benchmark comparison. Canada implies that "precision" is somehow lacking, but its assertion is unfounded. Spelter's observation that a standard conversion factor would be "least appropriate" relates to "valuations" conducted "irrespective of the particular circumstances." That observation does not describe the situation in this dispute.

111. To both parties: The information in figure 66 to Canada's first written submission appears to compare freight costs in BC Interior to freight costs in Washington and Oregon coastal regions. Please comment.

Response:

335. The United States notes that the entirety of Figure 66 to Canada's first written submission appears in double brackets. The United States thus responds to this question keeping in mind the Panel's Additional Working Procedures for the Protection of Business Confidential Information.

336. **[[BCI]]**[488]

337. The Panel should disregard the data in Figure 66 because it is irrelevant. Article 14(d) of the SCM Agreement unambiguously refers to prevailing market conditions, **[[BCI]]**.[489]

338. There is no limit to the number of adjustments an investigating authority would be required to make, if the Panel were to accept Canada's position. Canada's position is untethered to the SCM Agreement and should be rejected.

112. <u>To the United States</u>: At paragraphs 58 and 59 of its opening statement (Day 2), Canada argues that:

> **In B.C., stand-as-a-whole pricing simply meant that one stumpage rate was set for all sawlogs within the harvest area, instead of a separate rate for each species contained within. This meant that the value of Crown timber in terms of its characteristics such as species-mix is reflected in the overall price for the stand.**
>
> **Commerce's methodology required the B.C. respondents to artificially construct "species-specific" stumpage payments. When compared individually to species-specific benchmarks, this resulted in payments that appear to be "above-market" for some species relative to their benchmarks, while appearing to be "below-market" for others. However, the Panel must keep in mind that these constructed stumpage payments did not reflect the true value of the species that were used to generate the single price of the stand.**

Please comment.

<u>Response</u>:

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[488] Canada's First Written Submission, para. 732.

[489] Canada's First Written Submission, para. 733.

339. The premise of the USDOC's methodology was that "standing timber values are largely derived from the demand for logs produced from a given tree," which varies by species.[490] The USDOC compared the average annual price for each species in the Washington state log price data to annual prices paid by each respondent with operations in British Columbia by timbermark or stand (*i.e.*, a cutting authority or geographic area) and species.[491] Canada's claim that such a comparison is artificial or distortive reflects its erroneous contention that the USDOC was required to accept its stand-as-a-whole pricing as a prevailing market condition. The United States has addressed Canada's contention in the U.S. response to question 107.

340. Moreover, Canada acknowledges that timber value varies by species, asserting that British Columbia prices stands based on the relative composition of species. Canada explains that, "[w]hile a stand may contain multiple species of trees, separate stumpage rates are not determined for the individual species, but rather, in relation to the aggregate set of species contained in that particular stand."[492] Canada's argument that the USDOC's comparison of prices on a more specific basis, by constructing species-specific prices, does not "reflect the true value of the species" is baseless. Rather, as the United States explained in the U.S. first written submission, the USDOC's approach reflected a "careful matching" of transactions in connection with its examination of the benefit conferred by British Columbia's provision of stumpage.[493]

113. At paragraph 740 of its first written submission, Canada argues that "accounting for the negative comparison results associated with Commerce's transaction-specific methodology eliminates entirely the alleged benefit for each of the three B.C. respondent companies."

i. <u>To Canada</u>: Please elaborate how accounting for the negative comparison results eliminates entirely the alleged benefit?

<u>Response</u>:

341. This question is addressed to Canada.

ii. <u>To the United States</u>: Please comment on this argument of Canada.

<u>Response</u>:

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[490] Lumber Final I&D Memo, pp. 67-68 (Exhibit CAN-010).

[491] Lumber Final I&D Memo, pp. 66-67 (Exhibit CAN-010).

[492] Canada's First Written Submission, para. 721.

[493] U.S. First Written Submission, paras. 518-26.

342. Canada's statement regarding complete elimination of the subsidy benefit refers to Canada's own computation of the cumulative result of making each adjustment to the British Columbia benchmark for which Canada argues, other than the lumber transportation costs adjustment. Thus, Canada calculated the impact of using stand-as-a-whole pricing after implementing the Dual Scale Study conversion factors, and after incorporating both utility and beetle-killed prices.[494] Of course, the USDOC did not perform alternative calculations, so these calculations reflect Canada's untested assumptions regarding how each of its proposed adjustments should be implemented.

343. More fundamentally, Canada's argument that the USDOC was required to provide a credit for negative comparison results has no support in the text. As explained in the U.S. first written submission, nothing in the covered agreements obligates an investigating authority, when determining the amount of the benefit conferred by a financial contribution, to provide a credit for instances in which other financial contributions do not confer a benefit.[495] Accordingly, there is no textual basis in the covered agreements for finding that the USDOC was obligated to employ the hypothetical calculations that Canada has placed before the Panel.

8 THE USDOC'S USE OF "ZEROING" IN ITS BENEFIT CALCULATION

114. <u>To the United States</u>: At paragraph 520 of its first written submission, the United States asserts, in relevant part, that:

> **The USDOC compared the average annual price for each species in the Washington log-price data to <u>annual prices</u> paid by each respondent with operations in British Columbia by timbermark or stand (*i.e.*, a cutting authority or geographic area) and species. (emphasis added, footnote omitted)**

Please explain in detail the meaning of "annual prices" as it appears in the underlined text above, and how the USDOC calculated these prices. In particular, were the prices an <u>average of prices</u> "paid by each respondent with operations in British Columbia by timbermark or stand"?

<u>Response</u>:

344. In the preliminary decision memorandum, the USDOC explained that:

> [W]e are using log prices published by the WDNR as the basis for the U.S log-based benchmark for British Columbia, specifically,

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[494] Canada's First Written Submission, para. 740.

[495] *See* U.S. First Written Submission, para. 472-527.

monthly survey prices for delivered logs. The WDNR log prices in the Petition cover April through December 2015. Our POI covers calendar year 2015. Therefore, we placed WDNR log prices for January through March 2015 on the record of the investigation.

The WDNR survey contains species-specific U.S. log prices for the coast and interior of Washington. The harvesting operations of the B.C.-based mandatory respondents are located in the interior of British Columbia. Therefore, we have limited our U.S. log benchmark prices to those WDNR survey data corresponding to the interior of Washington, which, consistent with *Lumber IV*, we find is more comparable to the interior of British Columbia.

The log prices published by the WDNR are expressed in U.S. dollars per MBF. We converted these monthly prices into U.S. dollars per cubic meter using a conversion factor of 5.93, which is the same conversion factor for interior species used by the Department in *Lumber IV*. We will continue to evaluate the appropriate conversion factor to be used when converting from MBF to cubic meters. Next, we converted the monthly U.S. log prices per cubic meter into Canadian dollars per cubic meter using monthly exchange rates during the POI, as published by the U.S. Federal Reserve. As explained below, due to the way in which the GBC bills and invoices tenure holders, we have preliminarily determined to annualize the respondents' purchases of Crown-origin standing timber in British Columbia. Accordingly, we have calculated an annual U.S. log price benchmark.

The log price data published by the WDNR reflect unit prices without corresponding volumes. Therefore, to calculate annual U.S. log prices, we simple-averaged the monthly unit prices by species. Lastly, the U.S. log data from the WDNR contain prices for various grades within each species category. We find that these grades do not correspond to the grades contained in the B.C. stumpage data provided by the mandatory respondents. Thus, due to the inability to match by grade and in order to calculate a benchmark that is representative of all grades, we have relied upon

> the overall unit price listed for each species, which we find is reflective of all grades of logs contained in the WDNR survey.[496]

Notably, the USDOC's decision to utilize annual prices was consistent with the BC respondents' specific request that the USDOC consider their stumpage data on an annual basis because of the manner in which British Columbia invoices stumpage.[497]

345. The USDOC further explained in the preliminary decision memorandum that:

> To calculate a benefit under this program, we compared each respondent's purchases of Crown-origin standing timber to the Washington state benchmark prices for logs discussed above.
>
> The BC Crown stumpage scale-based invoicing system features monthly adjustments that apply retroactively and cumulatively to previous invoices. As a result, the species-specific volumes and values reported on the invoices do not represent the actual volume and value purchased in the month. Therefore, the Department has determined that aggregating the respondents' POI purchases of Crown-origin standing timber by cutting authority (i.e., timbermark) and species is a reasonable approach to addressing the inaccuracies that would result from relying on the volume and value as reported on the monthly invoices. We find this approach properly addresses the retroactive adjustments while also permitting a price comparison on as specific a basis as possible. We will continue to examine British Columbia's scale-based invoicing system and how best to incorporate aspects of that system in our benefit analysis for the final determination.
>
> Because we have aggregated the respondents' Crown-origin standing timber purchases to an annual basis, we have similarly aggregated the benchmark price data to an annual average basis. The benchmark pricing data do not allow for construction of a benchmark on a grade-specific basis. Therefore, for purposes of this preliminary determination, we have calculated species-specific benchmarks and matched to the Crown-origin species of standing timber purchased by the respondent firms. Where there were no exact species matches, we sought to compare the stumpage

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[496] Lumber Preliminary Decision Memorandum, pp. 52-53 (Exhibit CAN-008) (footnotes omitted; underline added).

[497] *See, e.g.*, Tolko Pre-Preliminary Determination Comments (April 11, 2017), pp. 4-6 (Exhibit USA-058).

> purchases to the most similar species represented in the benchmark data.
>
> * * *
>
> To calculate the unit benefit, we compared to the U.S. log benchmark value to each timbermark/species-specific, profit-adjusted cost for the respondents' POI purchases of BC Crown stumpage. We then multiplied the unit benefit by the corresponding volume of Crown-origin standing timber purchased. Next, we summed the timbermark/species-specific benefits to calculate the total benefit for the program. We divided the total stumpage benefit by the respondents' respective total softwood lumber and total softwood co-product sales during the POI. In this manner, we calculated a net subsidy rate of 7.16 percent *ad valorem* for West Fraser, 10.32 percent *ad valorem* for Tolko, and 10.91 percent *ad valorem* for Canfor.[498]

346. In the final issues and decision memorandum, the USDOC "continue[d] to apply its preliminary methodology in relation to aggregating the standing timber by timbermark and species in British Columbia for purposes of making a comparison with the Washington state benchmark",[499] and explained that "we determine that the use of annual average stumpage prices by timbermark and species remains a reliable methodology to examine the GBC's provision of stumpage for LTAR."[500] The USDOC also addressed arguments raised by interested parties, including the Government of British Columbia, Canfor, and West Fraser, which did not challenge the USDOC's use of annual averages.[501]

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[498] Lumber Preliminary Decision Memorandum, pp. 53-54 (Exhibit CAN-008) (footnotes omitted; underline added) (discussion of certain adjustments that are not relevant to the Panel's question, and which were changed in the final determination, has been omitted from the block quotation).

[499] Lumber Final I&D Memo, p. 67 (Exhibit CAN-010).

[500] Lumber Final I&D Memo, p. 66 (Exhibit CAN-010).

[501] *See* Lumber Final I&D Memo, pp. 65-68 (Exhibit CAN-010) (Indeed, the USDOC explained that "Canfor agrees with the annual roll-up by timbermark and species that the Department employed in the *Preliminary Determination*," but "Canfor argue[d] that the Department should not have disaggregated this roll-up by timbermark." *Ibid.*, p. 65).

347. As noted in the U.S. first written submission, the USDOC also provided further explanations of the subsidy rate calculations for Canfor, Tolko, and West Fraser in company-specific calculation memoranda.[502]

348. Based on the USDOC discussion quoted above, and to respond to the Panel's question as directly as possible, the phrase "annual prices" that appears in underlined text in the question means "the species-specific volumes and values reported on the [respondents'] invoices" "aggregat[ed] … by cutting authority (i.e., timbermark) and species"[503] "to address[] the inaccuracies that would result from relying on the volume and value as reported on the monthly invoices",[504] adjusted to include the costs associated with accessing, harvesting, and hauling these timber purchases to the sawmill, and the costs the respondents were obligated to incur as a condition of their Crown tenures, such as silviculture, forest management, annual rent, waste stumpage, and scaling expenses.[505] The characterization of "annual prices" in the question – that "the prices [were] an average of prices 'paid by each respondent with operations in British Columbia by timbermark or stand'", is a less precise description of the USDOC's approach than that given by the USDOC in its determinations.

115. <u>To Canada</u>: At paragraph 930 of its first written submission, Canada argues, in relevant part, that:

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[502] *See* U.S. First Written Submission, para. 520 (quoting from *Memorandum to the File, RE: Final Determination Calculations for Canfor* (November 1, 2017), p. 5 (Exhibit CAN-380 (BCI)); *Memorandum to the File, RE: Final Determination Calculations for Tolko Marketing and Sales Ltd. and Tolko Industries Ltd. (collectively Tolko)* (November 1, 2017), p. 7 (Exhibit CAN-381 (BCI)); *Memorandum to the File, RE: Final Determination Calculations for West Fraser Mills, Ltd. and its cross-owned affiliates* (November 1, 2017), pp. 3-4 (Exhibit CAN-382 (BCI)).

[503] Lumber Preliminary Decision Memorandum, p. 54 (Exhibit CAN-008) (footnotes omitted).

[504] Lumber Preliminary Decision Memorandum, p. 54 (Exhibit CAN-008) (footnotes omitted).

[505] *See* Lumber Final I&D Memo, pp. 71-75 (Exhibit CAN-010). In the Final Determination, the USDOC made adjustments for the following variables in the BC stumpage calculations: (1) Harvesting Costs (including stand to roadside costs); (2) Hauling Costs (cost of getting the log from road-side to mill); (3) Main/Secondary Road and Bridge Construction; (4) On-Block Road and Bridge Construction; (5) Water Transportation Costs (Canfor only); (6) Camp costs (logging in remote areas require setting up camps for loggers)/remote yard & haul costs (Canfor/West Fraser); (7) Miscellaneous Direct Harvesting Costs (Canfor only); (8) Cutting Rights Fees/Purchase Costs; (9) Silviculture; (10) Sustainable Forest Management Costs; (11) Annual Forest Rent; (12) Waste Stumpage Payments; (13) Conversion Scaling; (14) Weight Scaling; (15) Harvest and Haul Administrative Costs (Canfor only); and (16) Administration/Overhead (Tolko & West Fraser). *See, e.g., Memorandum to the File, RE: Final Determination Calculations for Canfor* (November 1, 2017), p. 4, footnote 17 (Exhibit CAN-380 (BCI)); *Memorandum to the File, RE: Final Determination Calculations for Tolko Marketing and Sales Ltd. and Tolko Industries Ltd. (collectively Tolko)* (November 1, 2017), p. 7 (Exhibit CAN-381 (BCI)); *Memorandum to the File, RE: Final Determination Calculations for West Fraser Mills, Ltd. and its cross-owned affiliates* (November 1, 2017), p. 4 (Exhibit CAN-382 (BCI)).

> **Comparing transaction-specific Crown stumpage prices to an average benchmark price that reflects a wide range of harvesting and other conditions results in the identification of price differences that occur because of differing *market* conditions, not because a good is being provided at below-market rates. However, transaction-to-average comparisons can provide an accurate and reasonable benefit calculation if the individual comparison results are added together.**

Please provide your views on whether, in the context of transaction-to-average comparisons, an investigating authority would be required to aggregate the individual comparison results or average government stumpage prices in a situation where the average benchmark price did pertain to transactions that appropriately reflected the prevailing market conditions.

Response:

349. This question is addressed to Canada.

116. To Canada: At paragraph 920 of its first written submission, Canada argues, in relevant part, that:

> **[B]y setting certain comparison results to zero, Commerce's benefit calculation methodologies for Irving in New Brunswick, and for Canfor, Tolko, and West Fraser in British Columbia, were inaccurate and inconsistent with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.**

Please clarify whether your claims that the USDOC's benefit calculation methodologies in question are inconsistent with Articles 1.1(b), 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 are consequential to your claim that those methodologies are inconsistent with Article 14(d) of the SCM Agreement.

Response:

350. This question is addressed to Canada.

117. To Canada: At paragraph 929 of its first written submission, Canada asserts, in relevant part, that:

> **Commerce's decision to set the benefit to zero made its already inaccurate benefit calculation—which improperly relied on Nova Scotia benchmark prices—even more inaccurate.**

Further, at paragraph 926 of its first written submission, Canada argues, in relevant part, that:

> **It naturally follows that a benefit calculation methodology selected pursuant to Article 14(d) that distances the comparison results from their connection to prevailing market conditions is an unreasonable one.**

Considering the above arguments, please explain why the USDOC's decision to set the benefit to zero made its allegedly "already inaccurate benefit calculation" even more inaccurate? Please also explain precisely how the USDOC's benefit calculation methodology in question "distances the comparison results from their connection to prevailing market conditions"?

Response:

351. This question is addressed to Canada.

9 THE EXPORT PERMITTING PROCESS FOR BRITISH COLUMBIA LOGS

118. To Canada: At paragraph 947 of its first written submission, Canada states that the relevant governmental action in this case is "the government provision of goods other than general infrastructure under Article 1.1(a)(1)(iii)". How does this statement correlate with Canada's argument at paragraph 952 that an export permitting process, as one type of export measures, cannot constitute a financial contribution as a matter of law, because it is not enumerated among the types of governmental actions in Articles 1.1(a)(1)(i) through (iii) of the SCM Agreement?

Response:

352. This question is addressed to Canada.

119. To Canada: Please comment on the United States' argument at paragraphs 569-570 of its first written submission that the relevant governmental function is the provision of goods (logs), whereas the export permitting process is just "the legal mechanism" through which the government takes action to entrust or direct private log suppliers to carry out the function of providing logs to BC consumers.

Response:

353. This question is addressed to Canada.

120. <u>To Canada</u>: Please comment on the United States' arguments at paragraphs 551-565 of its first written submission that the ordinary meaning of phrase "entrusts or directs" "encompasses a range of possible government actions", which is supported by the context of the phrase "entrusts or directs", and object and purpose of the SCM Agreement.

<u>Response</u>:

354. This question is addressed to Canada.

121. <u>To the United States</u>: At page 62 of its preliminary determination, the USDOC concluded that "[t]he cumulative impact of these legal restrictions on the export of timber has resulted in only a small volume of the logs in BC being exported during the POI." Pointing to record evidence, please provide the basis for this finding of the USDOC.

<u>Response</u>:

355. The Government of Canada and the Government of British Columbia reported that a total of 5,801,632 m^3 of softwood logs were permitted for export from British Columbia in 2015.[506] The Government of British Columbia reported that a total of 66,811,415 m^3 of softwood logs ("Coniferous Total") were harvested in British Columbia in 2015.[507] Thus, based on evidence provided to the USDOC by the Government of Canada and the Government of British Columbia, only 8.7 percent of softwood logs harvested were permitted for export.[508] Accordingly, the USDOC concluded that only a small volume of the logs harvested in British Columbia during the period of investigation, 2015, were exported.[509]

356. When the USDOC concluded in the preliminary decision memorandum that this small volume of log exports was the result of "[t]he cumulative impact of these legal restrictions on the export of timber",[510] the USDOC was referring to the discussion of the legal restrictions – and the references to record evidence supporting that discussion – set forth in the preceding pages of

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[506] Canada/British Columbia, "Summary of Federal Export Permits Issued in BC in 2015 – All Lands" (Exhibit LEP-41) (Exhibit CAN-053).

[507] British Columbia, "Timber Harvest in Calendar Year 2015" (Exhibit BC-S-2), last page (Exhibit CAN-055).

[508] This figure, 8.7 percent, has been calculated by dividing 5,801,632 m^3 by 66,811,415 m^3.

[509] *See* Lumber Preliminary Decision Memorandum, p. 62 (Exhibit CAN-008).

[510] Lumber Preliminary Decision Memorandum, p. 62 (Exhibit CAN-008).

the preliminary decision memorandum.[511] That discussion, of course, speaks for itself, and the United States does not reproduce that discussion here, in response to this question. However, in response to questions 122, 124, and 125, the United States discusses in greater detail the record evidence supporting the USDOC's findings concerning the legal restrictions on the export of timber from British Columbia.

122. To the United States: Could the United States respond to Canada's arguments at paragraph 963 of its first written submission that "British Columbian log suppliers retain freedom to choose what to do with their logs" and "Canada and British Columbia did not require Canadian companies to sell their logs to the domestic market", considering that most of the applications for export were approved and even after obtaining an export permit, log suppliers often chose not to export.

Response:

357. As noted in the U.S. first written submission, Canada ignores substantial record evidence.[512] The United States further discusses the record evidence that supported the USDOC's conclusions in the U.S. responses to questions 78, 121, 124, and 125.

358. In sum, the USDOC explained that the fact that "logs in British Columbia are by default not allowed to be exported from the province" restrains exports.[513] Furthermore, the record evidence demonstrates that log suppliers are forced to negotiate with other domestic processors to lower their export volumes or their prices, under the threat that the purchaser would otherwise "block" the suppliers' export sales in the surplus test process.[514] Certain record evidence indicates that blocking is widespread, and that the high approval rate of export applications reflects that log suppliers have made agreements with processors in advance of applying for export approval, to ensure that those processors do not bid on their logs when offered in connection with the export authorization surplus test.[515] Thus, log suppliers do not "retain freedom" in any meaningful way, despite Canada's suggestion to the contrary.[516]

123. To Canada: In light of the requirement of the BC Forest Act that logs have to be used in British Columbia or manufactured within the province into a wood product, unless an exception applies, could Canada elaborate on its argument at paragraph

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[511] *See* Lumber Preliminary Decision Memorandum, pp. 57-63 (Exhibit CAN-008).

[512] *See* U.S. First Written Submission, para. 593.

[513] Lumber Final I&D Memo, p. 139 (Exhibit CAN-010). *See also* U.S. Response to Question 124.

[514] Lumber Final I&D Memo, p. 139 (Exhibit CAN-010). *See also* U.S. Responses to Questions 78 and 125.

[515] Lumber Final I&D Memo, p. 141 (Exhibit CAN-010). *See also* U.S. Response to Question 125.

[516] Canada's First Written Submission, para. 963.

962 of its first written submission that the "LEP process does not require a log seller to provide a log to anyone"?

Response:

359. This question is addressed to Canada.

124. At paragraph 591 of the United States' first written submission, the United States argues that "Canada and British Columbia directly interfere with the ability of log suppliers to enter into long-term contracts with foreign purchasers, and to sell to foreign purchasers at all".

i. To the United States: Please elaborate on your argument, considering Canada's statement that 99% of applications for export were automatically authorized in 2015 (paragraph 963 of Canada's first written submission). In particular, please support with the record evidence your answer at the oral hearing to this particular question, i.e. that it takes from 7 to 13 weeks to obtain an export permit, and that it imposes additional costs and influences the way of doing business of potential log exporters.

Response:

360. This question contains several parts. Below, the United States addresses each part in turn.

"[P]lease support with the record evidence … that it takes from 7 to 13 weeks to obtain an export permit"

361. Evidence supporting the U.S. statement that it "can take between seven and thirteen weeks"[517] to obtain an export permit was provided to the USDOC by the Government of British Columbia.

362. In the preliminary decision memorandum, the USDOC explained that:

> In *SC Paper from Canada – Expedited Review*, the Department found that the process to apply for and receive an export permit under a Ministerial Order can take between seven and thirteen weeks. There is no indication on the record of this investigation that the timing of the approval process for Ministerial Orders has

[517] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

> changed between the POR of the *SC Paper from Canada – Expedited Review* (2014) and this POI.[518]

363. In the final issues and decision memorandum in *SC Paper from Canada – Expedited Review*, the USDOC explained that "[t]he export exemption process can take from seven to 13 weeks from filing an application for an exemption export under a Ministerial Order to receiving an export permit from the GOC."[519] As support for this statement, the USDOC referred to page 7 of the Government of British Columbia verification report in the *SC Paper from Canada – Expedited Review* proceeding.[520] In the Government of British Columbia verification report, the USDOC noted that:

> [T]he GBC explained the general timelines for the log export process under Ministerial Orders, indicating that the export process for applications that do not receive an offer (from the bi-weekly advertising list) takes about four weeks for the ministry to issue an exemption (i.e., approval of the order) and seven weeks to export (after obtaining provincial and export permits), while applications that do receive an offer that is deemed to be not fair, take six to ten weeks before the exemption is issued, and between 9 and 13 weeks to export.[521]

364. The USDOC referred in a footnote omitted from the above block quotation to "BC-VER-7", an exhibit submitted by the Government of British Columbia presenting the "Timeline for Log Exports in British Columbia."[522] The United States is providing that exhibit to the Panel as Exhibit USA-060.[523]

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[518] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008) (footnotes omitted).

[519] *SC Paper from Canada – Expedited Review*, Final I&D Memo, p. 46 (Exhibit USA-038) (footnotes omitted).

[520] *See SC Paper from Canada – Expedited Review*, Final I&D Memo, p. 46, footnote 227 (Exhibit USA-038).

[521] *SC Paper from Canada – Expedited Review*, GBC Verification Report, p. 7 (Exhibit USA-059) (footnotes omitted).

[522] *SC Paper from Canada – Expedited Review*, GBC Verification Report, p. 7, footnote 29 (Exhibit USA-059).

[523] To be clear, the United States emphasizes that neither the Government of British Columbia verification report from *SC Paper from Canada – Expedited Review* nor the verification exhibit entitled "Timeline for Log Exports in British Columbia" were on the record of the softwood lumber countervailing duty investigation. The United States is providing these documents to the Panel because they were on the record in *SC Paper from Canada – Expedited Review* and supported the USDOC's conclusion in that proceeding that "[t]he export exemption process can take from seven to 13 weeks". *SC Paper from Canada – Expedited Review*, Final I&D Memo, p. 46 (Exhibit USA-038). In the softwood lumber countervailing duty investigation, the USDOC relied on that conclusion from *SC Paper from Canada – Expedited Review*, again noting that "[t]here is no indication on the record of this investigation that the timing of the approval process for Ministerial Orders has changed between the POR of the *SC Paper from Canada –*

365. On the administrative record of the softwood lumber countervailing duty investigation itself, there was other evidence indicating that the process can take from seven up to thirteen weeks. The Fraser Institute report, which was provided to the USDOC with the petition, explained that "the log export approval process takes around seven weeks if no domestic offer is received, but takes nine to 13 weeks if domestic offers are received."[524]

366. During the countervailing duty investigation of softwood lumber, the Government of British Columbia "argue[d] that the record shows the entire process is frequently concluded in as little as two and a half weeks."[525] Of course, the evidence discussed above demonstrates that the process can take as long as seven to thirteen weeks. Additionally, the USDOC responded to the Government of British Columbia's argument, reasoning that "the fact that an application for an export permit must be filed at all introduces an additional burden on log sellers seeking to export, and the fact that the permit is not automatically approved renders exporting uncertain. This restriction, along with others identified above, hinders the free export of logs and discourages log sellers from considering all market options and seeking the highest price for their logs."[526]

"[P]lease support with the record evidence … that it imposes additional costs and influences the way of doing business of potential log exporters"

367. The USDOC identified a number ways in which the log export restraints imposed by the Government of British Columbia and the Government of Canada impose additional costs and influence the way that potential log sellers do business. In the following paragraphs, we summarize the USDOC's discussion and the evidence on which the USDOC relied.

368. As an initial matter, the British Columbia Forest Act requires "Crown timber to be used in British Columbia" unless an exemption is granted.[527] This is evidenced by the text of the Forest Act itself. The limited exemptions provided under the Forest Act permit logs to be exported only if the logs are surplus to the needs of timber processing facilities in British Columbia, or the logs cannot be processed economically in the province, or an exemption would

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Expedited Review (2014) and this POI." Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008). Indeed, neither the Government of British Columbia nor Canada has suggested that this information is incorrect, *i.e.*, they have not suggested that it is wrong to say that the process can take from seven to thirteen weeks. They simply argue, as discussed further below, that the process may often take less time than that.

[524] *See* Joel Wood, "Log Export Policy for British Columbia," Fraser Institute (June 2014), p. 10 (Exhibit 244 of the petition) (p. 26 of the PDF version of Exhibit USA-010).

[525] Lumber Final I&D Memo, p. 142 (Exhibit CAN-010).

[526] Lumber Final I&D Memo, p. 142 (Exhibit CAN-010) (underline added).

[527] British Columbia Forest Act, Part 10 "Manufacture in British Columbia" (p. 95 of the PDF version of Exhibit CAN-039).

prevent waste.[528] The USDOC explained that "the purpose of the surplus test is to ensure that there is an adequate domestic supply of logs to satisfy the needs of domestic lumber before an export exemption is granted", and "this requirement ensures that the timber processing and value-added wood product industry in British Columbia is assured of an abundant, low-cost source of supply."[529] The requirement to seek an exemption from the Forest Act's export prohibition before selling logs in an export market necessarily influences the way that potential log exporters do business. Log suppliers first must go through the exemption and export permit processes, which they otherwise would not have to do absent the log export restraints.

369. The USDOC described the operation of the exemption process in the preliminary decision memorandum, referring to record evidence, in particular the joint questionnaire response submitted to the USDOC by the Government of Canada and the Government of British Columbia:

> Exemptions under the surplus test are generally approved through Ministerial Orders or through an individual OIC or a blanket OIC. Under a Ministerial Order, a company submits an application, and the logs covered by the application are listed in a bi-weekly advertising list, notifying British Columbia mill operators the availability of the logs. If no bid is received for that listing, then the listing is considered surplus, and a Ministerial Order is granted. If an application receives an offer, the bid will then be evaluated by the [Timber Export Advisory Committee ("TEAC")] to determine whether the offer represents a fair market value. TEAC members include government officials and log market experts, some of whom are active buyers and sellers of logs. For the coastal region, the TEAC relies on pricing data from the VLM to evaluate whether an offer represents fair market value. The TEAC makes a recommendation to the GBC regarding whether the price offered is fair. If the offer is determined not to be fair, i.e., below "market prices" as considered by the Committee, then the listing is determined to be surplus to the needs of BC manufacturers, and a Ministerial Order is granted. If an offer is deemed to be fair, the application for an export exemption is rejected. The company that applied for an export exemption is not allowed to resubmit an

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[528] *See* British Columbia Forest Act, Part 10 "Manufacture in British Columbia" (pp. 95-96 of the PDF version of Exhibit CAN-039); Lumber Preliminary Decision Memorandum, pp. 58-59 (Exhibit CAN-008).

[529] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008) (footnotes omitted).

> application to export the same logs if it decides to not sell the logs to the company that made a fair offer.[530]

370. Once again, the fact that log suppliers, if they wish to offer logs for sale in the export market, first must offer those logs for sale to purchasers in British Columbia by listing them in a bi-weekly advertising list, influences the way that potential log exporters do business.

371. As discussed earlier in response to this question, the USDOC explained that the process of obtaining an export permit, which is required to export logs from British Columbia, can take between seven and thirteen weeks.[531] Even if, as the Government of British Columbia argued to the USDOC, and Canada argues now, "the entire process is frequently concluded in as little as two and a half weeks", the USDOC reasoned that "the fact that an application for an export permit must be filed at all introduces an additional burden on log sellers seeking to export, and the fact that the permit is not automatically approved renders exporting uncertain."[532] Any delay resulting from the process put in place by the governments necessarily will influence the way in which potential log suppliers do business.

372. As discussed in the U.S. response to questions 78 above and 125 below, information on the administrative record before the USDOC indicated that a "blocking" system operates in the province, "which creates an environment in which log sellers are forced into informal agreements that lower export volumes and domestic prices."[533] The "blocking" system that results from the imposition of log export restraints by the Government of British Columbia and the Government of Canada increases the costs of log suppliers, who "are frequently forced to sell a portion of their logs to processors in British Columbia at or below the cost of production in order to be able to export their remaining logs",[534] and influences the way that log suppliers do business, *inter alia*, in that they must negotiate such agreements at all.

373. Additionally, the USDOC explained that:

> [E]xports of logs under provincial jurisdiction in British Columbia are subject to fees "in-lieu of manufacturing." These fees range between C$1 per cubic meter to approximately 15 percent of the

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[530] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008) (footnotes omitted). *See also ibid*., footnotes 371-375, citing "GQRGBC at LEP-16 to 18", "LEP-17,", and "LEP-46". Canada has provided the document cited by the USDOC to the Panel as Exhibit CAN-049 (BCI)). *See also* Lumber Final I&D Memo, pp. 149-151 (Exhibit CAN-010).

[531] *See* Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

[532] Lumber Final I&D Memo, p. 142 (Exhibit CAN-010).

[533] Lumber Final I&D Memo, p. 139 (Exhibit CAN-010) (footnotes omitted).

[534] Lumber Final I&D Memo, p. 140 (footnotes omitted) (Exhibit CAN-010).

> value of the specific log. The fees vary based on the location, species, and grade of the log. Further, in certain coastal areas, exports of logs are subject to an additional multiplication factor between 1.1 and 1.3 of the fee.[535]

The Government of Canada and the Government of British Columbia provided evidence to the USDOC of the existence of the fees in-lieu of manufacture in their joint questionnaire response.[536]

374. In the final issues and decision memorandum, the USDOC responded to arguments made by the Government of Canada and the Government of British Columbia that "the in-Lieu-of-Manufacturing fees that BC log exporters are required to pay do not pose a meaningful obstacle to log export activities", and the USDOC gave reasons for disagreeing with those arguments.[537]

> First, approximately 58 percent of the logs exported from the province during the POI were under provincial jurisdiction, and thus subject to the in-Lieu-of-Fee-of-Manufacturing fees. As such, we find that the majority of exported logs are subject to these fees. Further, we find that these fees can be significant, and can substantially increase the final price a potential customer would have to pay for the logs.
>
> We also disagree with the significance that the GOC/GBC attribute to the fact that the fees for the interior of the province, where the mandatory respondents are located, are less than the fees from the coastal region of British Columbia. Although the fees for logs harvested from the interior are lower in comparison to the BC coast, we find the fact that any fee is required at all to be significant. These fees increase the cost of exporting, as compared to producing domestically, and represent another impediment (along with the "blocking" system, approval process, etc.) to export logs from British Columbia.[538]

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[535] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008) (footnotes omitted).

[536] *See* Lumber Preliminary Decision Memorandum, p. 60, footnotes 380 and 381 (Exhibit CAN-008) (citing "GQRGBC at LEP-34-35", which Canada has provided to the Panel as Exhibit CAN-049 (BCI)).

[537] Lumber Final I&D Memo, p. 141 (Exhibit CAN-010).

[538] Lumber Final I&D Memo, p. 142 (Exhibit CAN-010) (footnotes omitted, underline added). Note, the USDOC again cited the joint questionnaire response of the Government of Canada and the Government of British Columbia as evidence that approximately 58 percent of the logs exported from the province during the POI were under

Again, the fee in-lieu-of-manufacture is required because a log is exported and not processed in British Columbia. Ultimately, the fee simply is an export tax. Such a tax necessarily increases a log supplier's cost to export logs.

375. The USDOC further explained that:

> Exports of logs under federal jurisdiction are subject to an almost identical process to the Ministerial Order surplus test described above for logs under provincial jurisdiction. Logs harvested under the provincial and federal jurisdiction in British Columbia, and all exports of logs throughout Canada, require an export permit under the [Export and Import Permits Act ("EIPA")] because logs of all species are included on the Export Control List. Companies submit an application to the Export Controls Division of the DFATD, which then has the GBC list these logs on the same bi-weekly advertising list discussed above. If an offer is received, the offer is reviewed by the [Federal Timber Export Advisory Committee ("FTEAC")]. The FTEAC makes a recommendation to DFATD regarding whether the logs are surplus and should be granted an export permit. Violations of EIPA are punishable by the penalties described in section 19 of the EIPA.[539]

376. Evidence supporting the USDOC's description of the process for obtaining permission to export logs under federal jurisdiction once again came from the Government of Canada and the Government of British Columbia in their joint response to the USDOC's questionnaire.[540] On the face of the documents, the federal government Notice to Exporters No. 102[541] and the Export and Import Permits Act[542] establish that the exportation of logs from British Columbia without an export permit is a crime, "punishable on summary conviction and liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding twelve

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provincial jurisdiction. *See* Lumber Final I&D Memo, p. 142, footnote 849 (Exhibit CAN-010) (citing "QNR Response, Part 1 at LEP-8", which Canada has provided to the Panel as Exhibit CAN-049 (BCI)).

[539] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008) (footnotes omitted).

[540] *See* Lumber Preliminary Decision Memorandum, p. 60, footnotes 382-384 (Exhibit CAN-008) (citing "GQRGBC", the joint questionnaire response of the Government of Canada and the Government of British Columbia, pp. LEP-8, LEP-11-12, and Exhibit LEP-5. Canada has provided the joint questionnaire response to the Panel as Exhibit CAN-049 (BCI), and the Exhibit LEP-5 as Exhibit CAN-070.

[541] *See* Notice to Exporters, Export of Logs from British Columbia, Serial No. 102 (April 1, 1998) (Exhibit CAN-069).

[542] *See* Export and Import Permits Act, section 19 "Offence and penalty" (pp. 37-38 of the PDF version of Exhibit CAN-070).

months, or to both", or "an indictable offence and liable to a fine in an amount that is in the discretion of the court or to imprisonment for a term not exceeding ten years, or to both."[543] The surplus testing process for obtaining a federal export permit is very similar to the British Columbia process, and exists "[i]n order to determine adequate supply" for British Columbian timber processors "in consultation with the Provincial government."[544]

377. Responding to arguments made by the Government of Canada and the Government of British Columbia, which were similar to the arguments Canada makes to the Panel,[545] the USDOC explained:

> While the GOC/GBC are correct that there is no information on the record that the penalty provisions under the EIPA have ever been applied to exporters of logs, this does not change the fact that these penalty provisions apply to exports of logs in the same manner as exports of other goods in the export control list. Further, in citing to Article 3(1)(a) of the EIPA, the GOC/GBC have implied that the EIPA only pertains to military sensitive matters. However, in addition to section (a), Article 3(1) lists five other types of goods that it deems necessary to control, including Article 3(1)(b) which is to promote further manufacturing in Canada of a natural resource. Finally, the GOC/GBC have not provided any record information that indicates that violators of log exports are subject to different penalties under the EIPA than violators of other goods. As such, we continue to find that the EIPA, and the corresponding penalties for violators under the EIPA, are relevant to our analysis.[546]

378. The federal restriction on the export of logs and the process for obtaining an export permit, like the other aspects of the export restraints imposed by the Government of British Columbia and the Government of Canada discussed above, influences the way in which log

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[543] Export and Import Permits Act, section 19(1) (pp. 37-38 of the PDF version of Exhibit CAN-070).

[544] Notice to Exporters, Export of Logs from British Columbia, Serial No. 102 (April 1, 1998), para. 1.3 (Exhibit CAN-069).

[545] *See* Canada's First Written Submission, para. 966.

[546] Lumber Final I&D Memo, p. 143 (Exhibit CAN-010) (footnotes omitted) (citing "GBC Primary QNR Response at Exhibit LEP-5", the Export and Import Permits Act, which Canada has provided to the Panel as Exhibit CAN-070. Specifically, the USDOC quoted Article 3(1)(b) of the Act: "to ensure that any action taken to promote the further processing in Canada of a natural resource that is produced in Canada is not rendered ineffective by reason of the unrestricted exportation of that natural resource". Lumber Final I&D Memo, p. 143, footnote 854 (Exhibit CAN-010)).

suppliers do their business. Additionally, Notice to Exporters No. 102, which was on the USDOC's administrative record and which Canada provided to the Panel, establishes that "a fee of $14.00 will be levied for each Federal export permit".[547] While this may be a small cost, it is yet another additional cost imposed on log suppliers that wish to export logs as a result of the export restraints put in place by the Government of Canada.

"Please elaborate on your argument, considering Canada's statement that 99% of applications for export were automatically authorized in 2015 (paragraph 963 of Canada's first written submission)"

379. Canada's assertion that 99 percent of applications for export authorization "were essentially automatically authorized"[548] is not supported by the evidence that was before the USDOC. While that percentage of applications may have been authorized, their authorization certainly was not "essentially automatic[]". During the investigation, the Government of Canada and the Government of British Columbia made the same argument that Canada now makes to the Panel. The USDOC addressed this argument in the final issues and decision memorandum:

> [T]he GOC/GBC have argued that virtually all log export requests are approved, substantial quantities of logs are exported from British Columbia, and that a significant number of export authorizations are never utilized. As an initial matter, while we do not disagree with their characterization of these facts, we find that none of these facts demonstrate that exports are not restrained. Specifically, the claim that some volume of logs were exported, or that not all authorizations were utilized does not demonstrate that the process does not restrain exports. There is no way to know how many more logs would be exported in the absence of this process. Further, as discussed above, the "blocking" system in place indicates that due to these informal arrangements the fact that most export requests are approved is not a reliable indication of how the market is impacted by the existence of the log export restraints.[549]

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[547] *See* Notice to Exporters, Export of Logs from British Columbia, Serial No. 102 (April 1, 1998), para. 7.1 (Exhibit CAN-069).

[548] Canada's First Written Submission, para. 963 (underline added).

[549] Lumber Final I&D Memo, p. 141 (Exhibit CAN-010) (footnotes omitted). We discuss further the "blocking" system and the record evidence supporting the USDOC's findings with respect to the "blocking" system in the U.S. response to question 125.

The USDOC further reasoned that "the fact that an application for an export permit must be filed at all introduces an additional burden on log sellers seeking to export, and the fact that the permit is not automatically approved renders exporting uncertain. This restriction, along with others identified above, hinders the free export of logs and discourages log sellers from considering all market options and seeking the highest price for their logs."[550]

380. Thus, it simply is not the case that applications for export authorization are essentially automatically authorized, as Canada contends. The outcome of the process through which log suppliers are required first to offer for sale to consumers in British Columbia any logs proposed for export, in which any potential purchaser may make an offer that then will be judged fair or not fair by a government committee, is unknowable in advance, even if a log supplier has made agreements to avoid "blocking" by some purchasers.[551] There is nothing at all "automatic" about such an export permit application process.

381. The USDOC ultimately reasoned as follows, in light of all the evidence that was on the administrative record before it, and which is summarized above:

> To analyze whether the timber harvesters have been entrusted or directed to provide a financial contribution within the meaning of section 771(5)(D)(iii) of the Act, we considered the laws and regulations that govern the provision of logs within British Columbia. As detailed above, the lengthy and burdensome export prohibition exemption process discourages log suppliers from considering the opportunities that may exist in the export market by significantly encumbering their ability to export, especially where there may be uncertainty about whether their logs will be found to be surplus to the requirements of mills in BC. Moreover, this process restricts the ability of log suppliers to enter into long-term supply contracts with foreign purchasers.
>
> The legal obligations described above do not exist in some other markets. In de-regulated or totally open markets, sellers can choose to sell their products whenever and to whomever it makes economic sense to do so. Timber harvesters can choose to sell logs wherever it makes economic sense to do so and they can approach buyers while the timber is still standing. However, as noted above, timber harvesters in British Columbia must ensure that demand for logs in British Columbia is met before seeking a purchaser overseas and, therefore, they are forced to receive a lower price for

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[550] Lumber Final I&D Memo, p. 142 (Exhibit CAN-010) (underline added).

[551] *See infra*, U.S. Response to Question 125.

> their timber in British Columbia than they would if they were able to export free of the GBC and GOC export restrictions.
>
> Therefore, the legal requirements that logs remain in British Columbia combined with the process for obtaining an exception from those requirements to export, result in a policy where the GOC and GBC have entrusted or directed timber harvesters to provide logs to producers in British Columbia. Specifically, with respect to the GBC, we continue to find that the legal requirements, combined with both the lengthy process for obtaining an exception, and the fees charged by the GBC upon export, result in a policy where the GBC has entrusted or directed private log suppliers to provide logs to mill operators within the meaning of section 771(5)(B)(iii) of the Act. With respect to the GOC, we continue to find that the GOC has also entrusted and directed private log suppliers to provide logs to mill operators, within the meaning of 771(5)(B)(iii) of the Act, insofar as the surplus test and the legal penalties for exporting logs without an export permit compel such suppliers to divert to mill operators some volume of logs that could otherwise be exported.[552]

382. The U.S. argument to the Panel that "Canada and British Columbia directly interfere with the ability of log suppliers to enter into long-term contracts with foreign purchasers, and to sell to foreign purchasers at all"[553] is no different than the reasoning quoted above, which the USDOC set forth in the final issues and decision memorandum. As demonstrated above, the USDOC's conclusion is supported by ample record evidence, and is one any unbiased or objective investigating authority could have reached.[554]

383. The United States notes that the USDOC is not alone in concluding that the export restraints imposed by the Government of British Columbia and the Government of Canada restrict the ability of log suppliers to enter into long-term supply contracts with foreign purchasers. This was also the conclusion reached by the author of a 2014 study by the Fraser Institute, which was on the administrative record of the softwood lumber countervailing duty

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[552] Lumber Final I&D Memo, pp. 154-155 (Exhibit CAN-010).

[553] U.S. First Written Submission, para. 591.

[554] *See* U.S. First Written Submission, paras. 41-44 (discussing the role of a panel under Article 11 of the DSU in a dispute involving a determination made by a domestic authority based on an administrative record).

investigation,[555] and which referred to an earlier study published in 2002, the "Haley (2002)" study.[556]

384. Throughout its discussion of export restraints in both the softwood lumber preliminary decision memorandum and the softwood lumber final issues and decision memorandum, the USDOC made numerous references to its final determination in "*SC Paper – Expedited Review*".[557] The USDOC, in part, relied on that determination and, with respect to certain issues, reached the same conclusions in the softwood lumber countervailing duty investigation that it reached in *SC Paper – Expedited Review*.

385. For example, as noted above, in the softwood lumber countervailing duty investigation, the USDOC concluded that:

> [T]he lengthy and burdensome export prohibition exemption process discourages log suppliers from considering the opportunities that may exist in the export market by significantly encumbering their ability to export, especially where there may be uncertainty about whether their logs will be found to be surplus to the requirements of mills in BC. Moreover, this process restricts the ability of log suppliers to enter into long-term supply contracts with foreign purchasers.[558]

386. In *SC Paper – Expedited Review*, the USDOC came to the same conclusion:

> The lengthy and burdensome export exemption process discourages timber harvesters from considering the opportunities that may exist in the export market, and suppresses their applications for export exemptions if they have uncertainty that their volumes are likely not to be found to be surplus to the requirements of mills in British Columbia. Moreover, this process

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[555] *See* Petitioners, "Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada," dated November 25, 2016, Exhibit 244 (starting at p. 11 of the PDF version of Exhibit USA-010).

[556] Joel Wood, "Log Export Policy for British Columbia," Fraser Institute (June 2014), p. 10 (Exhibit 244 of the petition) (p. 26 of the PDF version of Exhibit USA-010).

[557] *See*, *e.g.*, Lumber Preliminary Decision Memorandum, pp. 58, 59, 60, 61 (Exhibit CAN-008); Lumber Final I&D Memo, p. 141 (Exhibit CAN-010).

[558] Lumber Final I&D Memo, p. 154 (Exhibit CAN-010).

> restricts the ability of timber harvesters to enter into long-term supply contracts with foreign purchasers.[559]

387. The USDOC referred in footnotes omitted from the above block quotation of the *SC Paper – Expedited Review* final issues and decision memorandum to a 2014 study by the Fraser Institute.[560] As noted above, that Fraser Institute study also was on the administrative record of the USDOC's softwood lumber countervailing duty investigation; it was placed before the USDOC by the petitioner as Exhibit 244 to the petition.[561] The Fraser Institute study, citing an earlier study, "Haley (2002)", highlighted "three detrimental effects on timber owners of the current process of granting log export permits:"

> 1 it prevents log owners from securing long-term contracts with foreign buyers to shelter from price volatility;
>
> 2 it prevents log owners from sorting logs per customer request;
>
> 3 it imposes time delays that increase log-handling costs and ties up capital.[562]

This is further evidence on the record of the USDOC's countervailing duty investigation of softwood lumber from Canada that supports the conclusions that the USDOC reached concerning how the export restraints increase log suppliers' costs and influence the way that log suppliers do business.

388. The United States has discussed above particular pieces of evidence and described how each piece of evidence supports the conclusion that the log export restraints, in the words of the Panel's question, "impose[] additional costs and influence[] the way of doing business of potential log exporters". Once again, though, the United States reiterates that the text of the Forest Act itself explicitly requires that "Crown timber to be used in British Columbia" unless an exemption is granted.[563] The Forest Act alone is sufficient to demonstrate that government

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[559] *SC Paper from Canada – Expedited Review*, Final I&D Memo, pp. 46-47 (Exhibit USA-038) (footnotes omitted).

[560] *See SC Paper from Canada – Expedited Review*, Final I&D Memo, pp. 46-47, footnotes 230 and 231 (Exhibit USA-038) (citing "Petitioner [New Subsidy Allegation ('NSA')] at Exhibit 31", which, the USDOC explains earlier on page 46 and in footnote 226, is the 2014 Fraser Institute study).

[561] *See* Petitioners, "Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada," dated November 25, 2016, Exhibits 242-257 (Exhibit USA-010).

[562] Joel Wood, "Log Export Policy for British Columbia," Fraser Institute (June 2014), p. 10 (Exhibit 244 of the petition) (p. 26 of the PDF version of Exhibit USA-010).

[563] British Columbia Forest Act, Part 10 "Manufacture in British Columbia" (p. 95 of the PDF version of Exhibit CAN-039).

action influences the way that log suppliers do business and results in the entrustment or direction of private log suppliers to provide logs to consumers in British Columbia. The USDOC, however, examined all of the evidence summarized above in response to arguments that the Forest Act has no practical effect, and the USDOC expressly found that "these obstacles, when considered in their totality, restrain log exports from the province."[564] As reflected in the findings in prior reports:

> [A] panel reviewing a determination on a particular issue that is based on the "totality" of the evidence relevant to that issue must conduct its review on the same basis. In particular, the Appellate Body held that if an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination, rather than assessing whether each piece on its own would be sufficient to support that determination.[565]

Accordingly, "in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference."[566]

ii. To Canada: Please respond to the United States' arguments at paragraph 591 of the United States' first written submission and to the United States' statements at the oral hearing mentioned above. In your reply, please support with record evidence your answer at the oral hearing that it takes approximately 2.5 weeks to obtain an export permit, and that the impact of the restriction in the normal course of business is minimal. In addition, please respond to the United States' assertion questioning the existence of the policy if it did not affect the market.

Response:

389. This question is addressed to Canada.

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[564] Lumber Final I&D Memo, p. 139 (Exhibit CAN-010) (underline added).

[565] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52. *See also Japan – DRAMs (Korea) (AB)*, para. 131.

[566] *Japan – DRAMs (Korea) (AB)*, para. 131.

125. <u>To the United States</u>: At paragraph 593 of its first written submission, the United States argues that "the record evidence demonstrates that log suppliers are forced to negotiate with other domestic processors to lower their export volumes or their prices, under the threat that the purchaser would otherwise "block" the suppliers' export sales in the surplus test process." Please explain how this argument is supported by the record evidence.

<u>Response</u>:

390. As an initial matter, the United States notes that the U.S. response to question 78 above discusses record evidence that supports the USDOC's conclusions with respect to the existence of a "blocking" system. The United States refers the Panel to the U.S. response to that question. The United States also offers the following comments in response to this question.

391. In the final issues and decision memorandum, the USDOC explained that:

> [R]ecord information indicates that a "blocking" system operates in the province, discussed further below, which creates an environment in which log sellers are forced into informal agreements that lower export volumes and domestic prices.[567]

392. In footnote 836, which appears at the end of the statement quoted above, the USDOC refers to "Petitioner Comments – Primary QNR Responses at Exhibits 11, 12, 13, and 32."[568]

- Exhibit 11 of Petitioner Comments – Primary QNR Responses is a report by the Canada Institute at the Wilson Center entitled "From Log Export Restrictions to a Market-Based Future: Towards an Enduring Canada-U.S. Softwood Agreement". The United States provided that report to the Panel in Exhibit USA-019 (beginning at p. 76 of the PDF version of Exhibit USA-019).

- Exhibits 12 and 13 are documents filed by a BC log exporter in a proceeding initiated under Chapter 11 of NAFTA, which set forth certain factual claims about the operation of the BC log export restraints. The United States provided those documents to the Panel in Exhibit USA-019 (Exhibit 12 begins at p. 101 of the PDF

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[567] Lumber Final I&D Memo, p. 139 (footnotes omitted) (Exhibit CAN-010).

[568] Lumber Final I&D Memo, p. 139, footnote 836 (Exhibit CAN-010). *See also* Petitioner, Comments on Initial Questionnaire Responses (March 27, 2017) (public version) (excerpted, Vol. I, pp. 1-3) ("Petitioner Comments – Primary QNR Responses") (Exhibit USA-043).

version of Exhibit USA-019; Exhibit 13 begins at p. 120 of the PDF version of Exhibit USA-019).

- Exhibit 32 is an affidavit from a BC timber producer, which discusses the "blocking" system in BC and confirms that the BC log export restraints force BC private landowners to provide logs to BC producers for less than adequate remuneration. The United States provided that affidavit to the Panel in Exhibit USA-019 (beginning at p. 134 of the PDF version of Exhibit USA-019).

393. The USDOC discusses the exhibits described above in the final issues and decision memorandum. Citing the Wilson Center report, the USDOC explained the "blocking" system in the following terms.

> Under the "blocking" system, processors in the province will block a harvester's export application in order to force the harvester to provide logs to the processor at low prices. To export their logs from the province, most exporters in British Columbia are required to first offer their logs to processors in the province. As such, most potential exports are subject to this blocking process. As explained in the Canada Institute at the Wilson Center's report "From Log Export Restrictions to a Market-Based Future: Towards an Enduring Canada-U.S. Softwood Agreement", the processors in the province will make a bid on the logs offered for sale, effectively blocking the harvester from exporting their logs, for the sole purpose of negotiating concessions from the exporter. Once an informal agreement is reached, in which the processor receives logs at discounted prices, the processor will agree not to block the log exports. In other words, the domestic processor agrees to lift the block on certain exports of logs in return for favorable terms on the sales of other logs. Further, the report indicates that this practice is wide spread throughout the province. As a result of this blocking process, harvest operators are frequently forced to sell a portion of their logs to processors in British Columbia at or below the cost of production in order to be able to export their remaining logs.[569]

[569] Lumber Final I&D Memo, p. 140 (footnotes omitted) (Exhibit CAN-010).

394. In footnotes 840-843 of the final issues and decision memorandum, which are omitted from the block quotation above, the USDOC quoted the following passages from the Wilson Center report:

- Final I&D Memo, footnote 840: "British Columbia's timber processors have the ability to stop exports by objecting to the granting of export licenses for B.C. logs. Under the regime, a processor merely has to make an offer on an export application in order to bring the process to a halt; hence the application is blocked." Wilson Center Report, p. 8 (p. 83 of the PDF version of Exhibit USA-019).

- Final I&D Memo, footnote 841: "They negotiate informal supply arrangements at discounted prices with key B.C. log processors in exchange for their agreement not to block exports." Wilson Center Report, p. 8 (p. 83 of the PDF version of Exhibit USA-019).

- Final I&D Memo, footnote 842: "Almost every timber harvester has negotiated side agreements to keep its exports from being blocked". Wilson Center Report, p. 9 (p. 84 of the PDF version of Exhibit USA-019).

- Final I&D Memo, footnote 843: "[S]ome harvest operations are forced to sell logs at or below their cost of production to the domestic processors. In other words, the net effect of B.C. policy is to force timber harvesters to make next to nothing (or worse) on the domestic side of their business in order to safeguard their profitable export operations." Wilson Center Report, p. 8 (p. 83 of the PDF version of Exhibit USA-019).

395. Citing the documents from the NAFTA Chapter 11 proceeding (Exhibits 12 and 13 described above) and the affidavit from a BC timber producer (Exhibit 32 described above), the USDOC continued:

> The existence of this "blocking process" is corroborated by record evidence that a log exporter in British Columbia has been subject to this process. Specifically, these documents detail how the company has been forced to negotiate agreements with domestic processors in which they sell logs below market rates to prevent

> their requests for exports from being blocked and that the GBC is aware of this process.[570]

396. In footnotes 845 and 846 of the final issues and decision memorandum, which are omitted from the block quotation above, the USDOC quoted the following passages from Exhibits 12, 13, and 32:

- Final I&D Memo, footnote 845, citing Exhibit 12: ("The practice of 'log blocking' refers to the process used by a domestic purchaser to gain concessions from the potential log exporter in exchange for a withdrawal of its bids for logs. A blocker is not required to purchase the logs which were the subject of its bid. The concessions range from lower prices to different private log sorts, and result in a loss to the potential log exporter…. Merrill & Ring regularly receives such blocking letters and must negotiate agreements whereby the domestic processor agrees to lift blocks on certain private logs in return for the sale of other private log sorts." Exhibit 12, paras. 50 and 52 (pp. 114, 115 of the PDF version of Exhibit USA-019).

- Final I&D Memo, footnote 845, citing Exhibit 32: "Merrill's applications are only granted because Merrill has been forced to pre-arrange or negotiate agreements with domestic processors in order to prevent its export product from being blocked. Therefore, by the time the GOC receives a log export application, Merrill has already suffered a loss because it has been forced to sell additional logs at below market prices to a domestic processor in order to prevent the domestic processor from blocking their application." Exhibit 32, para. 8 (p. 136 of the PDF version of Exhibit USA-019).

- Final I&D Memo, footnote 846, citing Exhibit 12: "FTEAC's administration of the Federal Surplus Test knowingly permits such 'log blocking.'" Exhibit 12, para. 50 (p. 114 of the PDF version of Exhibit USA-019).

- Final I&D Memo, footnote 846, citing Exhibit 13: "The ability to target log producers is crucial in enabling log processors to engage in the illicit practice of 'blockmailing' …. Despite the fact that TEAC/FTEAC is aware of the practice of targeting, it has never

[570] Lumber Final I&D Memo, pp. 140-141 (footnotes omitted) (Exhibit CAN-010).

adopted any procedures or protocols to address this problem." Exhibit 13, para. 350 (p. 121 of the PDF version of Exhibit USA-019).

126. To both parties: Does the term "governments" in the phrase "the practice, in no real sense, differs from practices normally followed by governments" in Article 1.1(a)(1)(iv) refer to the practice of any government or governmental practice of the Member providing an alleged subsidy?

Response:

397. Article 1.1(a)(1)(iv) of the SCM Agreement provides, in relevant part, that a "financial contribution" exists where:

> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.[571]

398. Article 1.1(a)(1) also provides that the term "a government or any public body within the territory of a Member" is "referred to in [the SCM] Agreement as 'government'".

399. The textual elements of Article 1.1(a)(1) discussed above indicate that the term "a government" at the beginning of Article 1.1(a)(1)(iv) refers to the particular government or public body under consideration, which allegedly "makes payments to a funding mechanism, or entrusts or directs a private body". The term "the government" in the middle of Article 1.1(a)(1)(iv), with its use of the definite article "the", as opposed to the use of an indefinite article such as "a", or the use of the word "any", refers back to the particular government or public body under consideration, *i.e.*, the government or public body that allegedly has made payments to a funding mechanism, or entrusted or directed a private body.

400. While the earlier instances of "a government" and "the government" are singular, the term "governments" at the end of Article 1.1(a)(1)(iv), by contrast, is plural.[572] The term "governments" also is not associated with any article at all, neither definite nor indefinite. These

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[571] Underline added.

[572] This is the case also in the Spanish version of the SCM Agreement, where the term "gobiernos" in the plural is used at the end of Article 1.1(a)(1)(iv), in contrast to the term "gobierno" in the singular, which is used earlier in subparagraph (iv) and elsewhere throughout Article 1.1(a)(1). In the French version of the SCM Agreement, the term "pouvoirs publics," which is itself plural, is used throughout Article 1.1(a)(1).

textual elements indicate that this latter reference is not to the particular government or public body under consideration, but to governments (and public bodies) generally.

401. This understanding of the meaning of the term "governments" at the end of Article 1.1(a)(1)(iv) of the SCM Agreement accords with findings in the Appellate Body reports in *US – Anti-Dumping and Countervailing Duties (China)* and *US – Carbon Steel (India)*.[573] In those reports, the Appellate Body examined the terms of Article 1.1(a)(1)(iv) as context for the interpretation of the term "public body" in Article 1.1(a)(1). The Appellate Body reasoned that the latter part of Article 1.1(a)(1)(iv), "which refers to a practice that, 'in no real sense, differs from practices normally followed by governments', … suggests that the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies."[574] This reasoning is logical and persuasive, and the Panel should take it into account when undertaking its own interpretive analysis of Article 1.1(a)(1)(iv) of the SCM Agreement.

127. <u>To Canada</u>: Could Canada elaborate on its arguments at paragraphs 967-968 of its first written submission as to why the historical existence of export permitting process and the fact that British Columbia manages forests do not support the USDOC's consideration that the provision of logs would not "normally be vested in the government and the practice, in no real sense, differs from practices normally followed by the governments"?

<u>Response</u>:

402. This question is addressed to Canada.

128. <u>To Canada</u>: Is Canada's claim under Articles 11.2 and 11.3 of the SCM Agreement consequential to its previous claim under Article 1.1(a)(1)(iv)?

<u>Response</u>:

403. This question is addressed to Canada.

10 REIMBURSEMENTS RELATING TO LICENSE MANAGEMENT AND SILVICULTURE

129. <u>To Canada</u>: Please comment on the United States' arguments at paragraph 634 of its first written submission that (i) Irving was required to undertake silviculture and

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[573] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297; *US – Carbon Steel (India) (AB)*, para. 4.29.

[574] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297. *See also US – Carbon Steel (India) (AB)*, para. 4.29.

forest management, as well as Resolute was required to undertake partial cut prescriptions as a condition to their access to harvest provincial Crown timber; and that (ii) the governments reimbursed these companies for performing tasks that "they had legally required the companies to perform", therefore this government practice clearly involved a direct transfer of funds.

Response:

404. This question is addressed to Canada.

130. To the United States: At paragraphs 638 and 645 of its first written submission, the United States submits that the New Brunswick stumpage price does not include an amount for silviculture, as well as the Québec stumpage price is not adjusted for the cost difference between a partial and clear cut. If the stumpage prices in New Brunswick and Québec have been adjusted for silviculture and partial cuts respectively, would it mean that there was no benefit conferred to Irving and Resolute? How does adjusting the stumpage price differ from reimbursing silviculture expenses to these companies?

Response:

405. Any silviculture and forest management payments to JDIL and Resolute provided by New Brunswick and Quebec, respectively, would confer a benefit even if the New Brunswick stumpage price included an amount for silviculture and the Quebec stumpage price adjusted for the cost difference between a partial and a clear cut.

406. As discussed in detail in the U.S. first written submission, the provision of stumpage and the payments for silviculture and forest management constitute two distinct transactions.[575] The first transaction involves the provision of goods (*i.e.*, stumpage). In this transaction, a benefit is conferred if the goods are provided for less than adequate remuneration.[576] The second transaction involves a direct transfer of funds in the form of a grant (*i.e.*, payments for silviculture and partial cuts). In this transaction, a benefit exists in the full amount of the grant.[577]

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[575] U.S. First Written Submission, paras. 638 (British Columbia) and 645 (Quebec).

[576] SCM Agreement, Arts. 1.1(b) and 14(d).

[577] SCM Agreement, Arts. 1.1(b) and 14. *See also US – Lead and Bismuth II (Panel)*, para. 122 ("the act of identifying the 'benefit' (under Article 1.1) is normally the same as the act of measuring the 'benefit' (under Article 14)"); *EC – Large Civil Aircraft (Panel)*, para. 7.1969, footnote 5724 ("the amount of the financial contribution and the amount of the benefit are the same").

407. The two separate transactions constitute two different forms of financial contributions, each of which could confer a benefit on the recipient. Adjustments to the stumpage prices in New Brunswick and Quebec for silviculture and partial cuts might affect the amount of remuneration paid and, in turn, the amount of the benefit conferred with respect to the provision of stumpage. However, such adjustments do not negate the benefit conferred by payments for silviculture and partial cuts issued by the Governments of New Brunswick and Quebec, respectively. The amount of the benefit conferred with respect to such payments would remain the same, *i.e.*, the full amount of the grants.

131. To the United States: At paragraph 647 of its first written submission, the United States submits that the program documents show that the intended purpose of the Partial Cut Investment Program is to "facilitate granting of financial assistance", rather than purchase of services. Please clarify your argument, considering that the program documents specifically indicate that the purpose of this financial assistance is "to ensure the realization of partial cutting."

Response:

408. The underlying reasons that motivated the Government of Quebec to establish the Partial Cut Investment Program ("PCIP") do not change the fact that the payments made pursuant to this program constituted direct transfers of funds in the form of grants. Governments often establish subsidy programs in an effort to incentivize companies to act in a certain manner. For example, a government may decide to establish an export grants program that incentivizes companies to increase the amount of exports with the goal of increasing competition of exports in foreign trade and boosting the overall economy. That companies may not have increased exports but for the subsidy, does not alter the fact that there is a financial contribution by a government that involves a direct transfer of funds.

409. In respect of the PCIP, timber supply guarantee holders in Quebec are legally required to use partial cutting techniques in certain harvest areas and to pay for the additional costs for harvesting timber using such techniques as part of their agreements to access standing timber on provincial Crown lands.[578] That Resolute later received, through a completely separate transaction, a grant from Quebec that partially alleviated the costs associated with using a partial cutting technique does not retroactively transmute its legal obligation to use this technique into an act of buying by Quebec. That is, while this separate transaction may have, as suggested by program documents, helped "to ensure the realization of partial cutting,"[579] this does not change the fact that Resolute was legally obligated to use partial cutting techniques in the applicable

[578] U.S. First Written Submission, paras. 628-629.

[579] GOQ QR, Exhibit QC-OTHER-13 (PCIP), p. 9 (Exhibit CAN-208).

harvest areas, and any failure by Resolute to use such a technique would have violated this legal obligation.

132. <u>To Canada</u>: At paragraph 640 of its first written submission, the United States argues that if Irving wants to stay in business, it would need to undertake activities that involve the renewal and maintenance of forestry land, even in the absence of the reimbursements. Please comment on this argument.

<u>Response</u>:

410. This question is addressed to Canada.

133. <u>To the United States</u>: At paragraph 979 of its first written submission, Canada submits that:

> **Article 1.1(a)(1)(iii) excludes the purchase of services as it provides that a financial contribution exists where "a government provides goods or services other than general infrastructure, or purchases goods". Similarly, Article 14(d) contains no reference to the purchase of services. It follows that the purchase of services cannot constitute a financial contribution under the SCM Agreement.**

Please comment on this argument.

<u>Response</u>:

411. It is plain from the text of Article 1.1(a)(1)(iii) of the SCM Agreement that the purchase of services cannot constitute a financial contribution under Article 1.1(a)(1) of the SCM Agreement.[580] However, any such transaction actually must be a "purchase of services" before it can be deemed not to constitute a financial contribution under Article 1.1(a)(1). Where the evidence establishes that a transaction is not a purchase of services, but is instead a direct transfer of funds, such as a grant, that transaction properly is categorized as a financial contribution under Article 1.1(a)(1)(i). The nature of a given transaction must be assessed case by case, and the investigating authority[581] examining whether there is a financial contribution

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[580] As noted during the first substantive meeting, the USDOC stated in its final determination that, under U.S. municipal law, "a government's purchase of services is not countervailable." Lumber Final I&D Memo, p. 184 (Exhibit CAN-010).

[581] Or a WTO panel considering a claim under Part III of the SCM Agreement against an alleged subsidy (as opposed to a WTO panel reviewing a determination by a Member's investigating authority in a countervailing duty proceeding).

will need to base its determination on positive evidence and provide a reasoned and adequate explanation for its conclusion.

134. To Canada: Please comment on the United States' argument at paragraph 649 of its first written submission that Canada has failed to make out its claims under Articles 19.3 and 19.4 of the SCM Agreement regarding the financial contributions for silviculture and forest management provided by New Brunswick to Irving and the financial contribution for partial cut silviculture restrictions provided by Québec to Resolute.

Response:

412. This question is addressed to Canada.

135. To Canada: Please comment on the United States' arguments at paragraphs 662 and 667 of its first written submission that Canada has failed to make out its claims under Articles 14(d), 19.3 and 19.4 of the SCM Agreement relative to the benefit conferred by Québec's and New Brunswick's financial contribution.

Response:

413. This question is addressed to Canada.

11 THE USDOC'S DETERMINATION OF BENEFIT WITH REGARD TO PROVINCIAL ELECTRICITY PROGRAMS

136. To the United States: Could the United States respond to Canada's argument at paragraph 1051 of its first written submission that the USDOC "ignored the fact that British Columbia created a provincial market in which BC Hydro would acquire only new or incremental biomass electricity". Please comment on the Appellate Body's approach at paragraphs 5.188-5.190 of its report in *Canada – Renewable Energy/Feed-in Tariff Program* that if a government creates a market for renewable electricity that would otherwise not exist, the benchmark has to be selected within that new market.

Response:

414. Canada's argument fails because evidence in the record, which Canada ignores, demonstrates that British Columbia (and Quebec) intervened to support certain players in renewable energy markets that already existed. The benchmark approach discussed in paragraphs 5.188-5.190 of the Appellate Body report in *Canada – Renewable Energy/Feed-in Tariff Program* is inapposite, because neither the Government of British Columbia nor the Government of Quebec, through the pertinent subsidy programs, created markets for renewable electricity that otherwise would not have existed but for those programs.

415. The Appellate Body in *Canada – Renewable Energy/Feed-in Tariff Program* focused on the significant differences in costs between conventional energy resources (specifically exhaustible fossil energy) and renewable energy resources (specifically wind- and solar PV-generated energy).[582] According to the Appellate Body, "[g]overnments intervene by reducing reliance on fossil energy resources and promoting the generation of electricity from renewable energy resources to ensure the sustainability of electricity markets in the long term."[583] Even so, the Appellate Body reasoned that "a distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein."[584] Such a distinction exists here, where the evidence confirms that the markets for the generation of electricity from renewable energy resources were well established in both British Columbia and Quebec before the introduction of the subsidy programs at issue.

416. For example, unlike in *Canada – Renewable Energy/Feed-in Tariff Program*, the renewable energy market in British Columbia was well established – since 2004, over 93 percent of the electricity generated in British Columbia originated from renewable resources, including biomass.[585] This contrasts sharply with the renewable energy market in Ontario, which was the subject of the Appellate Body's review in *Canada – Renewable Energy/Feed-in Tariff Program*, where only about 30 percent of the electricity in 2004 was generated from renewable energy resources.[586] Furthermore, unlike in *Canada – Renewable Energy/Feed-in Tariff Program*, the Electricity Purchase Agreements ("EPA") process in British Columbia promoted the purchase of electricity mostly from existing renewable energy markets[587] and mostly from renewable energy operating facilities already in existence.[588] Therefore, as the evidence before the USDOC

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[582] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, paras. 5.175-5.177.

[583] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.186.

[584] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.188 (underline added).

[585] The BC Energy Plan: A Vision for Clean Energy Leadership, p. 26 (Exhibit CAN-402); GBC QR, BC Volume II, p. BC II-32 (Exhibit CAN-395).

[586] The BC Energy Plan: A Vision for Clean Energy Leadership, p. 26 (Exhibit CAN-402). *See also Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.189 (discussing the Government of Ontario's consideration of "the adverse impact on human health and the environment of fossil fuel energy emissions and nuclear waste disposal … [as] [c]onsiderations … [that] will often underlie a government definition of the energy supply-mix and thus be the reason why governments intervene to create markets for renewable electricity generation.").

[587] GBC QR, BC Volume II, pp. 62-63 (Exhibit CAN-395) (most of BC Hydro's contractual commitments under the EPA process – 68 percent – were with hydroelectric facilities).

[588] GBC QR, BC Volume II, p. 33 (Exhibit CAN-395) (as of October 2015, of the 128 EPAs, 105 – or 82 percent – were with facilities already in operation; only 23 – or 18 percent – were with facilities in development).

demonstrated, the Government of British Columbia did not intervene to create a renewable energy market that otherwise would not exist but for the EPA process, but rather intervened through the EPA process to support certain players in renewable energy markets that already existed in British Columbia.

417. Also, unlike in *Canada – Renewable Energy/Feed-in Tariff Program*, the renewable energy market in Quebec was similarly well established – "more than 99% … is produced from a clean, renewable source"[589] – and the Government of Quebec mostly promoted the purchase of electricity from renewable energy facilities already in existence.[590] Indeed, Resolute's PAE 2011-01 agreements with Hydro-Quebec involved already existing forest biomass cogeneration power plants.[591] Quebec also promoted the purchase of electricity mostly from existing renewable energy markets.[592] The evidence before the USDOC thus similarly demonstrated that the Government of Quebec did not intervene in Quebec to create a renewable energy market that otherwise would not exist but for the PAE 2011-01 process, but rather intervened through Power Purchase Agreements ("PPAs") to support certain players in renewable energy markets that already existed in Quebec.

418. In sum, both British Columbia and Quebec intervened through subsidy programs designed to support certain players in already existing and well established renewable energy markets. As such, the benchmark approach discussed in the *Canada – Renewable Energy/Feed-in Tariff Program* Appellate Body report is not applicable to the evidence of record here because neither British Columbia nor Quebec intervened in the supply side of the electricity market to create renewable energy markets that otherwise would not exist in such a market.

137. <u>To the United States</u>: At paragraph 1091 of its first written submission, Canada argues that:

> **Commerce's record shows that biomass prices include capital costs for biomass plants, as well as annual operation and maintenance expenses specific to the biomass electricity**

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[589] Hydro-Quebec Annual Report, p. 3 (Exhibit CAN-437) ("Our electricity—more than 99% of which is produced from a clean, renewable source …."); *see* Quebec Energy Strategy 2006-2015, p. 6 (Exhibit CAN-429) ("Practically all of Québec's electricity is generated from hydroelectricity – a renewable energy source that creates almost no greenhouse gas emissions.… Wind energy is another form of renewable energy widely available in Québec …."); *ibid.*, p. 10 (indicating that hydroelectricity makes up to 94 percent of all of Quebec's electricity capacity).

[590] GBC QR, BC Volume II, p. 33 (Exhibit CAN-395) (as of December 31, 2015, most of the long-term contracts awarded to Hydro-Quebec Distribution – 53 contracts or 71 percent – were with facilities already in service; only 22 – or 29 percent – were with facilities under development).

[591] *See* Resolute's Response to Section III of Initial Questionnaire on General Issues and Non-Stumpage Programs, p. 56 (Exhibit CAN-434 (BCI)).

[592] GOQ QR, Volume III-a, p. 4 (Exhibit CAN-424 (BCI)) (most of long-term contracts awarded to Hydro-Quebec Distribution – 68 percent – were with hydroelectric and wind facilities).

> **industry. Any party selling this more expensive energy would expect to be compensated for it; otherwise they would not generate it. It was on the basis of these supply-side differences that the Appellate Body recognized that "a comparison between renewable energy electricity generators and conventional energy electricity generators requires consideration of the full costs associated with the generation of electricity." (footnotes omitted)**

Please respond to this argument.

Response:

419. Canada's argument, which is directed at Hydro-Quebec's purchases of electricity,[593] is not supported by the record evidence. First, for the most part, Quebec's PPA process promoted the purchase of electricity generated by already existing renewable energy facilities. More than half of the contracts, and over two-thirds of the capacity (MW), in Quebec were with forest and non-forest biomass cogeneration facilities already "in service" (including the Resolute facilities).[594] A large part of the capital investments associated with these biomass cogeneration facilities thus was made before these facilities contracted with Hydro-Quebec for the purchase of electricity.

420. Second, "[e]lectricity prices in Hydro-Québec Distribution Power Purchase Agreements under PAE 2011-01 are not the result of negotiations."[595] Hydro-Quebec is obligated to charge rates set by the Régie de l'énergie (Quebec's energy board). Hydro-Quebec therefore is "implicitly required to purchase electricity from any source for a rate that permits [Hydro-Quebec to achieve] cost recovery and provides [Hydro-Quebec] a reasonable return rate."[596] Quebec otherwise rejected requests to pay higher prices for electricity generated from biomass.[597] As Quebec itself acknowledged, "[r]ates are fixed [in Quebec] to allow recovery of

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[593] Canada's First Written Submission, paras. 1087-1092. In addition, pages 3-4 of the Hydro-Quebec Annual Report 2015 (Exhibit CAN-437), which Canada cites as support for its argument, do not demonstrate that biomass prices include capital costs for biomass plants or annual operation and maintenance expenses specific to the biomass electricity industry, or that biomass electricity is generally more expensive to produce than other energies. *Ibid.*, para. 1091, footnote 1746 (omitted from the Panel's question).

[594] GOQ QR, Volume III-a, p. 4 (Exhibit CAN-424 (BCI)). Resolute's contractual agreements with Hydro-Quebec involved already existing forest biomass cogeneration power plants. *See* Resolute's Response to Section III of Initial Questionnaire on General Issues and Non-Stumpage Programs, p. 56 (Exhibit CAN-434 (BCI)).

[595] GOQ QR, Volume III-a, p. 14 (Exhibit CAN-424 (BCI)).

[596] GOQ QR, Volume III-a, pp. 34-35 (Exhibit CAN-424 (BCI)).

[597] GOQ QR, Volume III-a, p. 57 (Exhibit CAN-424 (BCI)).

approved revenue requirement, including estimated supply costs, and a reasonable rate of return. There is no distinction between sources of electricity generated."[598] Therefore, contrary to Canada's argument, it is clear from the record that the purchase price for the electricity generated from these renewable energy facilities was based on Quebec's efforts to recover costs associated with, and achieve a reasonable rate of return in respect of, the government's sale of electricity generally (as opposed to the companies' sale of electricity).

421. Finally, the Appellate Body's reasoning in *Canada – Renewable Energy/Feed-in Tariff Program* does not support Canada's position. As the sentence quoted by Canada indicates, the Appellate Body was addressing differences that may exist between "renewable energy electricity generators and conventional energy electricity generators."[599] Here the situation is completely different given that the renewable energy market in Quebec is well established and Quebec intervened through PPAs to support certain players in this already existing market.[600]

138. To Canada: At paragraph 133 of its opening statement (Day 2), Canada indicates that:

> **[T]he wholesale markets where BC Hydro and Hydro-Québec purchase and generate electricity from a variety of sources at a variety of prices; and the retail market, where BC Hydro and Hydro-Québec sell electricity to consumers at tariff rates that reflect the blend of generation sources and their costs.**

Please explain why buying in the wholesale market and selling in the retail market would not result in lower purchase prices than selling prices, rather than higher purchase prices and lower sales prices, as in this case.

Response:

422. This question is addressed to Canada.

139. To Canada: The United States at paragraph 676 of its first written submission argues that the prices that result from the EPA process could not be considered an appropriate benchmark, because the policy framework imposed by the Government of British Columbia on BC Hydro's purchase of electricity limits the sources from

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[598] GOQ QR, Volume III-a, p. 12 (Exhibit CAN-424 (BCI)) (underline added); *see also* Lumber Final I&D Memo, p. 172 (Exhibit CAN-010).

[599] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.189 (underline added).

[600] *See supra*, U.S. Response to Question 136.

which BC Hydro can source electricity, so those prices cannot be considered market-based. Please comment.

Response:

423. This question is addressed to Canada.

140. To Canada: Canada argues at paragraphs 1057-1059 of its first written submission that the USDOC improperly rejected BC Hydro's competitive bidding processes, namely BC Hydro's Bioenergy Call Phase I prices, as in-market benchmarks. Canada also argues at paragraph 1060 of its first written submission that Tolko's Armstrong EPA and both of West Fraser's EPAs had market-determined prices such that they did not need a benchmark. Please clarify.

Response:

424. This question is addressed to Canada.

141. To the United States: Please explain how the USDOC factored BC Hydro's turn-down payments to Tolko in its benefit analysis?

Response:

425. Tolko described BC Hydro's turndown payments as compensation for Tolko's "investment in fixed generation assets that relate to its sales of electricity to BC Hydro."[601] As such, the USDOC treated BC Hydro's turndown payments to Tolko as grants, because BC Hydro provided a direct transfer of funds to Tolko with respect to Tolko's investment in fixed generation assets for which BC Hydro did not receive anything in return.[602]

142. To the United States: Please comment on Canada's argument at paragraph 1059 of its first written submission that the USDOC failed to take into account, without any explanation, Dr. Rosenzweig's expert report that showed that BC Hydro's Bioenergy Call Phase I prices were market-based.

Response:

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[601] Lumber Final I&D Memo, p. 159 (Exhibit CAN-010). *See also* Tolko, Certain Softwood Lumber Products from Canada: Response to Section III of the Department's CVD Questionnaire, pp. 143-144, 153 ("BC Hydro then pays a fee, essentially a charge for having made our generation capacity available to BC Hydro, for the firm energy that is not delivered.") (Exhibit CAN-067 (BCI)).

[602] *See* Lumber Final I&D Memo, p. 159 (Exhibit CAN-010). *See also US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 616-617.

426. Canada's assertion is not true. The USDOC did take into account Dr. Rosenzweig's report about BC Hydro's Bioenergy Call Phase I prices. This is, *inter alia*, evidenced by the USDOC's discussion of its consideration of arguments put forward by British Columbia and the respondent companies as to why the EPAs reflected market-based prices and should be used as benchmark prices. Those arguments discuss and rely on Dr. Rosenzweig's report.

427. Specifically, the USDOC's final determination considered the arguments of Tolko and British Columbia as set out in their case briefs, including specific arguments that relied on Dr. Rosenzweig's report.[603] The USDOC summarized and referred to pages 54-64 of Tolko's case brief,[604] which referenced Dr. Rosenzweig's report at pages 55, 56, and 64.[605] The USDOC also summarized and referred to pages 93-98 of British Columbia's case brief,[606] which discussed Dr. Rosenzweig's report extensively at pages 94-97 of its case brief and relied on it as support for its argument that the USDOC should use BC Hydro's Bioenergy Call Phase I prices as benchmark prices.[607] Therefore, even though the USDOC did not refer to Dr. Rosenzweig's report in its final determination by name, it is clear that the USDOC took the report into account when it considered the arguments of Tolko and British Columbia, which relied on the report.[608]

428. In response to the arguments made by British Columbia and the respondent companies, the USDOC explained that the selection of BC Hydro's Bioenergy Power Call Phase I bids as benchmarks would not be appropriate because "it is incongruent to select as a benchmark price the same program price for electricity that is under investigation as providing a benefit, *i.e.*, comparing an allegedly subsidized price with the same allegedly subsidized price."[609] As the USDOC further explained:

> Using rates from an investigated subsidy program to measure the benefit from that same investigated program is inconsistent with the benefit-to-the-recipient standard because, first, it does not capture the difference between the price at which the government *sold* electricity and the price at which it *purchased* electricity, and

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[603] *See*, *e.g.*, Lumber Final I&D Memo, p. 163 (Exhibit CAN-010).

[604] *See* Lumber Final I&D Memo, p. 163, footnote 981 (Exhibit CAN-010).

[605] *See* Tolko Case Brief, pp. 55, 56, 64 (Exhibit CAN-138 (BCI)).

[606] *See* Lumber Final I&D Memo, p. 163, footnote 983 (Exhibit CAN-010).

[607] *See* GBC Case Brief, pp. 94-97 (Exhibit CAN-295).

[608] The United States notes that Dr. Rosenzweig's report was attached as Exhibit BC-BCH-36 to the Government of Canada's Initial Questionnaire Response. The report was framed principally as a response to allegations made in the petition about BC Hydro's subsidization as it pertains to EPAs.

[609] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010). *See also ibid.*, pp. 164, 165-166 (Exhibit CAN-010).

> second, the comparison would be circular insofar as it would result in a comparison of an alleged subsidy with itself.[610]

429. The USDOC provided a reasoned and adequate explanation for its conclusion that the purchase of electricity by BC Hydro conferred a benefit on Tolko and West Fraser.[611] Dr. Rosenzweig's report purportedly supported a proposition – namely, that the Bioenergy Call Phase I prices resulted from a competitive process – that was not relevant to the USDOC's ultimate conclusion. In that sense, regardless of whether or not Dr. Rosenzweig's report established that the Bioenergy Call Phase I prices resulted from a competitive process, the USDOC's conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

143. <u>To Canada</u>: The United States argues at paragraph 708 of its first written submission that the amount of LIREPP credit was fixed in advance in the Electricity Act and was not tied to the amount of electricity purchased, therefore the USDOC correctly concluded that the credits reduce Irving Companies' monthly electricity bill. Please comment.

<u>Response</u>:

430. This question is addressed to Canada.

12 THE USDOC'S DETERMINATION OF THE PRECISE AMOUNT OF SUBSIDIES ALLEGEDLY CONFERRED BY PROVINCIAL ELECTRICITY PROGRAMS

144. <u>To both parties</u>: Do investigating authorities need to perform an attribution analysis if an alleged subsidy was provided to a single corporation that produces several products?

<u>Response</u>:

431. The mere fact that an alleged subsidy was provided to a single corporation that manufactures several products does not, in and of itself, necessitate that an investigating authority perform an attribution analysis. The GATT 1994 and SCM Agreement both contemplate the application of countervailing duties for subsidies that may benefit more than the product under investigation.[612] For example, Article VI:3 of the GATT 1994 and footnote 36 to

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[610] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010) (italics in original).

[611] U.S. First Written Submission, paras. 674-678.

[612] *See* U.S. First Written Submission, paras. 719-721.

Article 10 of the SCM Agreement refer to a subsidy bestowed "indirectly," suggesting that some subsidies could benefit more than one product or activity of a recipient.[613]

432. An investigating authority thus need not always conduct an attribution analysis to determine whether a subsidy benefits one or more products. As the Appellate Body observed in *US – Washing Machines*, "the appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product."[614] As such, if the subsidy provider does not acknowledge prior to, or concurrent with, the bestowal of the subsidy (*i.e.*, when the subsidy provider sets the terms for the provision of the subsidy) that the subsidy is tied to the production or sale of a particular product or activity, an investigating authority need not perform an attribution analysis. In such a situation, the subsidy has not been bestowed for any particular product or activity, and an investigating authority may find without further need of analysis that the subsidy is effectively "untied" and divide the benefit conferred by the subsidy by the recipient corporation's combined sales of all products.

145. To the United States: Please comment on Canada's argument at paragraph 1137 of its first written submission that the Hydro-Québec's PPAs with Resolute were signed with facilities that did not, and could not have, produced softwood lumber.

Response:

433. Contrary to Canada's arguments at paragraph 1137 of its first written submission, the design, structure, and operation of Hydro-Quebec's PAE 2011-01 program, as well as the bestowal of payments pursuant to PPAs entered into under the PAE 2011-01 program, is not connected to, or conditioned on, the production by Resolute of a particular product or products. The PAE 2011-01 program was designed to purchase electricity from forest biomass cogeneration power plants.[615] As the Government of Quebec itself explained, "[a]ny prospective supplier from any industry or sector that is able to show eligibility for the PAE 2011-01 was able to submit a bid. If the PAE 2011-01 requirements were met and the target quantity or program

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[613] GATT 1994, Art. VI:3; SCM Agreement, Art. 10, footnote 36 (""The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.").

[614] *US – Washing Machines (AB)*, para. 5.273 (underline added).

[615] GOQ QR, p. 55 (Exhibit CAN-424 (BCI)).

termination date had not yet been reached, the bid would be accepted and a contract executed."[616]

434. Further, the PPAs between Hydro-Quebec and Resolute benefited the overall production activities of Resolute because Quebec, at the time of bestowal of this subsidy, did not require that Resolute use the payments received from the PAE 2011-01 program for a subset of its production activities, nor did it link the bestowal of this subsidy to any specific industry or products.[617] Resolute sold an input (electricity) used in its production processes (including the production of softwood lumber) to Hydro-Quebec. During its verification of Resolute's questionnaire response, the USDOC "traced the electricity sales for both mills to Resolute's consolidated Direct Revenue account in SAP," which further tied "to Resolute's Cost of Sales recorded in the Profit and Loss Statement, and then tied … to Resolute Forest Product's 2015 Form 10-K at 'Consolidated Statements of Operations.'"[618] The revenue earned for this input thus benefited Resolute's overall operations.[619] As a result, the USDOC's decision to attribute this benefit over all products, including Resolute's production of softwood lumber,[620] is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

146. <u>To the United States</u>: Please respond to Canada's argument at paragraphs 1142-1143 of its first written submission that one of the objectives of the LIREPP was to bring the electricity costs of Irving's paper facilities in line with those of pulp and paper producers in other provinces, and the Net LIREPP credit as well as a cap on the purchases by NB Power were expressly calculated to meet this objective.

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[616] GOQ QR, p. 65 (Exhibit CAN-424 (BCI)). *See also* GOQ QR, pp. 59, 60, 63, 65 (Exhibit CAN-424 (BCI)). "[T]he electricity must originate from generating facilities located in Québec, and may be installed in new buildings or in existing buildings." GOQ QR, p. 64 (Exhibit CAN-424 (BCI)).

[617] *See generally* Contrat d'approvisionnement en électricité entre PF Résolu Canada Inc. et Hydro-Québec distribution centrale de cogénération de Gatineau (Exhibit CAN-435 (BCI)); Contrat d'approvisionnement en électricité entre PF Résolu Canada Inc. et Hydro-Québec distribution centrale de cogénération de Dolbeau (Exhibit CAN-436 (BCI)).

[618] Verification of the Questionnaire Responses of Resolute FP Canada Inc., p. 16 (Exhibit CAN-174 (BCI)).

[619] Resolute is a subsidiary of Resolute Forest Products Inc. Resolute manufactures a diverse range of forest products; owns or operates multiple facilities, including sawmills and power generation assets; and produced the subject merchandise during the period of investigation. *See*, *e.g.*,Resolute's Response to Section III of Initial Questionnaire on General Issues and Non-Stumpage Programs, pp. 2-7 (Exhibit CAN-434 **(**BCI)); Verification of the Questionnaire Responses of Resolute FP Canada Inc., pp. 4-5 (Exhibit CAN-174 (BCI)) (verifying that Resolute is one company "built on the product lines of pulp, tissue, newsprint, specialty paper, and wood products, as summarized in Resolute Forest Products' annual Form 10-K filed with the SEC").

[620] Lumber Final I&D Memo, pp. 169-170 (Exhibit CAN-010).

Response:

435. The Government of New Brunswick explained that, "[u]nder this program, New Brunswick Power ('NB Power') purchases renewable electricity from large industrial customers and the revenue generated from these purchases is used as a credit on the participating customers' bill against their overall electricity charges."[621] As such, the LIREPP benefited the overall production activities of the Irving companies because New Brunswick, at the time of bestowal of this subsidy, did not require that the Irving companies use the LIREPP, or the Net LIREPP credit, for a subset of their production activities.[622] As the USDOC found:

> The [LIREPP] program was not designed to assist specific products. The GNB does not link the bestowal of the LIREPP credit to any specific industry or products. Further, the LIREPP Agreements signed between the participating Irving companies and NB Power does not place any requirement on the Irving companies to effectuate a transfer of the credit between IPL and JDIL, nor does it speak to the Irving companies' use of the LIREPP credit once it is applied to IPL's electricity bill.[623]

Therefore, even though one of the objectives of the LIREPP may have been to bring the electricity costs of large industrial enterprises in New Brunswick in line with similar costs in other provinces,[624] this objective does not alter the fact that the LIREPP credits provided by NB Power constituted a financial contribution in the form of revenue forgone.

436. In sum, the participating Irving companies provided to NB Power an input (electricity) used in the companies' production processes (including the production of softwood lumber). These companies received a credit from New Brunswick that reduced their monthly electricity bills. The credit received for this input benefited the participating Irving companies' overall

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[621] GNB QR, Exhibit NB-LIREPP-1, p. 1 (Exhibit CAN-450 (BCI)) (underline added). *See also* Lumber Final I&D Memo, p. 212 (Exhibit CAN-010), citing JDIL Primary QNR Response, Exhibit LIREPP-07, and JDIL Verification Report, p. 17 ("The purpose of the LIREPP program is for New Brunswick to (1) reach NB Power's mandate to supply 40 percent of its electricity from renewable sources by 2020; and (2) bring New Brunswick's large industrial enterprises' net electricity costs in line with the average cost of electricity in other Canadian provinces. … [Indeed, the Government of New Brunswick specifically] explained one of the reasons that the LIREPP program was implemented was for industries to get credit applied to their electricity bill for the renewable energy they generated.").

[622] *See* Lumber Final I&D Memo, pp. 214-215 (Exhibit CAN-010).

[623] Lumber Final I&D Memo, p. 215 (Exhibit CAN-010) (underline added).

[624] *See* Lumber Preliminary Decision Memorandum, p. 79 (Exhibit CAN-008).

operations.[625] As a result, the USDOC's decision to attribute this benefit over all products, including JDIL's production of softwood lumber,[626] is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

13 THE USDOC'S DETERMINATION THAT THE ACCELERATED CAPITAL COST ALLOWANCE FOR CLASS 29 ASSETS WAS *DE JURE* SPECIFIC

147. <u>To both parties</u>: Can a subsidy with activity-based exclusions, rather than enterprises- or industries-based exclusions, be considered *de jure* specific under Article 2.1(a)?

<u>Response</u>:

437. A subsidy with activity-based exclusions can be considered *de jure* specific under Article 2.1(a) of the SCM Agreement. Article 2.1(a) provides that a subsidy shall be specific "[w]here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises."[627] The term "explicitly" modifies the phrase "limits access," which means that the granting authority, or the legislation pursuant to which the granting authority operates, must contain an overt limitation on access to a subsidy to be considered *de jure* specific. The plain text of Article 2.1(a) does not further require that the "certain enterprises" that have access to the subsidy be explicitly identified.[628] Rather, the term "certain enterprises" refers to "a single enterprise or industry or a class of enterprises or industries that are known and particularized."[629] The term "certain enterprises" thus involves "a certain amount of indeterminacy at the edges," and whether a group of enterprises or industries constitute "certain enterprises" can only be made on a case-by-case basis.[630]

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[625] *See* GNB QR, Exhibit NB-LIREPP-1, p. 12 (Exhibit CAN-450 (BCI)) (participants produce electricity as part of their participation in the program and the fact that "[p]resently, the only industry that qualifies is the pulp and paper industry" has no bearing on whether the LIREPP itself is tied *per se* to pulp and paper).

[626] Lumber Final I&D Memo, pp. 215-216 (Exhibit CAN-010).

[627] SCM Agreement, Art. 2.1(a).

[628] *US – Carbon Steel (India) (AB)*, para. 4.365 ("The ordinary meanings of the terms 'group' and 'certain' do not indicate any numerical threshold pointing to a minimum or maximum number of things required in order to qualify as a 'group' or 'certain'. These definitions suggest rather that the relevant enterprises must be 'known and particularized', but not necessarily 'explicitly identified', and that they may have 'some mutual or common relation or purpose', or 'degree of similarity'. … [H]owever, …'any determination of whether a number of enterprises or industries constitute "certain enterprises" can only be made on a case-by-case basis.'" (footnotes omitted)).

[629] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

[630] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373; *US – Upland Cotton (Panel)*, para. 7.1142 ("The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness

438. Activity-based exclusions can explicitly limit access to a subsidy, and thus a subsidy can be considered *de jure* specific under Article 2.1(a) when a single enterprise or industry or a class of enterprises or industries can be known and particularized as a result of the activity-based exclusions. It is not unusual to define an industry or an enterprise by the product or business activity in which it is engaged (*e.g.*, timber industry, steel industry).[631] The panel in *US – Upland Cotton (Panel)* observed that an industry, or group of industries, "may be generally referred to by the type of products they produce" and "the concept of an 'industry' relates to producers of certain products."[632]

439. The evidence before the USDOC demonstrated that Accelerated Capital Cost Allowance ("ACCA") Class 29 assets program excludes enterprises and industries engaged in numerous activities from eligibility for a tax deduction under this program.[633] The USDOC found that the ACCA for Class 29 assets program excludes machinery and equipment used in manufacturing or processing industries engaged in:

> (a) farming or fishing; (b) logging; (c) construction; (d) operating an oil or gas well or extracting petroleum or natural gas from a natural accumulation thereof; (e) extracting minerals from a mineral resource; (f) processing of (i) ore, other than iron ore or tar sands ore, from a mineral resource to any stage that is not beyond the prime metal stage or its equivalent, (ii) iron ore from a mineral resource to any stage that is not beyond the pellet stage or its equivalent, or (iii) tar sands ore from a mineral resource to any stage that is not beyond the crude oil stage or its equivalent; (g) producing industrial materials; (h) producing or processing electrical energy or steam, for sale; (i) processing a natural gas as part of the business of selling or distributing gas in the course of operating a public utility; (j) processing heavy crude oil recovered from a natural reservoir in Canada to a stage that is not beyond the

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of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis.").

631 *See* U.S. First Written Submission, para. 752.

632 *US – Upland Cotton (Panel)*, para. 7.1142 (footnote omitted).

633 Lumber Final I&D Memo, pp. 197-200 (Exhibit CAN-010); Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008).

> crude oil stage or its equivalent; or (k) Canadian field processing.[634]

As the USDOC explained, by excluding certain activities from the definition of "manufacturing and processing," enterprises and industries that exclusively engage in the activities not included in the definition of "manufacturing and processing" are ineligible to receive the tax benefits.[635] For this reason, the USDOC determined that Canada's ACCA Class 29 assets program "favors enterprises or industries that are engaged in qualifying manufacturing and processing activities, over enterprises or industries that are not."[636]

440. The ACCA Class 29 assets program is therefore *de jure* specific because the relevant enterprises and industries that have access to the subsidy are "known and particularized." The USDOC's conclusion that the activity-based exclusion rendered the ACCA Class 29 assets program *de jure* specific is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before the USDOC.

148. <u>To both parties</u>: What share of total production in the Canadian economy during the POI does the body of activities that can apply Class 29 represent. How important in that body of activities is softwood lumber? Should these percentages come to bear on the issue of specificity and how? In this question, the Panel wants to clarify how broad are the exclusions, or how large is the timber sector within the inclusions, and whether this should matter.

<u>Response</u>:

441. The evidence of record does not demonstrate what share of total production in the Canadian economy during the POI was covered by the body of activities that might have qualified for the ACCA Class 29 assets program.[637] Even if such quantitative information did exist, the Panel should consider such information of no consequence because the USDOC determined that the ACCA Class 29 assets program was <u>*de jure* specific</u>. The *de jure* analysis and the phrase "certain enterprises" do not require an investigating authority to engage in a

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[634] Lumber Final I&D Memo, p. 197 (Exhibit CAN-010), quoting GOC QR, Exhibit GOC-CRA-ACCA-1 (*Income Tax Regulations*, Definitions) (Exhibit CAN-466). *See* Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008).

[635] Lumber Final I&D Memo, p. 198 (Exhibit CAN-010).

[636] Lumber Final I&D Memo, p. 199 (Exhibit CAN-010).

[637] *See*, *e.g.*, Program Usage 2010-2014 (Exhibit CAN-468) (although the exhibit shows that a limited number of corporations filed claims under the ACCA Class 29 assets program during certain tax years, the exhibit does not show what share of total production in the Canadian economy during the POI was covered by the body of activities that might have qualified for the ACCA Class 29 assets program).

precise identification or quantification exercise.[638] Nor does Article 2.1(a) of the SCM Agreement require an investigating authority to compare, as part of a *de jure* specificity analysis, the number of enterprises or industries that are eligible to access a subsidy to those that are not. Such an exercise is reserved for a *de facto* specificity analysis, "which aims to identify evidence of allocation or use that provides an investigating authority or panel sufficient assurance as to the existence of specificity."[639]

442. A *de jure* specificity analysis requires determining whether a subsidy is specific as a matter of law. This analysis "involves a consideration of legislation or of a granting authority's acts or pronouncements that explicitly limit access to the subsidy."[640] Here, the USDOC properly conducted the *de jure* specificity analysis contemplated by Article 2.1(a) and determined that the ACCA Class 29 assets program explicitly limits access to the subsidy to enterprises and industries that engage in activities that are not excluded from the definition of "manufacturing and processing." Therefore, relative to the Panel's questions, how broad the exclusions are from a factual standpoint, and how large the timber sector is within the inclusions, are not relevant inquiries under Article 2.1(a) of the SCM Agreement, because an investigating authority need not engage in a *de facto* specificity analysis if the evidence under consideration establishes that the ACCA Class 29 assets program is *de jure* specific.[641]

149. To Canada: At paragraph 155 of its opening statement (Day 2), referring to Class 29, Canada indicates that "[a]ny company, in any industry, may use the deduction" (emphasis added). However, Canada further indicates at paragraph 156 that "[t]he *Income Tax Regulations* set out particular activities that do not fall within the definition of 'manufacturing and processing' under Class 29." (emphasis original) Please explain this apparent discrepancy.

Response:

443. This question is addressed to Canada.

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[638] *US – Carbon Steel (India) (AB)*, para. 4.376 ("We have previously discussed the definition of Article 2.1 of the term 'certain enterprises', highlighting that it suggests that relevant enterprises must be 'known and particularized' but not necessarily 'explicitly identified'. This indicates that the meaning of 'certain enterprises', which serves as both text and context in the chapeau and each of the subparagraphs of Article 2.1, does not itself entail a precise identification or quantification exercise." (footnote omitted)).

[639] *US – Carbon Steel (India) (AB)*, para. 4.376.

[640] *US – Countervailing Measures (China) (AB)*, para. 4.146.

[641] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368 ("Article 2.1(a) … focuses not on whether a subsidy has been granted to certain enterprises, but on whether *access* to that subsidy has been explicitly limited. This suggest that the focus of the inquiry is on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it." (italics in original)).

14 THE USDOC'S USE OF THE "MARITIMES STUMPAGE BENCHMARK"

150. To Canada: Please respond to the United States' argument at paragraph 767 of its first written submission that Canada has failed to establish the precise content of the alleged measure.

Response:

444. This question is addressed to Canada.

151. To the United States: Please clarify the argument at paragraph 773 of your first written submission that by choosing to describe the measure as one of "present and continued application", Canada seeks to avoid explaining how the alleged measure could constitute "a rule or norm of general and prospective application"? Please comment on the Appellate Body's statement at paragraph 179 in *US – Continued Zeroing* that a measure that may be challenged in the WTO dispute settlement "need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm."

Response:

445. The quotation referenced in this question from paragraph 179 of the Appellate Body report in *US – Continued Zeroing* illustrates that considerable subjectivity may be involved in a complaining Member's characterization of the measure it seeks to challenge. While the form of the complaint should not necessarily determine the applicable framework for analysis, the form of the complaint should also not excuse a complaining Member from the burden of establishing that a measure exists, is attributable to the respondent, and is inconsistent with an obligation under the covered agreements.[642] By choosing to characterize its complaint as one of "present and continued application," Canada argues that it should only be required to show that the alleged measure "currently applies and [] will continue to be applied in the future until the underlying policy ceases to apply."[643] However, Canada has not established that there exists any

[642] *See Argentina – Import Measures (AB)*, para. 5.104 ("We observe that, in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, to the extent that such content is the object of the claims raised."); *ibid.*, para. 5.110 ("A complainant seeking to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a Member and its precise content."); *ibid.*, para. 5.146 (challenged measure had "present and continued application, in the sense that it currently applies and it will continue to be applied in the future until the underlying policy ceases to apply.").

[643] *Argentina – Import Measures (AB)*, para. 5.146.

"underlying policy" or that any such policy "applies and []will continue to be applied in the future."[644]

446. More typically, a challenge to an underlying policy that applies, and will continue to apply in the future, would require a complaining Member to establish that the alleged policy is "a rule or norm of general and prospective application."[645] Paragraphs 773-774 of the U.S. first written submission explain that Canada would be unable to make this showing and that the analogous analytical framework helps to illustrate the deficiencies in Canada's claim.

447. As explained in paragraph 774 of the U.S. first written submission, when considering allegations of a rule or norm of general or prospective application, prior reports have relied on specific statements in relevant documents to provide evidence that a rule or norm exists and would continue to apply in the future. For example, in *US – Countervailing Measures (China)*, the panel found that the USDOC policy at issue "provides 'administrative guidance and creates expectations among the public and among private actors,'" and this was "evident from the declaratory style of the text" and "the consistent application" of the policy by the USDOC.[646] The panel pointed out that the United States had admitted that "a 'policy' announcement provides 'the public with guidance as to how [the USDOC] may interpret and apply the statute and regulations in individual cases."[647] Likewise, the panel in that dispute found that the policy had "general and prospective application, as it is intended to apply to future investigations."[648] The panel found evidence to support this conclusion in "the text itself," in which "the USDOC explains that this policy has been applied for some time, that the USDOC is clarifying its policy for the public through the Issues and Decision Memorandum and that the USDOC will continue applying it."[649] The determinations to which Canada points share none of these features, as the United States has demonstrated.[650]

152. <u>To Canada</u>: Please respond to the United States' argument at paragraph 766 of its first written submission that the alleged Maritimes Stumpage Benchmark measure cannot be attributable to the United States, because neither Article 14(d) of the SCM Agreement nor the US law provides for the concept of "in-market" benchmark.

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[644] *Argentina – Import Measures (AB)*, para. 5.146.

[645] *See* U.S. First Written Submission, paras. 773-774.

[646] *US – Countervailing Measures (China) (Panel)*, para. 7.111.

[647] *US – Countervailing Measures (China) (Panel)*, para. 7.111.

[648] *US – Countervailing Measures (China) (Panel)*, para. 7.114.

[649] *US – Countervailing Measures (China) (Panel)*, para. 7.114.

[650] *See* U.S. First Written Submission, paras. 770-777.

Response:

448. This question is addressed to Canada.

153. To Canada: How does Canada reconcile its argument at paragraph 1196 of its first written submission that the alleged measure has "repeated and uninterrupted application" since 2004 with the fact that there were no investigations on softwood lumber from 2006 to 2015 due to the Softwood Lumber Agreement between Canada and the United States (footnote 1992 of Canada's first written submission)?

Response:

449. This question is addressed to Canada.