UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

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

Business Confidential Information (BCI) Redacted in Double Brackets ("[[ ]]") on pages 49, 57, 58, 59, 69, 74, 106, 125, 127, 128, 129, 130, 133, 134, 135, 136, 137, 152, and 167

November 12, 2019

TABLE OF REPORTS

Short Form	Full Citation
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 (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
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) (Panel)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R, adopted 19 December 2014, as modified by Appellate Body Report, WT/DS/436/AB
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 – Coated Paper (Indonesia) (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
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 – Countervailing Measures (Article 21.5 – China) (AB)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China*, WT/DS437/AB/RW and Add.1, adopted 15 August 2019
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Softwood Lumber III (Panel)	Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted 1 November 2002
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

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
U.S. Second Written Submission	
USA-061	List of Case-Related Documents
USA-062	Initial Non-Stumpage Questionnaire (January 19, 2017)
USA-063	Initial Stumpage Questionnaire (January 19, 2017)
USA-064	Initial Questionnaire Addendum (January 31, 2017)
USA-065	Complete Set of Verification Outlines Issued to Parties
USA-066	Petitioner's Comments on Initial Questionnaire Responses (March 27, 2017) (excerpted, Vol. I, pp. 1-71)

Exhibit No.	Description
USA-067	Canada and British Columbia Case Brief Vol. III (July 27, 2017) ("GOC/GBC Case Brief")
USA-068	British Columbia and the B.C. Lumber Trade Council Rebuttal Brief Vol. III (August 4, 2017) ("GBC/BCLTC Rebuttal Brief")
USA-069	Resolute First Supplemental Questionnaire Response (Stumpage) (April 12, 2017)
USA-070	Ontario Case Brief (July 27, 2017)
USA-071	Petitioner Rebuttal Brief (August 7, 2017)
USA-072	USDOC Memorandum, "Hearing Transcript on CVD Issues," dated August 24, 2017
USA-073	USDOC Response to Requests for Clarification by Canadian Parties (issued Feb. 3, 2017)
USA-074	Supplemental Questionnaire to Resolute (issued Mar. 30, 2017)
USA-075	Government of Quebec Questionnaire Response, Exhibit QC-STUMP-22 (excerpt from *SFDA* Regulations, chapter A-18.1, r.7, section 89 of the regulation respecting standards of forest management for forests in the domain of the State (this portion of Exhibit QC-STUMP-22 is not included in Exhibit CAN-197))
USA-076	Definition of "purchase" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2418
USA-077	Government of Canada Counter-Memorial, ICSID Case No. ARB(AF)/12/3 (Aug. 22, 2014) (excerpted)
USA-078	Definition of "group" from Oxford English Dictionary Online
U.S. Responses to the Panel's Second Set of Questions	
USA-079	Definition of "type" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 3441

Exhibit No.	Description
USA-080	Definition of "function" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1042
USA-081	Definition of "carry out" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 343
USA-082	Definition of "normally" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 1940
USA-083	Definition of "vested" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 3570
USA-084	Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-124
USA-085	Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-125
USA-086	Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-126
USA-087 (BCI)	Government of British Columbia Verification Exhibit VER-12
USA-088 (BCI)	Market Memorandum, New Brunswick attachment, Table 2.1
USA-089	Canfor 4th Supplemental Questionnaire Narrative Response (May 31, 2017)
USA-090	USDOC Administrative Protective Order (November 25, 2016)
USA-091	"BC Timber Sales Opportunity Review: Final Report" (Exhibit BC-SUPP3-6 attached to BC Supplemental Questionnaire Response (May 30, 2017))

1 CANADA'S CLAIM THAT THE USDOC WAS REQUIRED TO ASSESS BENEFIT IN RELATION TO PREVAILING MARKET CONDITIONS IN CANADA'S "REGIONAL MARKETS"

154. To the United States: At paragraph 20 of its response to the Panel's question no. 5 the United States asserts that:

> **[A]rticle 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." 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." (footnotes omitted)**

a. In light of the arguments above, please provide your views on whether a market-determined benchmark selected from *anywhere* in the country of provision would satisfy the requirements of Article 14(d)?

b. If such a benchmark does meet the requirements of Article 14(d), why did the USDOC conclude that private stumpage prices in Nova Scotia were not an appropriate benchmark for British Columbia even though the USDOC had found that the Nova Scotia prices were in-country, market-determined prices?

Response:

1. The United States is responding to subparts (a) and (b) of this question together. Canada has argued in this dispute for a new obligation to be created and read into the text of Article 14(d) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") where no such obligation exists. Article 14(d) provides that adequacy of remuneration be determined using a benchmark that relates to the prevailing market conditions for the good in question in the country of provision. Canada would have the Panel impose an additional obligation on WTO Members to then also assess the adequacy of remuneration in relation to subdivided units of the country of provision. Canada's reading posits that a benchmark price can only be considered to relate to the prevailing market conditions for the good in question in the country of provision if the benchmark price is first determined to relate to the prevailing market conditions for the good in question within a particular unit within the country of provision. In Canada's view, a price

cannot reflect the prevailing market conditions in the country of provision unless the price reflects the conditions that prevail in an area where, by Canada's logic, the prevailing market conditions in the country do not prevail. Canada's approach has no support in the text of Article 14(d) or in logic.

2. As explained in the U.S. first written submission, there is no basis for Canada's assertion that, simply because one can speak of stumpage in terms of regional markets, Article 14(d) required the U.S. Department of Commerce ("USDOC") to use prices from the province of provision.[1] One can also speak in terms of even broader markets, *e.g.*, the North American market, the softwood lumber commodity market, the global market for lumber, etc.[2] Despite the availability of any number of ways to divide up markets for different purposes, Canada has completely failed to establish any factual or legal basis for making regional market distinctions here, much less a requirement to make such a region-based assessment under Article 14(d).

3. For a number of reasons, as explained in the U.S. second written submission, Canada has failed to demonstrate a factual basis for drawing a categorical distinction between one region and other regions – whether by province or by any number of smaller subdivisions.[3] As the United States has demonstrated, a fatal problem with Canada's position that benchmark selection should have been limited to regional jurisdictions is that Canada has never established that such regional divisions even exist. On the one hand, Canada argues that the conditions in one province cannot be compared to conditions in another province because the government pricing mechanism in each province creates province-specific conditions. On the other hand, Canada argues that the relevant market conditions "vary significantly" across even the smallest distances, *e.g.*, "even at the level of individual mills located within the same state, owned by the same company, and within an hour and a half haul of each other."[4] Canada has offered a litany of even more minute considerations that, in its view, make for different conditions on a tree-by-tree basis. As explained in the U.S. first written submission, however, Canada's proposition implies that there may be no appropriate basis upon which to delineate between conditions in one region and another.

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[1] *See* First Written Submission of the United States of America (November 30, 2018) ("U.S. First Written Submission"), paras. 83-86.

[2] *See, e.g.*, Exhibit CAN-240 (BCI), p. NBII-18 (where, in a single paragraph, New Brunswick reports that its timber market is simultaneously a regional market, a Maritimes region market, an international regional market that is partly Canadian and partly in the United States, a market consisting of four provincial or state jurisdictions, and noting that "[o]nce again, within this regional market there is evidence over time of 'micro markets' that are functioning within it. These micro markets are visible at the county level. From year to year there may be significant changes . . . . But this fact is consistent throughout the regional market [and] does not undercut the broader regional market.").

[3] *See* Second Written Submission of the United States of America (May 6, 2019) ("U.S. Second Written Submission"), para. 165.

[4] First Written Submission of Canada (October 5, 2018) ("Canada's First Written Submission"), para. 616.

4. The deficiency of Canada's approach is highlighted by Canada's failure to respond to question 9 in the first set of Panel questions. The Panel asked Canada:

> 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.

5. In its written response to this question, Canada was unable to articulate a principled basis upon which to draw the geographic distinctions that Canada asserts should have been taken into account. As a result, Canada's argument for a categorical distinction between provinces remains unsubstantiated. Canada has argued that each mill takes into account its own circumstances (*e.g.*, the exact distance between the mill and the harvest site) and, on that basis, Canada argues that those circumstances are not the exact same circumstances found in Nova Scotia (*e.g.*, because Nova Scotia mills are not located the exact same distance from particular harvest sites). Canada has taken the position, essentially, that no two mills face the same circumstances. But this position is based on the considerations of individual mills, not based on any categorical difference between provinces.

6. As the United States has explained, the corollary of Canada's position is that while no two mills face identical circumstances, all mills take into account the same kinds of considerations.[5] If Canada were to follow its own logic, Canada would be forced to acknowledge the inevitable conclusion that the actual transaction prices observed in Nova Scotia also reflect the same universe of considerations faced by lumber producers in other provinces. Though Canada has failed to appreciate it, this is also the logic of referring to the prevailing market conditions for the good in question in the country of provision. Ultimately, so long as the benchmark good is the same as the good in question and the benchmark price is a market-determined price, actual transaction prices will reflect the same prevailing market conditions. And this is consistent with the reasoning in prior reports that, where the good in question was the same as (or similar to) the benchmark good, "[t]o the extent that … 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)."[6]

7. While the USDOC established that the good in question is the same as the good in Nova Scotia, Canada has not established that the prices in Nova Scotia are determined on any basis that deviates from the kinds of considerations mills take into account, and which are prevalent in the lumber industry in Canada. Absent any categorical distinction between provinces, the prices

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[5] *See* U.S. Second Written Submission, paras. 165-169.

[6] *US – Countervailing Measures (China) (AB)*, para. 4.46 (underline added).

for SPF timber in Nova Scotia, therefore, are prices that reflect the prevailing market conditions for SPF timber across the other provinces (in contrast, a categorical distinction was established between eastern SPF timber and British Columbia SPF timber). Therefore, even by Canada's own reasoning, the actual transaction prices in Nova Scotia reflect the prevailing market conditions for the good in question. Canada has no basis for arguing that this comparison fails to comport with the provisions of Article 14(d) of the SCM Agreement.

8. As noted, even if no two mills face identical circumstances, all mills take into account the same kinds of considerations. Canada has suggested that any "consideration" should be considered as a "condition," and has argued that such conditions vary across provinces, but Canada has failed to explain precisely what it means by "conditions."[7] The relevant conditions under Article 14(d) are the prevailing market conditions for the good in question in the country of provision. The prevailing market conditions refer to the conditions of sale or purchase manifest in the result of arm's-length transactions between private buyers and sellers and the terms they bargain for on the basis of such exchange. Canada's catalogue of "conditions" is not that. Canada's catalogue only illustrates that infinitely unique circumstances may characterize any particular harvest. Taken to its logical (but absurd) conclusion, Canada's argument appears to be that each tree (or each purchase) has its own prevailing market conditions, thus rendering any comparison impossible, or ultimately meaningless.

9. To the extent Canada's position really is that each tree (or each purchase) must be evaluated as if it had its own prevailing market conditions, that argument amounts to taking the position that the good in question has different characteristics that make it unlike the benchmark good. While this position is implied by Canada's arguments, Canada has not – and could not – make that case. Here, the USDOC searched the record, evaluated the evidence, and concluded that the relevant distinction to be made was the distinction between eastern SPF timber and British Columbia SPF timber. As this discussion has illustrated, Canada's approach is ultimately circular and it fails to establish a categorical distinction between provinces that translates to a difference in prevailing market conditions for the good in question.

10. Returning to the question of the applicable legal standard implicated by the Panel's question, as noted in the excerpt that appears in the question, Article 14(d) of the SCM Agreement 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." The language in Article 14(d) that speaks to the geographical scope of that provision is the phrase "in the country of provision."

11. Thus, with respect to subpart (a) of the question, to the extent the question asks whether "*anywhere* in the country of provision" can be considered to be within "the country of

[7] *See* Canada's First Written Submission, para. 783. *See also* U.S. Second Written Submission, para. 167.

provision," the answer is yes.

12. To the extent that subpart (a) of the Panel's question is asking whether location alone necessarily makes any potential benchmark suitable for the comparison under Article 14(d), the answer is no. In further exploring this question during the second substantive meeting of the Panel with the parties, the United States further addressed the question of whether the fact that a price is found within the country of provision means that everything else about that price is irrelevant. As the United States explained, the fact that a price is found within the country of provision does not speak to other aspects of comparability, *e.g.*, whether the potential benchmark is a price for the good in question or, *e.g.*, whether the potential benchmark is a market-determined price.

13. As discussed, Canada has argued that Article 14(d) requires the use of prices from particular regions within the country of provision. But the text of Article 14(d) contains no such requirement and, further, Canada has failed to show that the benchmark good here is not comparable to the good in question or that the benchmark prices are not market-determined prices.

14. Regarding subpart (b) of the question, with respect to the distinction between Nova Scotia and British Columbia, the USDOC explained that it found a distinction between the good in question provided by British Columbia and the good in question provided by the other provinces. For the good in question provided by the governments of Ontario, Quebec, New Brunswick, and Alberta, the record provided in-country prices that could be used as benchmarks. For the good in question provided by the government in British Columbia, the record did not provide market-determined prices from within the country of provision that could be used as benchmarks. The good in question is distinct, as between British Columbia stumpage and the stumpage provided in the other provinces – and it does not appear that this distinction is in dispute. Canada itself recognizes this distinction as resting upon a valid basis for differentiating between the two different goods provided.

155. Question 7 at page NBII-18 of Exhibit CAN-240 (BCI) states:

> **Describe in detail the timber market in New Brunswick, including, but not limited to the following:**
>
> **Do you characterize the timber market in New Brunswick as a regional market, a provincial market, or by another scope of market? Explain in detail the characteristics of the market.**

a. To both parties: Please indicate, pointing to the record, whether the USDOC made a determination as to whether New Brunswick was a "regional market", "provincial market", or "another scope of market". Please also indicate, pointing to the record, where the USDOC had investigated, and decided on, whether a similar characterization applied to the other provinces

in question.

b. <u>To the United States</u>: Please explain in detail the difference between a "regional market", a "provincial market" and "another scope of market" to which the USDOC itself referred to in its question above.

<u>Response</u>:

15. The United States is responding to both subparts of this question together. The language that appears in the excerpt of the USDOC's question reflects an initial inquiry by the USDOC into allegations the petitioner presented in its petition for relief, based on statements of the New Brunswick Auditor General, and based on the experience developed in the course of prior lumber investigations where the Government of New Brunswick had not been found to be providing stumpage subsidies.

16. A comparison of the source document for the excerpt that appears in the Panel's question, *i.e.*, **Exhibit CAN-240 (BCI)**, with the original source document in which the USDOC actually posed its question, *i.e.*, **Exhibit USA-064**, illustrates the pertinence of the particular question the USDOC posed to New Brunswick.[8] While **Exhibit CAN-240 (BCI)** contains New Brunswick's responses to questions from the USDOC, **Exhibit USA-064** provides the actual Questionnaire Addendum as it was issued to New Brunswick and certain other parties.[9] At the first page of **Exhibit USA-064** is a cover letter from the USDOC to the recipients, conveying the Questionnaire Addendum along with an explanation of the reasons for issuing the Questionnaire Addendum and the reasons why the USDOC addressed the Questionnaire Addendum only to certain parties.[10]

17. The cover letter, which is dated January 31, 2017, explains that, two weeks earlier, the USDOC had "issued to the Government of Canada the initial questionnaire in this CVD investigation on January 19, 2017, which included stumpage questions for the provinces of Alberta, British Columbia, Ontario, and Quebec."[11] The cover letter also asks that recipients "[p]lease refer to cover letter and Section I of the January 19, 2017, initial questionnaire for procedural information for this investigation," among other things.[12]

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[8] *See* Exhibit CAN-240 (BCI), p. NBII-18 (p. 21 of the PDF version); *cf.* Exhibit USA-063, p. 1 (p. 2 of the PDF version).

[9] *See* Exhibit CAN-240 (BCI), p. NBII-18 (p. 21 of the PDF version); *cf.* Exhibit USA-063, p. 1 (p. 2 of the PDF version).

[10] *See* Exhibit USA-064, p. 1 (p. 2 of the PDF version).

[11] Exhibit USA-064, p. 1 (p. 2 of the PDF version).

[12] Exhibit USA-064, p. 1 (p. 2 of the PDF version).

18. For reference, the cover letter and Section I of the January 19, 2017, initial questionnaire can be found at **Exhibit USA-062**. As can be seen, Section I of the January 19 questionnaire consists of the "General Instructions" for the questionnaire.[13] In turn, **Exhibit USA-063** contains Sections II and III of the January 19 questionnaire. Section II is addressed to particular provincial governments (namely, Alberta, British Columbia, Ontario, and Quebec) and focuses on the allegations that those provincial governments provided stumpage for less than adequate remuneration.[14] Section III of the January 19 questionnaire is addressed to the individual producers or exporters of the merchandise under investigation.[15]

19. Included as an attachment to Section I (and provided for the respondents' reference) is a copy of the Initiation Checklist the USDOC published as part of initiating the investigation.[16] The Initiation Checklist explains the basis upon which the petitioner has alleged that a subsidy is being provided (or has been provided).[17] For each subsidy that the petitioner included in its petition for relief, the checklist provides a brief description of the allegation and each of the constituent subsidy elements (financial contribution, benefit, and specificity), along with a brief summary of the evidentiary basis for the allegation and whether it is sufficient to justify initiation.

20. Given that the Panel's question invites a comparison between New Brunswick and the other provinces, the United States briefly notes the relevant background provided in the Initiation Checklist for those provinces as well, before proceeding to discuss in more detail the relevant background for New Brunswick.

21. First, at pages 8-10, the Initiation Checklist sets out the basis for the petitioner's allegation that "the [Government of British Columbia] sells timber to Canadian producers for [less than adequate remuneration]."[18]

22. At pages 10-11, the Initiation Checklist sets out the basis for the petitioner's allegation that "the [Government of Alberta] has a stumpage program that provides public timber to softwood lumber producers for [less than adequate remuneration]."[19]

23. At pages 16-17, the Initiation Checklist sets out the basis for the petitioner's allegation

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[13] Exhibit USA-062, p. 6 (p. 9 of the PDF version).

[14] Exhibit USA-063, p. 6 (p. 6 of the PDF version).

[15] Exhibit USA-063, p. 6 (p. 6 of the PDF version).

[16] Exhibit USA-062 – Initiation Checklist (p. 70 of the PDF version). *See also ibid.*, p. 8 (p. 77 of the PDF version).

[17] Exhibit USA-062 – Initiation Checklist (p. 70 of the PDF version). *See also ibid.*, p. 8 (p. 77 of the PDF version).

[18] Exhibit USA-062 – Initiation Checklist, pp. 8-10 (pp. 77-79 of the PDF version).

[19] Exhibit USA-062 – Initiation Checklist, pp. 10-11 (pp. 80-81 of the PDF version).

that "the [Government of Ontario] administers a stumpage program that provides public timber for lumber production for [less than adequate remuneration]."[20]

24. At pages 18-19, the Initiation Checklist sets out the basis for the petitioner's allegation that "the [Government of Quebec's] stumpage program provides Crown timber to lumber producers for [less than adequate remuneration]."[21]

25. Finally, at pages 19-20, the Initiation Checklist sets out the basis for the petitioner's allegation that "the stumpage prices charged by the [Government of New Brunswick] in Crown lands represent less than adequate remuneration."[22] With respect to the petitioner's evidentiary basis for this allegation, under the heading "*Support*", the USDOC explained that it had "examined the evidence provided to support the allegation on pages 96 through 114 of Volume III of the Petition and the Petition Amendment, including all referenced exhibits therein. We relied on all information submitted."[23] Included in that allegation, among other things, the petition referred to the USDOC's finding in the *Lumber IV* investigation that subsidization by provincial governments did not extend to stumpage in the Maritime Provinces. The petitioner explained why it was no longer likely that New Brunswick stumpage was unsubsidized. As the USDOC explained:

> Petitioner argues that the methodology used to set these [government stumpage] fees is flawed and in turn fails to collect a fair market value from companies that harvest timber from Crown lands. In determining an appropriate benchmark to compare to stumpage prices from Crown land in the province, Petitioner alleges that due to the combined effects of the GNB's dominance in the market and private mills' oligopoly, private timber prices in New Brunswick are unusable. On this basis, Petitioner has provided prices for timber in Nova Scotia and Maine. Petitioner argues that in comparison to either of these prices, the stumpage prices charged by the GNB in Crown lands represent less than adequate remuneration. Finally, Petitioner adds that the Department determined to investigate this program and preliminarily found it to provide a countervailable subsidy in the preliminary results of *Supercalendered Paper from Canada*

[20] Exhibit USA-062 – Initiation Checklist, pp. 16-17 (pp. 85-86 of the PDF version).

[21] Exhibit USA-062 – Initiation Checklist, pp. 18-19 (pp. 87-88 of the PDF version).

[22] Exhibit USA-062 – Initiation Checklist, pp. 19-20 (pp. 88-89 of the PDF version).

[23] Exhibit USA-062 – Initiation Checklist, p. 20 (p. 89 of the PDF version).

Expedited Review.[24]

26. Among the evidence supporting the allegation, the petitioners also pointed to the Reports of the Auditor General, which introduce certain of the terms in the excerpt flagged in this question. As noted above in the U.S. response to question 154, New Brunswick did not argue that the USDOC should artificially define the provincial boundaries as constituting the boundaries of a regional market. Rather, New Brunswick took a different approach than the approach taken by the other provinces under investigation, and instead described its timber market (all within the span of a single paragraph) as simultaneously a regional market, a Maritimes region market, an international regional market that is partly Canadian and partly in the United States, a market consisting of four provincial and state jurisdictions, and that "within this regional market there is evidence over time of 'micro markets' that are functioning within it. These micro markets are visible at the county level. From year to year there may be significant changes . . . . But this fact is consistent throughout the regional market [and] does not undercut the broader regional market."[25] Thus, the questions that the USDOC posed arose in the New Brunswick context for reasons that were particular to New Brunswick and New Brunswick's own ready acknowledgment that the timber market can be described in many different ways at the same time.

27. Against this background, in the Questionnaire Addendum for New Brunswick, *i.e.*, **Exhibit USA-064**, the USDOC pursued this line of inquiry as part of its investigation into the alleged subsidization – as alleged specifically with respect to the stumpage provided by the Government of New Brunswick, and on the basis alleged by the petitioner.

28. It is important to recall also that this Questionnaire Addendum also reflects the initial steps of the inquiry. In fact, the excerpt appears to be the seventh question the USDOC posed to New Brunswick regarding the provision of stumpage by the provincial government. It was just weeks into the investigation when the USDOC posed this question.[26]

29. Ultimately, the USDOC did not make a determination as to whether New Brunswick was a "regional market", "provincial market", or "another scope of market". Nor did the USDOC decide whether a similar characterization applied to the other provinces in question. Nor did the USDOC, in its determination, ever explain in detail the difference between a "regional market", a "provincial market" and "another scope of market". It was not necessary for the USDOC to do so in the course of its countervailing duty investigation.

156. To Canada:

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[24] Exhibit USA-062 – Initiation Checklist, p. 20 (p. 89 of the PDF version).

[25] *See* Exhibit CAN-240 (BCI), p. NBII-18.

[26] *See* Exhibit USA-064 (p. 1 of the PDF version).

a. Please indicate where on the record the Canadian respondents proposed to the USDOC to use private market and/or log prices from each of the provinces in question as benchmarks for determining adequacy of remuneration for Crown stumpage in those provinces.

b. Please indicate whether the proposals from the respondents to use regional benchmarks for determining adequacy of remuneration for Crown stumpage in each of the provinces in question came in response to any of the USDOC's own questions set out in its questionnaires to the respondents.

Response:

30. This question is directed to Canada.

157. To Canada: At paragraph 16 of its opening statement at the first substantive meeting of the Panel (Day 1), the United States argues:

> **A third problem with Canada's position that benchmark selection should have been limited to regional jurisdictions is that *Canada has never established that such regional divisions even exist*. On the one hand, Canada argues that the conditions in one province cannot be compared to conditions in another province because the government pricing mechanism in each province creates province-specific conditions. On the other hand, Canada argues that the relevant market conditions "vary significantly" across even the smallest distances, *e.g.*, "even at the level of individual mills located within the same state, owned by the same company, and within an hour and a half haul of each other." Canada has offered a litany of even more minute considerations that, in its view, make for different conditions on a tree-by-tree basis. But as we explained in the U.S. first written submission, Canada's proposition implies that there may be no appropriate basis upon which to delineate between conditions in one region and another. If one accepts Canada's proposition, then the only remaining basis for designating each province as its own "market" is that each provincial government sets different pricing policies within its jurisdiction. And ultimately, as we have explained, the provincial stumpage pricing policies do not constitute "prevailing market conditions" within the meaning of Article 14(d). (footnotes omitted) (italics added)**

Please respond to the United States' assertions above, pointing to the record to supplement your response.

Response:

31. This question is directed to Canada.

158. To the United States: At paragraph 749 of its first written submission, Canada asserts that:

> **Canada submitted expert evidence that confirmed that provincial markets for standing timber are regional in nature. For example, Dr. Kalt explained that standing timber and log markets are "inherently local and often differentiated by substantial quality and locational differences across local areas. Stumpage prices, being tied to a specific block of trees at a specific location, thus inherently depend on local market conditions." Similarly, Dr. Asker indicated in his expert report that:**
>
> > **standing timber […] cannot be transported and logs have high transportation costs. As a matter of economics, stumpage prices in each local market reflect supply and demand conditions (*e.g.* harvesting costs, presence of sawmills, transportation costs, marketability, etc.), differences in forests […], as well as other factors that are specific to that locality.**

Please respond to Canada's assertions above.

Response:

32. The United States refers the Panel to the U.S. response to question 154 above. Additionally, as explained in the U.S. first written submission, there is no basis for Canada's assertion that, simply because one can speak of stumpage in terms of regional markets, Article 14(d) of the SCM Agreement therefore obligates the USDOC to use prices from the province of provision.[27] Indeed, one can also speak in terms of even broader markets, *e.g.*, the North American market, the softwood lumber commodity market, the global market for lumber, etc.[28]

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[27] *See* U.S. First Written Submission, paras. 83-86.

[28] *See*, *e.g.*, Exhibit CAN-240 (BCI), p. NBII-18 (where, in a single paragraph, New Brunswick reports that its timber market is simultaneously a regional market, a Maritimes region market, an international regional market that is partly Canadian and partly in the United States, a market consisting of four provincial or state jurisdictions, and noting that "[o]nce again, within this regional market there is evidence over time of 'micro markets' that are functioning within it. These micro markets are visible at the county level. From year to year there may be significant changes . . . . But this fact is consistent throughout the regional market [and] does not undercut the

Despite the availability of any number of ways divide up markets for different purposes, Canada has completely failed to establish any factual or legal basis for making regional market distinctions here, much less establish a requirement to make such an assessment under Article 14(d).

33. Moreover, the USDOC addressed the comments by Asker and Kalt and explained why their observations were unavailing.[29] The U.S. second written submission addressed these issues at length, in response to Canada's Chart of Reports, and the United States refers the Panel to that discussion.[30]

34. With respect to Asker's comments, Canada argued in its Annex A Chart of Reports that the relevance of this commentary[31] is that it "discusses how Nova Scotia's unique characteristics . . . distinguish this province from the other provinces under investigation."[32] The USDOC addressed this report in the final issues and decision memorandum at pages 113-115.[33] The USDOC addressed, in particular, the Asker study's conclusions regarding transportation costs, finding that the report was based on assumptions rather than actual costs, and the report's conclusions were undercut by other record evidence.[34]

35. The USDOC found generally that, "[r]egarding the[] supposed dissimilarities [between Nova Scotia and the other provinces], the Canadian Parties do not provide enough information to determine the relative impact, if any, of land ownership distribution or land management policy differences as well as any lingering differences in the impact of the recession across the aggregated actual transactions."[35] Canada subsequently argued in response to the Panel's first set of questions that "much of this information was submitted to show that there are regional markets for standing timber and that Nova Scotia were [*sic*] an inappropriate benchmark for a comparison."[36] But this was exactly the USDOC's point. Having found that the benchmark

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broader regional market.").

[29] *See 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. 113-115 (Asker) and pp. 143-148 (Kalt) (Exhibit CAN-010).

[30] *See* U.S. Second Written Submission, paras. 81-83 (Asker) and paras. 63-68 (Kalt).

[31] *See* John Asker, Ph.D., "Economic Analysis of Factors Affecting Cross Jurisdictional Stumpage Price Comparisons" (Exhibit CAN-015).

[32] Responses of Canada to Questions to the Parties from the Panel in Connection with the First Substantive Meeting (April 3, 2019) ("Canada's Responses to the First Set of Panel Questions"), Annex A, p. A-9.

[33] *See* Lumber Final I&D Memo, pp. 113-115 (Exhibit CAN-010).

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

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

[36] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-9.

good was the same as (or similar to) the good in question and that the benchmark prices were market-determined prices, the USDOC was then left with evaluating the Canadian parties' arguments, which asserted that the Nova Scotia benchmark was inappropriate for comparison to the other provinces for various reasons, as argued by particular parties. The USDOC's assessment confirmed that, even taking into account the various arguments of the Canadian parties, those arguments failed both qualitatively and quantitatively to provide a sufficient basis to find that the benchmark stumpage was somehow incomparable to the good in question. Based on Canada's current argument, it appears Canada wanted the USDOC simply to take Canada's conclusion as fact, notwithstanding the lack of quantitative information supporting that conclusion or a basis for making a distinction in qualitative terms (*i.e.*, a categorical distinction).

36. Moreover, the USDOC also found "that these and other arguments regarding comparability incorrectly presuppose that the Department must meet an impossible standard of finding a tier-one benchmark that accounts for every purported market condition."[37] As the United States has demonstrated previously, accounting for "prevailing market conditions"[38] does not require re-constructing a subsidy recipient's entire commercial experience. Rather, the reference in Article 14(d) of the SCM Agreement to "prevailing market conditions" ensures that a proper comparison is made, such that it will demonstrate how much more the recipient would have had to pay to obtain the good on the market. Without quantitative information supporting its conclusions – which, again, were commissioned for the purpose of the investigation – it was not unreasonable for USDOC to decline to rely on the Asker report's commentary regarding alleged differences in prevailing market conditions.

37. With respect to Kalt's comments, Canada argued in its Annex A Chart of Reports that the relevance of this commentary[39] is that it "discusses the local nature of the log market and the distinctions between the B.C. Coast and Interior," "analyzes British Columbia's log exporting process," and "includes a data analysis showing that export premia are a normal feature of log markets."[40] The USDOC addressed this report in the final issues and decision memorandum at pages 143-148.[41] In their case brief during the investigation, Canada and British Columbia referenced the Kalt report to argue against the USDOC's determination that log export restraints on the coast would have a ripple effect on the volume and prices of logs in the BC interior.[42] Canada and British Columbia cited the Kalt report for the proposition that log prices are

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

[38] SCM Agreement, Art. 14(d) (underline added).

[39] *See* Joseph P. Kalt, "An Analysis of Certain Economic Issues Relating to Petitioner's Claims About the Operation of Stumpage and Log Markets in British Columbia" (Exhibit CAN-016).

[40] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-5.

[41] *See* Lumber Final I&D Memo, pp. 143-148 (Exhibit CAN-010).

[42] *See* GOC/GBC Case Brief, p. 20 (Exhibit USA-067).

inherently local and do not "ripple" across log markets.[43]

38. In the final issues and decision memorandum, the USDOC disagreed with the conclusions of the Kalt report for two reasons. First, the report was prepared for the investigation and therefore deserved limited weight given its potential for biased conclusions and data selected for the purpose of reaching a specific finding.[44] Second, the petitioner had placed several other reports on the record (market integration reports), which were not prepared for the purposes of the investigation, that concluded that log markets covering large areas and transecting international borders can be integrated.[45] The USDOC explained that these reports identified regions in which there is significant integration in a timber market covering a large area and including multiple jurisdictions, as well as cases in which logs follow the "law of one price."[46] In support of the proposition that log markets are not inherently local, the USDOC also cited data submitted by Quebec and New Brunswick indicating that logs harvested in those provinces are traded with other provinces and the United States.[47] The USDOC also cited a statement by the provincial Government of New Brunswick that the log market in New Brunswick is integrated with the surrounding area.[48] Faced with "conflicting evidence about the nature of log markets," the USDOC determined 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 report that was] commissioned specifically for purposes of this investigation."[49]

39. Canada and British Columbia's case brief also cites the Kalt report for the proposition that because the coastal BC tree species are different from those harvested and used in the interior, any impact the LEP process had on coastal log prices would not ripple into the BC interior, in which lodgepole pine is the dominant species.[50] The USDOC directly addresses this argument, reasoning (in the final issues and decision memorandum, although not specifically citing the Kalt report on this point) that although the species of the BC coast and interior differ, the record shows that they are interchangeable, and therefore government action such as a log export restraint that affected one species would have an impact on the market for other species in

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[43] GOC/GBC Case Brief, p. 20 (Exhibit USA-067).

[44] *See* Lumber Final I&D Memo, p. 145 (Exhibit CAN-010).

[45] *See* Petitioner's Comments on Initial Questionnaire Responses (March 27, 2017), pp. 11-13 (Exhibit USA-066).

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

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

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

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

[50] *See* GOC/GBC Case Brief, p. 21 (Exhibit USA-067).

the province.[51] Furthermore, the USDOC noted that both regions had significant volumes of balsam, cedar, fir, and hemlock.[52] Therefore, even if log export restraints only affected those four species, such restrictions would affect the volume, and consequently the price, of those species throughout the province.[53] Finally, the USDOC explained that lodgepole pine, the dominant species in the interior, falls within the SPF group of products, for which hemlock and fir are substitutable.[54] Lodgepole pine, hemlock, and fir are used in the production of similar products, including lumber.[55] Therefore, export restraints on coastal hemlock or fir, which had significant harvest volume in coastal BC during the period of investigation, would impact the interior hemlock and fir supply, as well as that of other interchangeable log species, including lodgepole pine.[56] Consequently, the USDOC directly contradicted the assertion, as stated in the Kalt report and incorporated into Canada and British Columbia's case brief, that differences in coastal and interior species would render export restraints on coastal logs irrelevant to the interior.[57]

40. Canada and British Columbia's case brief also cites the Kalt report to argue that, because transportation routes between the interior and coast are limited or absent, there are no overlapping markets and consequently no ripple price effects.[58] Again, the USDOC did address the report's arguments regarding transport in the final issues and decision memorandum, although not specifically citing the Kalt report on this point. First, the USDOC explained that, because it found that the coastal and interior markets are integrated, the presence or absence of transport routes between the coast and interior does not alter the USDOC's finding of price suppression throughout the province.[59] Furthermore, the USDOC pointed to other record evidence submitted by Canada and British Columbia that contradicted their argument about lack of transport routes between the coast, including maps showing transport routes between the coast and interior, as well as statements that logs can be easily transported from the interior to the coast.[60]

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

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

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

[54] *See* Lumber Final I&D Memo, pp. 146-147 (Exhibit CAN-010).

[55] *See* Lumber Final I&D Memo, p. 147 (Exhibit CAN-010).

[56] *See* Lumber Final I&D Memo, p. 147 (Exhibit CAN-010).

[57] *See* Lumber Final I&D Memo, pp. 146-147 (Exhibit CAN-010).

[58] *See* GOC/GBC Case Brief, pp. 21-22 (Exhibit USA-067).

[59] *See* Lumber Final I&D Memo, p. 147 (Exhibit CAN-010).

[60] *See* Lumber Final I&D Memo, p. 147 (Exhibit CAN-010).

41. Canada and British Columbia's case brief also relied on the Kalt report to assert that it is not economically feasible to export logs from much of the interior of BC.[61] The USDOC addressed this argument in the final issues and decision memorandum when it explained its conclusion that log export restraints directly impact the interior region of BC – regardless of any ripple effect from the coast to the interior – because logs can be and are exported from the interior of BC.[62] Furthermore, other record evidence indicated that logs are exported from different parts of the interior – particularly the tidewater interior and southern interior, and possibly the eastern BC interior.[63] Therefore, the USDOC determined that it was economically feasible to export logs from the interior.[64] Although these exports were mostly from a different area of the interior, the record demonstrated that most of the interior mills overlap with each other and potential export markets, and the impact on the border regions of the interior would have a similar ripple effect on the interior.[65]

42. Canada and British Columbia also relied on the Kalt report to argue that export premia are a typical feature of log markets in support of their broader argument that the log export permitting process does not restrain log exports.[66] Although the USDOC first stated that the Kalt report might contain bias because it was commissioned for the investigation, the USDOC also analyzed the report and identified additional concerns about the methodology and data underlying the report.[67] Specifically, the Kalt report examines differences in domestic and export log prices in only three markets – New Zealand, Chile, and the U.S. Pacific Northwest ("PNW") – to demonstrate that log export premia exist in log markets in general.[68] However, the report did not indicate how the sample was selected, and the use of only three markets did not permit the USDOC to assess the validity of the report's overall conclusions.[69] Furthermore, in reviewing the underlying data, the USDOC found that the data contradicted the Kalt report's conclusion that export premia are a normal feature of log markets because each market included cases in which the domestic price was higher than the export price.[70]

159. <u>To both parties</u>: At paragraph 34 of its opening statement at the first substantive

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[61] *See* GOC/GBC Case Brief, p. 23 (Exhibit USA-067).

[62] *See* Lumber Final I&D Memo, p. 147 (Exhibit CAN-010).

[63] *See* Lumber Final I&D Memo, pp. 147-148 (Exhibit CAN-010).

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

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

[66] *See* GOC/GBC Case Brief, pp. 18-19 (Exhibit USA-067).

[67] *See* Lumber Final I&D Memo, p. 143 (Exhibit CAN-010).

[68] *See* Lumber Final I&D Memo, p. 143 (Exhibit CAN-010).

[69] *See* Lumber Final I&D Memo, p. 143 (Exhibit CAN-010).

[70] *See* Lumber Final I&D Memo, p. 143 (Exhibit CAN-010).

meeting of the Panel (Day 1), Canada states, in relevant part:

> **Canada's argument is that an investigating authority can only resort to an out-of-market benchmark – whether it's out-of-country, or it's in a distinct regional market within the same country – in very limited circumstances because in-market prices will necessarily reflect the prevailing market conditions.**

a. Please provide your views on whether "in-market prices will *necessarily* reflect the prevailing market conditions", and if so, why.

b. Please also comment on whether prices anywhere in the market of provision will necessarily reflect the prevailing market conditions if there are differences in market conditions within the market.

Response:

43. The United States is responding to both subparts of this question together. The United States refers the Panel to the U.S. response to question 154 above. Moreover, the United States continues to emphasize that Canada's conflation of the words "market" and "country" in the text of Article 14(d) of the SCM Agreement must be rejected.

44. As discussed above, Canada's arguments on the facts are not compelling. Given this defect in its position, Canada has sought to stitch together a radical and unsupported legal theory that would, Canada hopes, salvage its remaining claims.[71] But Canada cannot overcome the circumstances in this case by misconstruing the applicable provisions of Article 14(d). Canada's legal theory is based on an interpretation that is patently unsupported. Under Canada's approach, Article 14 should simply be re-written to include a reference to so-called "in-market" conditions.[72] But the fact is that Article 14 does not refer to "in-market" conditions. Canada invented that term for the purpose of this dispute.

45. Nor does the term "in-market" reflect a supportable interpretation of Article 14. In spite of this, at every opportunity in its submissions and other responses Canada has inserted that term into the otherwise familiar quotations from prior reports discussing Article 14(d), and Canada even does so when purporting to refer to the SCM Agreement text itself. This is simply unacceptable as a means of setting out a legal theory that a panel could endorse or adopt. Canada's approach has left the Panel with no ability to find in Canada's favor on this issue, because Canada has not set out a basis for its legal assertions, and it would constitute legal error for the Panel to do that work for Canada as the complaining party. This is not to say that a party

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[71] *See* Second Written Submission of Canada (May 6, 2019) ("Canada's Second Written Submission"), para. 5.

[72] *See* Canada's Second Written Submission, paras. 5.1 and 10-21.

in a dispute may not choose to present a novel legal theory or assert and develop an interpretation just because it has not yet been recognized by others. But Canada chose instead to insert this term "in-market" wherever it could, without ever articulating or developing a basis for a supportive interpretation that would accord with customary rules of interpretation.

46. Canada persists in premising its claims on this non-treaty term without ever explaining the justification for approaching questions of treaty interpretation by substituting non-treaty terms for the words that appear in the Agreement itself. Further, as addressed above in the U.S. response to the question 154, even if Canada could provide a justification for asserting that Article 14(d) could be interpreted to allow its approach, Canada still would not be able to show that Article 14(d) obligates an investigating authority to follow that approach.

160. To the United States: At paragraph 11 of its opening statement at the second substantive meeting of the Panel, Canada asserted:

> **In *Supercalendered Paper from Canada*, Commerce rejected Alberta electricity prices as an in-country benchmark for Nova Scotia electricity prices because it was not commercially available to a paper producer in Nova Scotia. In particular, Commerce found that Alberta electricity was not "available, marketable, or transportable" to Nova Scotia. The same logic and legal requirements apply, even more so, to trees, which are immovable and thus even less available, marketable, or transportable – a fact that Commerce has acknowledged in previous determinations. (footnote omitted)**

Please respond to this assertion.

Response:

47. Canada is wrong. The "same logic" does not apply, nor can the other circumstances of the Alberta electricity example be considered analogous to the question of stumpage in this dispute. The United States has already responded to Canada's argument and has explained where the USDOC addressed this issue comprehensively in its final determination.[73] Specifically, 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."[74] The USDOC made this statement in response to the Canadian parties' argument that stumpage in this

[73] *See* Responses of the United States to the Panel's First Set of Questions to the Parties (April 3, 2019) ("U.S. Responses to the First Set of Panel Questions"), paras. 9-11.

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

investigation should be treated the way electricity was treated in a separate investigation involving supercalendered paper from Canada.[75] 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."[76] Moreover, Canada has purposefully omitted the actual reasons given for the determination that was reached in the case of Alberta electricity. It also bears recalling a key physical difference that Canada omits from the comparison – namely, that when electricity is transmitted over any distance by wire, it increasingly loses its charge as the distance traveled increases away from the source. That is a striking difference (among many others noted by the USDOC) for Canada to have omitted from all of its submissions thus far.

48. Equally or even more importantly, Article 14(d) does not require an investigating authority to ensure that a benchmark price would be commercially available to the respondent company in its commercial operations. Canada's arguments are a transparent attempt to distract the Panel. And the USDOC addressed these points directly when it explained the distinction between the analysis of electricity in the separate investigation of *SC Paper from Canada* and the analysis in this investigation which was concerned with stumpage – an altogether different good, in nearly every possible sense.[77] The USDOC **did not** suggest that Nova Scotia would be the commercial source of stumpage for companies across Canada. The relevant inquiry is not whether stumpage in Nova Scotia would theoretically be provided to producers across Canada, but rather whether stumpage purchased in Nova Scotia is comparable (and therefore may serve as a benchmark) to stumpage purchased elsewhere in Canada.

49. At page 108 of the final issues and decision memorandum, the USDOC explained this distinction between, on the one hand, the relevant inquiry under the applicable legal provisions governing benchmarks and, on the other hand, the false inquiry posited by the Canadian parties (and proffered again by Canada in this dispute):

> The Canadian Parties note that in *SC Paper from Canada*, the Department determined that electricity prices in Alberta were not available to the Nova Scotia-based respondent and, as a result, private electricity prices in Alberta were not suitable for use as a tier-one benchmark when measuring whether GNS sold electricity for LTAR. The Canadian Parties argue that the Department's findings in *SC Paper from Canada* should lead the Department to similarly conclude that stumpage prices for private-origin standing

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

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

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

timber in Nova Scotia are not suitable for use as a tier-one benchmark because it is not available for use in provinces outside of Nova Scotia. We disagree that the Department's findings in *SC Paper from Canada* preclude the Department from using stumpage prices for private-origin standing timber in Nova Scotia as a tier-one benchmark when measuring whether the GNB, GOQ, GOO, and GOA sold Crown-origin standing timber for LTAR. The Department's decision that private electricity prices from Alberta did not constitute a viable tier-one benchmark was specific to the facts of that investigation and was based upon several factors.

Specifically, in *SC Paper from Canada*, the Department found that:

(1) the electricity data from Alberta were not, in fact, based on actual transactions under 19 CFR 351.511(a)(2)(i),

(2) Nova Scotia's sole inter-provincial electricity transmission connection was with New Brunswick and, thus, it was not possible for private electricity produced in Alberta to be provided to producers in Nova Scotia and, therefore, it was not possible to adjust the electricity prices to constitute a "delivered" price as required under 19 CFR 351.511(a)(2)(iv),

(3) transmission distances limited the comparability of the electricity produced in Alberta to the Nova Scotia electricity market, and

(4) even if the private electricity produced in Alberta were available in Nova Scotia, Alberta's suitability as a benchmark for Nova Scotia would still be in question by virtue of the NSUARB's regulation of electricity tariffs in Nova Scotia.

In contrast, the facts of the instant investigation are distinct from *SC Paper from Canada*. The purchase and transport of standing timber within Canada is not dependent upon a single, limited, means – which contrasts with the facts considered in *SC Paper from Canada* involving dedicated power transmission corridors – and, thus, it is possible for standing timber to be sold across provincial borders. Indeed, evidence on the record indicates that the New Brunswick-based JDIL purchased standing timber in Nova Scotia, and that one of Resolute's Québec-based sawmills

purchased standing timber in Ontario.[78]

50. Canada's arguments before the Panel ignore the foregoing explanation that the USDOC provided in the final determination and cannot overcome the reasons given by the USDOC.

161. To both parties: At paragraph 98 of its opening statement at the second substantive meeting of the Panel, Canada states that:

> **The Crown stumpage prices in Nova Scotia and New Brunswick during the period of investigation were set using the *same* survey of private stumpage prices from both of these provinces.[…] It was internally inconsistent – and absurd – for Commerce to conclude that New Brunswick Crown timber was subsidized while excluding Nova Scotia products from the countervailing duty order because the petitioner claimed that Nova Scotia Crown timber was unsubsidized. (footnotes omitted) (emphasis original)**

Discuss whether the exclusion of Nova Scotia in this instance indicates a regional approach to the investigation.

Response:

51. Where a petition for relief is filed indicating an alleged provision of specific subsidies, and where any appropriate considerations for initiating a subsidy investigation are satisfied, it will be that alleged subsidy which will be the object of the investigation. Canada, in the excerpted portion of its opening statement, fails to take into account any appropriate consideration of what subsidies have been alleged to be provided or by whom.

52. Moreover, the excerpt appears to assume that the Crown prices were the same in the two provinces, but that assumption is unfounded and is contradicted by record evidence. First, the suggestion that both provinces used a single survey does not mean they used it in the same way or in the same mathematical formula. To illustrate with a simple example, a stumpage price formula could just as easily add to a reference price or subtract from a reference price – but the use of the same reference price would not say anything about the formula in which it is used. Canada does not indicate how any potential reference price might have been used.

53. Further, the record demonstrates that the formulas used to set prices using these reference prices are not made public in at least one of these two provinces. Thus, there was no basis for Canada to assert, and Canada has provided the Panel no basis to accept, that any degree of

[78] *See* Lumber Final I&D Memo, p. 108 (Exhibit CAN-010) (footnotes omitted) (line breaks and tabs modified for clarity).

similarity in the pricing exists. Nor has it been alleged that Nova Scotia was providing stumpage subsidies to Canadian producers. Nor does the excerpt acknowledge the disparate levels of government ownership over timber in each province. Of course, in one province the government owns most of the timber and in the other it owns relatively less.

54. Finally, the term "a regional approach" is not defined in the question, nor in the USDOC's determination, nor is it a term that Canada, as the complaining party, used in the excerpted portion of its statement. Given the uncertainty concerning the meaning of the term, the United States takes no position as to whether Canada has described any such "regional approach" in the excerpted portion of its statement.

2 THE USDOC'S REJECTION OF PRIVATE MARKET STUMPAGE PRICES AND LOG PRICES IN ONTARIO AS A STUMPAGE BENCHMARK

162. To the United States: At paragraph 120 of its second written submission, Canada argues, in relevant part, that:

> ***In any event, Commerce's conclusion is actually false*. Dr. Hendricks' analysis does not in any way assume that southern Ontario prices are higher than northern Ontario prices. Nor does his analysis rely on this assumption. (emphasis original)**

Please respond to Canada's assertions above. In particular, please indicate where in his report Dr. Hendricks makes the "assumption" in question.

Response:

55. The Hendricks Report (Exhibit CAN-019 (BCI)) states at page 18 that the greater distances between forests and mills in the northern regions of Ontario "imply" that costs are "significantly higher in the northern regions than in the southern regions" and that, generally, "harvesting costs are likely to be higher in areas where harvesting is more difficult."[79] The next paragraph of the report concludes that, because stands in the northern region "are more costly to harvest," this "mak[es] some portion of the available supply uneconomical to harvest at current prices."[80] The implication of this statement is that prices would therefore be expected to be lower in the northern region, if determined by market forces, in order to reach equilibrium.

56. However, the observed prices that the Hendricks Report then discusses at page 38 demonstrate the opposite: SPF prices to sawmills were higher in the North during 2015-16

[79] Hendricks Report, p. 7 at para. 34 (Exhibit CAN-019 (BCI)).

[80] Hendricks Report, p. 8 at para. 35 (Exhibit CAN-019 (BCI)).

($9.93 in the North, versus $8.85 in the South), not lower.[81]

57. These price points are taken from the MNP Ontario survey, which notes that "SPF stumpage prices are lower in the South region than the North region, which was not expected" and that "[s]urvey respondents familiar with SPF markets in Ontario indicated that they expected stumpage prices in the South region to be higher than the North region based on an assumption that timber in southern Ontario is in closer proximity to markets, would typically attract lower costs associated with access and stump-to-mill transportation, and would result in a higher average stumpage price."[82] Because the Hendricks Report relied on this same assumption, which turned out to be incorrect, the USDOC noted this assumption at page 94 of its final determination as one among a number of concerns with the Hendricks Report.[83]

163. To the United States: At paragraph 120 of its second written submission, Canada states that:

> **This supposed observation was not even the case in much of the POI. *Commerce simply looked at the wrong table in the MNP Report.***

Please respond to Canada's assertion above.

Response:

58. Canada's assertion is mistaken and without foundation. The USDOC supported its findings with respect to the incorrectness of the assumption in the Hendricks Report, namely that stumpage prices in southern Ontario would be higher than prices in northern Ontario because the distance between the timber and sawmills is greater in the north than in the south (thereby depressing northern prices), by citing to the MNP Ontario Survey (Exhibit CAN-144 (BCI)) at page 7.[84] That page of the MNP Ontario Survey includes Exhibit 6, which summarizes total SPF stumpage prices for standing timber on private land in Ontario and establishes that SPF weighted average stumpage prices were lower in southern Ontario than northern Ontario.[85] The USDOC relied on the correct table to support its findings.

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[81] Hendricks Report, p. 38 at para. 98 (Exhibit CAN-019 (BCI)).

[82] MNP Ontario Survey, p. 5 (Exhibit CAN-144 (BCI)) (also noting that this observation is true "[o]ther than for sawmill SPF in 2014/15").

[83] *See* Lumber Final I&D Memo, p. 94 (Exhibit CAN-010).

[84] Lumber Final I&D Memo, p. 94, footnote 566 (Exhibit CAN-010).

[85] *See* Ontario, "MNP LLP, A Survey of the Ontario Private Timber Market" (Exhibit ON-PRIV-1), p. 7 (Exhibit CAN-144 (BCI)).

59. Canada nonetheless contends that the USDOC erred by not focusing on Exhibit 4 on page 6 of MNP Ontario Survey pertaining to SPF stumpage prices delivered to sawmills.[86] However, as Canada acknowledges,[87] the sawmill SPF weighted average stumpage prices for the 2015/2016 period, which partially encompasses the USDOC's period of investigation, also were lower in southern Ontario than northern Ontario.[88] The survey itself states that "[o]ther than for sawmill SPF in 2014/2015, SPF stumpage prices are lower in the South region than the North region."[89] Regardless of the table relied upon, the MNP Ontario Survey provides evidentiary support for the USDOC's conclusions regarding price differences for private stumpage between northern and southern Ontario.

164. <u>To the United States</u>: At paragraph 313 of its first written submission, the United States asserts, in relevant part, that:

> **The USDOC evaluated the provision of stumpage for less than adequate remuneration; as stated, logs are not standing timber, and thus log prices are not stumpage prices. As discussed above, the USDOC appropriately found that the Nova Scotia stumpage prices constituted market-determined prices for stumpage resulting from actual transactions in Canada, the country under investigation. Having determined that the Nova Scotia stumpage prices served as a suitable benchmark, the USDOC was not obligated to determine the suitability of lesser alternatives such as constructing a benchmark from private log prices in Ontario. (footnotes omitted)**

Pointing to the record, please indicate where in its determination the USDOC explained why log prices in Ontario, provided they were market-determined, could not be used to derive a benchmark which would more accurately reflect the *prevailing market conditions* for stumpage in Ontario than stumpage prices in Nova Scotia.

<u>Response</u>:

60. The USDOC explained its rationale for relying upon stumpage prices in Nova Scotia

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[86] *See* Canada's Second Written Submission, para. 121.

[87] *See* Canada's Second Written Submission, para. 121.

[88] *See* Ontario, "MNP LLP, A Survey of the Ontario Private Timber Market" (Exhibit ON-PRIV-1), p. 6 (Exhibit CAN-144 (BCI)).

[89] *See* Ontario, "MNP LLP, A Survey of the Ontario Private Timber Market" (Exhibit ON-PRIV-1), p. 5 (Exhibit CAN-144 (BCI)).

instead of log prices in Ontario as more accurately reflecting the prevailing market conditions for stumpage in Ontario on pages 95 and 96 of the final issues and decision memorandum. The USDOC explained that:

> Pursuant to our regulation, we prefer to apply, as a tier-one benchmark, "a market-determined price for the good or service resulting from actual transactions in the country in question." Accordingly, our regulation is clear that we prefer to use a benchmark price for the precise good that we are evaluating: here, the provision of stumpage. The log price that the GOO proposes as a benchmark is not a stumpage price, and, thus, is not "a market-determined price for the good or service" we are investigating.[90]

61. Additionally, the USDOC explained that:

> [W]e continue to find that the private stumpage prices in the NS Survey are appropriate prices to use as a tier-one benchmark to measure the provision of stumpage for LTAR in the province. Having determined that stumpage prices in the NS Survey may serve as a tier-one benchmark it is not necessary for the Department to examine the suitability of other proposed benchmarks, such as private logs prices in Ontario, that fall under the second and third tier of the LTAR benchmark hierarchy set forth in 19 CFR 351.511(a)(2).[91]

62. To recall, the USDOC explained in its preliminary determination its regulatory approach to the benefit determination under U.S. law as follows:

> Under 19 CFR 351.511(a)(2), the Department sets forth the basis for identifying benchmarks to determine whether a government good or service is provided for LTAR. These potential benchmarks are listed in hierarchical order by preference: (1) a market-determined price from actual transactions within the country under investigation (tier-one); (2) world market prices that would be available to purchasers in the country under investigation (tier-two); or (3) assessment of whether the government price is consistent with market principles (tier-three). This hierarchy

[90] Lumber Final I&D Memo, p. 96 (Exhibit CAN-010) (internal footnote citing to 19 C.F.R. § 351.511(a)(2)(i) omitted) (underline added). *See also ibid.*, p. 95 (Exhibit CAN-010).

[91] Lumber Final I&D Memo, p. 96 (Exhibit CAN-010). *See also ibid.*, p. 95 (Exhibit CAN-010).

> reflects a logical preference for achieving the objectives of the statute. In addition, as provided in 19 CFR 351.511(a)(2)(i), we take into consideration product similarity, quantity sold, imported or auctioned, and other factors affecting comparability.[92]

63. The USDOC explained further that:

> The most direct means of determining whether the government received adequate remuneration is a comparison with private transactions for a comparable good or service in the investigated country (*i.e.*, using a tier-one benchmark). We base this on an observed market price for a good, in the country under investigation, from a private supplier (or, in some cases, from a competitive government auction) located either within the country or outside the country (the latter transaction would be in the form of an import). As provided in our regulations, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation. This is because such prices generally would be expected to reflect more closely the commercial environment of the purchaser under investigation.[93]

64. That regulatory approach to prioritize "a comparison with private transactions for a comparable good or service in the investigated country" – in this instance, stumpage, not logs – is consistent with the obligations of Article 14(d) of the SCM Agreement, which calls for the adequacy of remuneration to be determined "in relation to prevailing market conditions <u>for the good or service in question in the country of provision or purchase</u> (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)."[94] In *US – Carbon Steel (India) (AB)*, the Appellate Body upheld the Panel's rejection of India's "as such" challenges to the U.S. benchmark regulation, 19 C.F.R. § 351.511(a)(2)(i)–(iii).[95]

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[92] *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"), p. 26 (Exhibit CAN-008). *See also* U.S. First Written Submission, paras. 60-64.

[93] Lumber Preliminary Decision Memorandum, p. 26 (Exhibit CAN-008). *See also* U.S. First Written Submission, paras. 60-64.

[94] SCM Agreement, Art. 14(d) (underline added).

[95] The regulation hierarchy is set forth in 19 C.F.R. § 351.511(a)(2)(i)-(iii), which provides:

> (2) "Adequate Remuneration" defined -

165. <u>To the United States</u>: At paragraph 70 of its opening statement at the second substantive meeting of the Panel, Canada argued:

> **Commerce's failure to consider and analyse the market effects of the available capacity in Ontario's mills was significant, and this had a direct impact on Commerce's improper rejection of the private standing timber market on the basis of the alleged price distortion.**

Please respond to Canada's argument.

<u>Response</u>:

65. Canada's argument concerning excess mill capacity in Ontario in no way detracts from the USDOC's finding that the market for standing timber from private sources in Ontario is distorted. Despite having multiple opportunities to do so, Canada has yet to explain the "direct impact" between excess mill capacity and the USDOC's distortion analysis.[96]

66. Canada's evidence of the purported effect of excess mill capacity on the market for private standing timber in Ontario derives primarily from the Hendricks Report.[97] Aside from

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> (i) *In general*. [the USDOC] will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price from actual transactions in the country in question. Such a price could include prices stemming from actual imports or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, [the USDOC] will consider product similarity; quantities sold, imported or auctioned; and other factors affecting comparability.
>
> (ii) *Actual market determined prices unavailable*. If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, [the USDOC] will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, [the USDOC] will average such prices to the extent practicable, making due allowance for factors affecting comparability.
>
> (iii) *World market prices unavailable*. If there is no world market price available to purchasers in the country in question, [the USDOC] will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

[96] *See* Oral Statement of Canada at the Second Substantive Meeting of the Panel (October 16, 2019) ("Canada's Second Opening Statement"), para. 70.

[97] *See* Canada's Responses to the First Set of Panel Questions, paras. 172-175; Canada's Second Written Submission, paras. 116-118.

questionable assumptions made by Dr. Hendricks about the harvesting decisions of license holders in Ontario,[98] the analysis of the Hendricks Report "ignores the fact that there is one dominant price setter, the [Government of Ontario], in the Ontario timber market."[99] That dominant price setter "supplied 96.5 percent of the market during the [period of investigation]," and, as detailed extensively by the USDOC in the final issues and decision memorandum, "set administered prices that do not fully consider market conditions."[100]

67. In conducting its distortion analysis, the USDOC also considered (1) Ontario's method of administratively setting prices (which did not take market conditions into account), (2) mills' "ability to harvest at levels greater than the short-term targets set in the AWSs and the option to transfer timber between mills," and (3) data from the Ontario government's eFAR system showing "that a majority of private origin standing timber is sold to a small number of customers, who are dominant consumers of both private and Crown timber."[101] Canada's belated efforts to focus solely on the issue of excess mill capacity would necessitate disregarding the ample evidence available to the USDOC to support its finding "that the private market in Ontario is not as independent and free of influence from the Crown timber market as the Hendricks Report suggests."[102]

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

166. <u>To the United States</u>: At page 103 of its final determination, the USDOC states that:

> **Furthermore, the Marshall Report did not provide any <u>analysis</u> of Québec 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**

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[98] *See* Hendricks Report, pp. 24-30 (Exhibit CAN-019) (BCI). For instance, Dr. Hendricks concludes his analysis about excess mill capacity with the following statement:

> Consequently, if harvesters, especially those who own sawmills, could have harvested more Crown softwood timber profitably, then they would certainly have done so. The reason why they do not is presumably because the additional softwood timber supply on Crown land was not economical to harvest.

Hendricks Report, p. 29 (Exhibit CAN-019) (BCI). Aside from presuming the reason for excess mill capacity to fit his ultimate conclusion, Dr. Hendricks analysis fails to account for myriad factors that could affect harvesting decisions in Ontario.

[99] Lumber Final I&D Memo, p. 94 (Exhibit CAN-010).

[100] Lumber Final I&D Memo, p. 94 (Exhibit CAN-010).

[101] Lumber Final I&D Memo, pp. 92-94 (Exhibit CAN-010).

[102] Lumber Final I&D Memo, pp. 92-94 (Exhibit CAN-010).

and stumpage prices in the United States to support a statement that the auction prices are not distorted by the government presence within the Québec market. (emphasis added)

a. Please clarify if the USDOC was referring in this observation to a comparative analysis between Québec auction prices and private stumpage prices from the Atlantic Provinces in Canada and the United States.

Response:

68. The point that the USDOC made in the observation quoted in the excerpt is that additional data points would have assisted the USDOC in its analysis of the Marshall Report as evidence presented by the Government of Quebec to establish that its auction system for stumpage operates on a market basis. As the United States previously observed, the Marshall Report "focused largely on the auction system itself" without any consideration of data or analysis extrinsic to Quebec.[103] For that reason, as well as the numerous other flaws the USDOC identified with the Marshall Report, which the United States has documented,[104] an analysis of Quebec auction prices relative to prices from a market-based timber system potentially would have been relevant and probative as evidence in the USDOC's assessment of the reliability of the Marshall Report.

b. Please explain, referring to record evidence, the significance of the analysis in question for the Marshall report's assessment of the competitiveness of the Québec auction system.

Response:

69. As the United States has demonstrated, the report's comparison of the auction system to itself is circular.[105] That is, to opine on whether the Quebec timber auction yields competitive, market-based prices, the report essentially compared the auction bids to each other. For example, "to evaluate whether holders of supply guarantees depress their bids," the report "compare[d] their winning bids to the winning bids of bidders that do not hold supply guarantees."[106] However, as the USDOC discussed (and found), non-TSG-holders do not have an incentive to bid above TSG-administered prices because non-sawmill harvesters of auctioned

[103] U.S. First Written Submission, para. 270.

[104] *See* U.S. First Written Submission, paras. 269-273; U.S. Responses to the First Set of Panel Questions, paras. 162-167, 182-183; U.S. Second Written Submission, paras. 89-91.

[105] *See* U.S. First Written Submission, paras. 271-272.

[106] Marshall Report, para. 119 (Exhibit CAN-171 (BCI)).

timber must sell the timber purchased at auction to TSG-holding sawmills.[107] The USDOC, thus, reasonably determined that the winning bids made by non-TSG-holders, as presented in the consultant's analysis, were not a useful comparator for whether Quebec, through its TSG system, distorted the stumpage market.[108] Indeed, if non-TSG-holders expect to sell timber won at auction to TSG-holders, and expect to make a small profit, the report's conclusion that non-TSG-holders' winning bids are slightly lower (but not statistically significantly lower) than TSG-holders' winning bids is unsurprising. Non-TSG-holders know what TSG-holders are willing to pay at auction, and bid below that with the expectation of making a small profit off of timber won.[109]

70. In contrast to this self-reinforcing comparison, prices from an external, market-based timber system, such as certain Atlantic Provinces or the United States, would have served as a control against which Quebec's auction prices could be compared to determine if those auction prices were also market-based.

c. Pointing to record evidence, please indicate whether the USDOC solicited information from the parties so as to itself conduct the analysis in question?

Response:

71. The record before the USDOC contained evidence of private stumpage prices from Nova Scotia, which ultimately served as the benchmark to determine the adequacy of remuneration for the provision of stumpage by the Government of Quebec. However, the USDOC did not use that evidence to conduct any analysis concerning the reliability of the Marshall Report. For the reasons stated in the USDOC's final issues and decision memorandum[110] and documented extensively in prior U.S. submissions in this dispute,[111] the USDOC had numerous reasons to question the conclusions of the Marshall Report that the auction system for Quebec stumpage is competitively run.

167. At paragraph 273 of its first written submission, the United States asserts that:

> **By ignoring the losing bids, the analysis failed to account for the full range of bidding behavior, which could have provided a broader, more credible, basis for assessing competitiveness**

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

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

[109] *See* Marshall Report, para. 122 (Exhibit CAN-171 (BCI)).

[110] *See* Lumber Final I&D Memo, pp. 103-104 (Exhibit CAN-010).

[111] *See* U.S. First Written Submission, paras. 269-273; U.S. Responses to the First Set of Panel Questions, paras. 162-167, 182-183; U.S. Second Written Submission, paras. 89-91.

and the behavior of both TSG-holders and non-TSG-holders.

a. <u>To Canada</u>: Please indicate, pointing to the record, where the Marshall report compared the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders in Québec's auctions.

<u>Response</u>:

72. Subpart (a) of this question is directed to Canada.

b. <u>To the United States</u>: Please explain why comparing the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders was significant for the USDOC's analysis of whether Québec auction prices were distorted where the USDOC provided that explanation.

<u>Response</u>:

73. The USDOC placed significance on comparing the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders because of its finding that there is little incentive for TSG-holding bidders and non-TSG-holding bidders to bid for Crown timber at auction above the TSG administered price. The USDOC explained its reasoning as follows:

> As noted above, under a TSG, a sawmill can source up to 75 percent of its supply need at a government-set price. We also verified that the first 100,000 m^3 of a mill's residual need is exempt from the MFFP's 25 percent auction ratio. As a result, certain mills are sourcing more than 75 percent of their supply needs via TSGs. And, as discussed below, a sawmill can obtain additional wood at the government-set price via transfers from other sawmills and the sale of unharvested timber by the BMMB. This evidence indicates that, given the large supply of Crown timber in the stumpage market, Crown timber is the price maker. Similarly, we find that there is little reason for non-sawmills (*i.e.*, independent bidders) to bid for timber in the auctions above the TSG administered price. Because the timber purchased at the auctions must be milled in Québec, we conclude that the non-sawmills must be selling the timber they purchase at the auctions to the TSG-holding sawmills. Within this market, the sale of timber by the non-sawmills is competing with the timber available to sawmills at the guaranteed government price via the TSGs. As such, the non-sawmills have little motivation to bid for timber at a price above which they can sell the wood to the sawmills. When setting their bid prices, the non-sawmills can reference the TSG prices, which are publicly available. Likewise, the non-sawmills

> can research the published winning auction prices of TSG-holding corporations to gauge the price point at which the sawmills will purchase wood. These circumstances indicate that the TSG-holding corporations wield considerable market power in the auction system and, consequently, the reference market (here, the auction) does not operate independently of the administered market.[112]

74. Such incentives rendered comparisons between the winning bids of TSG-holding bidders and non-TSG-holding bidders of limited value in assessing whether Quebec stumpage auction prices are distorted.[113] An analysis of the losing bids of TSG-holding bidders and non-TSG-holding bidders would have captured a more fulsome range of bidding behavior that would have enabled the USDOC to better assess the competitiveness of Quebec's auction system.

c. <u>To Canada</u>: Please confirm, pointing to record evidence, whether the data required for carrying out a comparison of the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders were available to the USDOC.

<u>Response</u>:

75. Subpart (c) of this question is directed to Canada.

168. <u>To the United States</u>: At paragraph 267 of its first written submission, the United States asserts, in relevant part, that:

> **[…] Canada repeatedly describes the government's market share as if it were comprised only of TSG stumpage when, in reality, the government's market share also includes the stumpage it sells at auction.**

Please indicate, pointing to the record, where the USDOC found that the government's market share also includes the stumpage it sells at auction.

<u>Response</u>:

76. The USDOC's finding that the provincial government's market share in Quebec also includes stumpage sold at auction can be found at page 99 and accompanying footnote 593 of the

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

[113] *See* Lumber Final I&D Memo, pp. 103-104 (Exhibit CAN-010).

final issues and decision memorandum, and relies upon data for fiscal year 2014-2015.[114] The USDOC's calculation of the government-controlled proportion of the softwood timber harvest (*i.e.*, sourced from Crown Land and auctions) 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 (*i.e.*, sourced from Crown Land and auctions), but not necessarily harvested, in Quebec is provided at Table 7.1 of the same document.[115] 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.[116]

169. <u>To the United States</u>: At page 99 of its final determination, the USDOC found that:

> **[T]he totality of the evidence on the record leads us to conclude that the 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.**

Please indicate where in its determination did the USDOC cite to any pricing data, or any other record evidence, indicating that auction prices "tracked" Crown prices in the period of investigation.

<u>Response</u>:

77. The United States respectfully refers the Panel to the U.S. response to question 49, which cites pages 105 through 106 of the USDOC's final issues and decision memorandum.

78. 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.[117]

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

> [E]vidence on the record leads us to conclude that the Quebec stumpage market is distorted because the auction prices for Crown

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

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

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

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

> timber track the prices charged for Crown timber allocated to TSG-holding sawmills. 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.[118]

170. <u>To the United States</u>: At paragraph 196 of its response to the Panel's question no. 62, the United States asserts, in relevant part:

> **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. 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 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. (footnotes omitted)**

Please indicate where in its determination, the USDOC itself examined Decree 259-2015 to conclude, as the United States asserts above, that "it was not a blanket authorization permitting the export of all timber from the specified regions in Quebec".

<u>Response</u>:

80. The USDOC confirmed that harvested Crown timber, including from auctions, must be processed in Quebec when it verified the questionnaire responses submitted by the Government

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

of Quebec.[119]

81. The United States notes that the statement excerpted above from paragraph 196 of the U.S. response to question 62 was an attempt to be as responsive as possible to a specific inquiry concerning representations made by Canada about the processing requirement in Quebec and, in particular, Decree 259-2015, which Canada first made during the first day of the first substantive meeting of the Panel.[120]

82. As indicated, the USDOC confirmed the existence of a processing requirement in Quebec at verification. Rather than addressing what the USDOC actually found – that the presence of such a restriction limits participation in the auctions and provides a disincentive for bidders to pay above the administratively-set price for Crown stumpage[121] – Canada engages in a parsing exercise to identify various ways in which the processing requirement and, specifically, Decree 259-2015, might be understood to have no practical effect.[122] However, consistent with the applicable standard of review, the Panel should decline Canada's invitation to reweigh record evidence.

83. As the United States argued during the Panel's substantive meetings with the parties, Decree 259-2015 appears to speak for itself. Canada's assertion at the second substantive meeting that it would have to check on the French translation to confirm the meaning is telling because it demonstrates that further analysis of Decree 259-2015 would go far beyond the scope of what the Panel is to review under the appropriate standard.

84. In any case, an examination of the document itself demonstrates that it was not a blanket authorization permitting the export of all timber from the specified regions in Quebec.[123] 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 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."[124]

85. Ultimately, because Decree 259-2015, which is limited to timber from the Abitibi-

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[119] *See* GOQ Verification Report, pp. 10-18 (Exhibit CAN-184).

[120] *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. 180.

[121] *See* Lumber Final I&D Memo, pp. 98, 102-104 (Exhibit CAN-010).

[122] *See* Canada's First Opening Statement (Day 1), paras. 173-181.

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

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

Témiscamingue and Outaouais regions of Quebec, does not eliminate the log processing restriction, but rather merely modifies it, it fits the pattern of disincentives to participating in the Quebec auctions that the USDOC identified in its determination.[125]

171. <u>To the United States</u>: At paragraph 458 of its first written submission, Canada states that:

> **If Québec had been given the opportunity to respond to Commerce's understanding of this provision, Québec would have shown, as it has in prior proceedings, that this regulation has no economic effect and is subject to exceptions which, in fact, allow timber to be processed outside of the province if anyone so requested.**

a. Please indicate where in its determination the USDOC assessed the impact of either sections 117 and 118 of the Sustainable Forest Development Act 2015-16 (to which Canada refers in the paragraph quoted above), or of Decree 259-2015, on bidder participation in the Québec auction.

<u>Response</u>:

86. As part of its verification of the Government of Quebec, the USDOC confirmed that harvested timber from auctions must be processed in Quebec.[126] Canada acknowledges that the USDOC based this finding, in part, on sections 117 and 118 of the Sustainable Forest Development Act 2015-16.[127]

87. The USDOC assessed the impact of the processing requirements imposed, in part, by sections 117 and 118 of the Sustainable Forest Development Act 2015-16, on pages 98 and 102 through 104 of its final issues and decision memorandum. As part of its assessment, the USDOC explained as follows:

> 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,

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[125] *See* U.S. Responses to the First Set of Panel Questions, para. 199.

[126] *See* GOQ Verification Report, p. 18 (Exhibit CAN-184).

[127] *See* Canada's First Written Submission, para. 457, footnote 833.

> 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 GOQ 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).[128]

88. As noted, the U.S. responses to questions 170 and 172 also address Decree 259-2015. The United States respectfully refers to the Panel to the discussion in those responses.

b. Please indicate, pointing to record evidence, how the USDOC engaged Canada on sections 117 and 118 of the Sustainable Forest Development Act 2015-16, or Decree 259-2015.

Response:

89. The Government of Quebec submitted the Sustainable Forest Development Act 2015-16 and Decree 259-2015 as exhibits to its initial questionnaire response.[129] The USDOC subsequently confirmed that harvested Crown timber must be processed in Quebec when it verified Quebec's questionnaire responses, inclusive of those exhibits.[130] Those verification findings were provided to parties with the issuance of the Quebec verification report on July 14, 2017,[131] in advance of the opportunity for parties, including Canada, to submit written argument and participate in a public hearing before the USDOC.[132]

172. To both parties: At paragraph 149 of its second written submission, Canada states that:

> **The preamble merely lays out some of Québec's considerations in issuing a blanket export authorization in the form of a Decree. It does not impose any conditions that have to be met prior to the export of timber.**

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

[129] *See* Sustainable Forest Development Act 2015-16 (Exhibit CAN-169); Decree 259-2015 (Exhibit CAN-500).

[130] *See* GOQ Verification Report, pp. 10-18 (Exhibit CAN-184).

[131] *See* GOQ Verification Report (Exhibit CAN-184).

[132] *See* U.S. Second Written Submission, paras. 32-33 (documenting the timeline by which parties had an opportunity to present written and oral arguments to the USDOC during the investigation).

Further, Decree 259-2015 (Exhibit CAN-500) at page 3 states that:

> **IT IS ORDERED, therefore, upon recommendation of *the Ministre des Forêts, de la Faune et des Parcs*:**
>
> **THAT the holders of timber supply guarantees, holders of permits to harvest timber in order to supply a wood processing plant and purchasers who have signed a sales contract with the timber marketing board be authorized to ship to wood processing plants located outside of Québec, during the harvest years 2015-2016, 2016-2017 and 2017-2018, volumes of round timber *without a buyer* that may reach annually, all authorized holders and purchasers taken together, 50,000 m^3 of pine, 26,000 m^3 of hemlock, 86,000 m^3 of thuya and 238,000 m^3 of hardwood from the forests in the domain of the State in the Abitibi-Témiscamingue Outaouais regions; (emphasis added)**

Please provide your views on whether the Decree's authorization of export of "volumes of round timber *without a buyer*" indicates that the Decree does not impose any conditions that have to be met prior to the export of timber.

Response:

90. The United States respectfully refers the Panel to the U.S. response to question 62, which addresses this issue.

91. An examination of the relevant document to which Canada 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. 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 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."[133]

92. Moreover, for those harvesters wishing to export logs for milling outside of Quebec "without a buyer," the maximum volume of timber permitted under Decree 259-2015 to be exported out of the province for milling is capped to an "annual quantity of up to 50,000 m^3 of

[133] U.S. Responses to the First Set of Panel Questions, para. 196 (footnotes omitted).

pine, 26,000 m^3 of hemlock, 86,000 m^3 of thuya (cedar), and 238,000 m^3 of hardwood."[134]

93. Therefore, Decree 259-2015 does not eliminate the log processing restriction, but "merely modifies it" for two regions of Quebec.[135] As the United States has demonstrated, "[t]hat 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)."[136]

173. <u>To the United States</u>: At paragraph 204 of its response to the Panel's question no. 60, Canada states, in relevant part, that:

> **In this context, losing bids are uninformative. Winning bids set the market price.**

Further, at paragraph 205 of its response to the same question, Canada states, in relevant part, that:

> **The "analysis" referred to here is a comparison of winning and losing auction bids to TSG prices in the regions where the auctions were conducted. Québec uses only winning bids in its transposition of auction prices onto non-auction public timber and Québec only publicizes winning bids. Losing bids do not inform public prices and are never disclosed. From the perspective of determining a "market price" for timber through auctions, the winning bids set the market price. The losing bids are irrelevant to the "market price" determined by the auctions.**

a. Please respond to Canada's assertions.

<u>Response</u>:

94. The United States disagrees that losing auction bids are "uninformative" in assessing the reliability of the Marshall Report and the competitiveness of Quebec's auction system.[137] The U.S. response to subpart (b) of question 167, above, addressed the importance of losing bids.

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[134] Decree 259-2015, p. 3 (Exhibit CAN-500).

[135] U.S. Responses to the First Set of Panel Questions, para. 199.

[136] U.S. Responses to the First Set of Panel Questions, para. 199.

[137] U.S. Responses to the First Set of Panel Questions, para. 196.

95. To reiterate, the USDOC explained its reasoning as follows:

> As noted above, under a TSG, a sawmill can source up to 75 percent of its supply need at a government-set price. We also verified that the first 100,000 m^3 of a mill's residual need is exempt from the MFFP's 25 percent auction ratio. As a result, certain mills are sourcing more than 75 percent of their supply needs via TSGs. And, as discussed below, a sawmill can obtain additional wood at the government-set price via transfers from other sawmills and the sale of unharvested timber by the BMMB. This evidence indicates that, given the large supply of Crown timber in the stumpage market, Crown timber is the price maker. Similarly, we find that there is little reason for non-sawmills (*i.e.*, independent bidders) to bid for timber in the auctions above the TSG administered price. Because the timber purchased at the auctions must be milled in Québec, we conclude that the non-sawmills must be selling the timber they purchase at the auctions to the TSG-holding sawmills. Within this market, the sale of timber by the non-sawmills is competing with the timber available to sawmills at the guaranteed government price via the TSGs. As such, the non-sawmills have little motivation to bid for timber at a price above which they can sell the wood to the sawmills. When setting their bid prices, the non-sawmills can reference the TSG prices, which are publicly available. Likewise, the non-sawmills can research the published winning auction prices of TSG-holding corporations to gauge the price point at which the sawmills will purchase wood. These circumstances indicate that the TSG-holding corporations wield considerable market power in the auction system and, consequently, the reference market (here, the auction) does not operate independently of the administered market.[138]

96. The incentives found by the USDOC rendered comparisons between the winning bids of TSG-holding bidders and non-TSG-holding bidders of limited value in assessing whether Québec stumpage auction prices are distorted.[139] An analysis of the losing bids of TSG-holding bidders and non-TSG-holding bidders would have captured a more fulsome range of bidding behavior that would have enabled the USDOC to better assess the competitiveness of Québec's auction system.

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

[139] *See* Lumber Final I&D Memo, pp. 103-104 (Exhibit CAN-010).

b. Furthermore, in its oral response to questions from the Panel during the second substantive meeting, Canada stated that Dr. Marshall *did* study losing bids in certain portions of his study. Please comment.

Response:

97. The United States addressed the issue of whether the Marshall Report studied losing bids in the U.S. response to question 57.[140] The United States respectfully refers the Panel to the discussion in that response.

98. As the United States has shown, 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.[141] 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."[142] 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.

99. To the extent that Canada contends that the Marshall 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,"[143] the United States addressed that issue in the U.S. response to question 58.[144]

100. As explained, 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.[145] 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.[146] Canada's suggestion that the USDOC should have focused on these data, or *sua sponte* conducted its own analyses of these data, when even

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[140] *See* U.S. Responses to the First Set of Panel Questions, para. 182.

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

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

[143] Canada's First Written Submission, para. 471.

[144] U.S. Responses to the First Set of Panel Questions, para. 183.

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

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

the interested parties did not do so, is unavailing.

174. To the United States: In paragraph 82 of its opening statement at the second substantive meeting of the Panel, Canada argued:

> **Dr. Marshall attended Commerce's verification and testified at Commerce's hearing. Commerce did not ask him a single question either time.**

Considering that the USDOC regarded the issue of the losing bids as important, please indicate whether the USDOC asked Dr. Marshall any questions regarding this issue at either the USDOC's hearing, verification or in writing at any stage of the investigation.

Response:

101. The United States confirms that the USDOC did not ask any direct questions of Dr. Marshall at the public hearing, at verification, or in writing at any stage of the investigation. Dr. Marshall was not a respondent party in the CVD investigation. Rather, the Government of Quebec was the respondent party. As such, the USDOC's questionnaires were addressed to the Government of Quebec. In turn, to verify the Government of Quebec's questionnaire responses, the USDOC requested to meet with the government officials of the Ministry of Forest, Wildlife, and Parks, Wood Marketing Bureau, and Chief Forester, who were directly responsible for preparing the government's responses to the USDOC's questions.[147] There is no obligation anywhere in the SCM Agreement that would, in this context, require an investigating authority to solicit testimony from or cross-examine the author of a report or other factual information commissioned and paid for by a respondent party in a CVD investigation.

102. For the reasons stated in the USDOC's final issues and decision memorandum[148] and documented in prior U.S. submissions in this dispute,[149] the USDOC found that the Marshall Report did not show that the auction system for Quebec stumpage operates on a competitive basis.

175. To the United States: As regards whether the log processing regulations in Québec distort prices, Canada referred to pages 124 and 125 of Exhibit CAN-525 during the second substantive meeting of the Panel. Canada also referred to arguments posed in the Marshall Report (Exhibit CAN-171(BCI)) regarding the lack of demand for

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[147] *See* GOQ Verification Outline, pp. 2, 6 (Exhibit USA-065).

[148] *See* Lumber Final I&D Memo, pp. 103-104 (Exhibit CAN-010).

[149] *See* U.S. First Written Submission, paras. 269-273; U.S. Responses to the First Set of Panel Questions, paras. 162-167, 182-183; U.S. Second Written Submission, paras. 89-91.

unrestricted private logs near the border with the United States, and in Exhibits CAN-173 and CAN-501 regarding Quèbec being a net importer of logs from the United States.

Was the information in the exhibits referred to above before the USDOC? Was it relevant to the USDOC's determination? If so, how was it addressed?

Response:

103. Exhibit CAN-525 is a Power Point presentation prepared by Canada to accompany its opening statement on the first day of the first substantive meeting of the Panel.[150] Because that document was created for the express purpose of this dispute, it was not before the USDOC during the investigation.

104. The other documents cited in the Panel's question and identified as source material in slides 124 and 125 of Exhibit CAN-525 were on the record before the USDOC as exhibits to the Government of Quebec's initial questionnaire response, and the USDOC did consider them.[151]

105. Exhibit CAN-171 (BCI) is the Marshall Report.[152] For the reasons stated in the USDOC's final issues and decision memorandum[153] and documented in prior U.S. submissions in this dispute,[154] the USDOC had numerous reasons to question the conclusions of the Marshall Report that the auction system for Quebec stumpage operates on a competitive basis. Specifically, the USDOC found as follows:

> 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 Québec. 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 Québec. Therefore, the Marshall Report is also not relevant with respect to whether the Québec auction can

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[150] Power Point Presentation Accompanying Canada's First Opening Statement (Day 1) (Exhibit CAN-525).

[151] *See* Power Point Presentation Accompanying Canada's First Opening Statement (Day 1), slides 124, 125 (Exhibit CAN-525).

[152] Marshall Report (Exhibit CAN-171 (BCI)).

[153] *See* Lumber Final I&D Memo, pp. 103-104 (Exhibit CAN-010).

[154] *See* U.S. First Written Submission, paras. 269-273; U.S. Responses to the First Set of Panel Questions, paras. 162-167, 182-183; U.S. Second Written Submission, paras. 89-91.

> serve as a benchmark. Furthermore, the Marshall Report did not provide any analysis of Québec 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 Québec market. Nor did the Marshall Report 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. 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 Québec; this restriction necessarily limits bidders.[155]

106. Exhibit CAN-501 is an Excel spreadsheet providing the underlying data for Figure 40 in the Marshall Report.[156] The information contained in the data file does not speak to the existence of the restriction requiring that harvested timber from auctions must be processed in Quebec.[157]

107. Lastly, Exhibit CAN-173 is a map of harvestable forest land prepared in response to question C.2 of the USDOC's initial questionnaire to the Government of Quebec,[158] which asked:

> Provide a percentage breakdown of provincial, federal, and private ownership of harvestable forest land in Québec. Specify where provincial, federal, and private tracts of harvestable forest land are located. If possible, please provide a map showing the location of provincial, federal, and private tracts of harvestable forest land. If there is another category of ownership, please specify and include in your answer.[159]

108. The question in response to which Exhibit CAN-173 was provided does not address log

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

[156] Data File for Figure 40 in Marshall Report (Exhibit CAN-501).

[157] *See* Data File for Figure 40 in Marshall Report (Exhibit CAN-501).

[158] Government of Quebec, "Map of Harvestable Forest Lands" (Exhibit CAN-173).

[159] GOQ Initial Questionnaire Response, p. QC-S-19 (Exhibit CAN-170).

processing restrictions in Quebec, and the map by itself reveals no information about processing restrictions for harvested timber from auctions and log exports.[160] There is no reason why Exhibit CAN-173 would have factored into the USDOC's analysis of the existence of processing restrictions in Quebec for harvested timber from auctions.

176. <u>To the United States</u>: At page 102 of its final determination, the USDOC observed that "[g]iven that just 22% of the stumpage harvested for 2015-2016 came from auctioned Crown timber, the ability of a TSG-holder to obtain an additional 10% of its TSG volume from another TSG-holder indicates that the auctions may not be a competitive source for wood".

Please explain, referring to the record, how the transfer of sawmills' allocations of Crown timber to other mills would reduce the sawmills' *cumulative* need to acquire timber from the auction or non-Crown sources.

<u>Response</u>:

109. The cumulative need of sawmills in Quebec depends upon the particular needs of individual sawmills, which could vary for any number of reasons. As part of its verification of the Government of Quebec, the USDOC examined the ability of mills and companies to transfer up to 10 percent of their TSG volumes annually to other mills and companies under section 92 and 93 of the Sustainable Forest Development Act.[161] Officials from the Quebec Ministry of Forest, Wildlife, and Parks explained to the USDOC that a sawmill might seek to transfer a portion of its TSG volume in a particular year because "it experienced a temporarily [sic] shut down or it cannot process certain types of logs, such as oversized logs."[162] For those or other reasons, a mill might seek to reduce its supply of wood fiber used to make softwood lumber products, while another mill, because of increased demand for its finished products or increased productivity of its mill because of technological improvements, might seek to increase its supply of wood fiber. In either instance, an individual mill's needs may change over time, which would affect the cumulative need of sawmills throughout Quebec. Because it is possible for TSG volume to go unharvested,[163] the amount of timber allocated under TSGs for a particular year need not be equal to the amount of timber harvested.

110. In noting that "just 22 percent of the stumpage harvested for FY 2015-2016 came from

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[160] *See* Government of Quebec, "Map of Harvestable Forest Lands" (Exhibit CAN-173).

[161] In certain situations subject to approval from the Quebec Ministry MFFP, a mill or company can effectuate a "larger (greater than 10 percent)" transfer of its TSG volumes to another mill or company. GOQ Verification Report, p. 15 (Exhibit CAN-184).

[162] GOQ Verification Report, p. 15 (Exhibit CAN-184).

[163] *See* GOQ Verification Report, p. 11 (Exhibit CAN-184).

auctioned Crown timber,"[164] the USDOC examined the effect that being able to transfer up to 10 percent of TSG volumes among mills and companies has on the competitiveness of the auction system for stumpage in Quebec. Because of "[t]he ability of corporations to shift allocations among sawmills," TSG-holding corporations possess "flexibility in terms of their supply sources," which reduces their need to source timber from auction and non-Crown sources.[165]

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

177. <u>To the United States</u>: At paragraph 541 of its first written submission, Canada states, in relevant part, that:

> **[I]t asserted that the province-wide supply "overhang" was "approximately 47 percent of the softwood Crown harvest during the Fiscal Year 2015-2016." Commerce generated this percentage by dividing the *unharvested* standing timber volume by the *harvested* volume. (footnotes omitted)**

Please confirm, pointing to record evidence, whether the USDOC calculated the supply "overhang" by dividing the *unharvested* standing timber volume by the *harvested* volume.

<u>Response</u>:

111. As evidenced by the USDOC's preliminary analysis memorandum of provincial stumpage markets, the USDOC, in both its preliminary and final determinations, calculated the supply "overhang" in New Brunswick by dividing the unharvested standing timber volume by the harvested volume.[166] This calculation was in error, but, for the reasons indicated below in the U.S. response to question 178, subpart (b), the error is not material to the USDOC's analysis, for which the existence, not the extent, of the "overhang" is the relevant consideration.[167]

178. At paragraph 158 of its second written submission, Canada states, in relevant part, that:

> **In the light of the available evidence in New Brunswick, the only accurate calculation of the unharvested softwood volumes**

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

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

[166] *See* Market Memorandum, New Brunswick attachment, Table 1.1 (Exhibit USA-036 (BCI)).

[167] *See also* Opening Statement of the United States of America at the Second Substantive Meeting of the Panel (October 16, 2019) ("U.S. Second Opening Statement"), para. 24.

> **in the province would include pulpwood. To calculate this amount of unharvested timber, Commerce would have had to take the total harvested softwood volume, 3,320,159 m^3, from Exhibit CAN-237 (BCI), and divide it by the total allocated softwood volume, 3,852,895 m^3, from Exhibit CAN-508 (BCI). This calculation produces an "overhang" of 13.8%.**

a. <u>To the United States</u>: Please respond to Canada's assertion above.

<u>Response</u>:

112. The United States does not dispute Canada's proposed revisions to the supply "overhang" calculations for New Brunswick.

b. <u>To both parties</u>: In their oral responses to this question, the parties disagreed over whether it was the size of the alleged overhang or its existence that had been at the centre of the USDOC determination on the matter. Please discuss pointing to the record.

<u>Response</u>:

113. As the United States indicated in its opening statement at the second panel meeting, "[c]ontrary to Canada's argument, it is the <u>existence</u> (and not the <u>extent</u>) of the 'overhang' that matters. The existence of 'overhang' is a categorical question, not one of degree."[168]

114. That the USDOC focused on the existence of the "overhang" and not its extent is confirmed by the final issues and decision memorandum. In conducting its analysis of whether private stumpage prices in New Brunswick could serve as a benchmark, the USDOC first addressed two other factors, namely that the GNB accounted for approximately half of the softwood harvest volume during the 2015-2016 harvesting season and that consumption of Crown-origin standing timber by sawmills is concentrated among a small number of corporations that also dominate the consumption of standing timber harvested from private lands.[169] The USDOC then additionally "found that tenure-holding corporations are not consuming the full volume of Crown timber allocated to them for harvest during the [period of investigation]."[170] To support its finding of an "overhang," the USDOC cited its "approximately 47 percent" figure

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[168] U.S. Second Opening Statement, para. 24 (underline in original).

[169] Lumber Final I&D Memo, p. 79 (Exhibit CAN-010). The USDOC determined that Crown-origin timber makes up 50.79 percent of the softwood timber harvest in New Brunswick based upon data for fiscal year 2015-2016. *See* Lumber Final I&D Memo, p. 80, footnote 478 (Exhibit CAN-010).

[170] Lumber Final I&D Memo, pp. 79-80 (Exhibit CAN-010).

calculated during the investigation.[171]

115. Despite Canada's hyperbolic description of the calculation error in its submissions, Canada does not dispute the existence of an "overhang" in New Brunswick.[172] And it is the existence of an "overhang," not its extent, that informed the USDOC's analysis. The USDOC explained its conclusions with respect to "overhang" as follows:

> Therefore, the record evidence demonstrates that the mill owners can source timber from alternative sources (*i.e.*, Crown land allocations, and industrial freehold land) if the prices from those sources are more advantageous than the prices available from private woodlot owners in New Brunswick. The mills also have the incentive not to purchase timber from private woodlots unless the price is lower than the Crown prices, because these private purchase prices form the basis of the New Brunswick Crown stumpage prices. The mills' ability to source timber from outside of the private woodlots means that mills possess the leverage to keep prices on private woodlots low, and they have an interest in doing so beyond their mere ability to source from private woodlot owners for low prices. As such, we find that, because tenureholding mills had ready access to, and could harvest, additional Crown-origin standing timber if private woodlot owners mainly served as a supplemental source to large mills and, thus, could not expect to charge more than Crown stumpage prices.[173]

116. Whether the "overhang" percentage is approximately 47 percent or precisely 13.8 percent does not change the crux of the USDOC's analysis. Tenure-holding mills in New Brunswick had ready access to, and could harvest, additional Crown-origin standing timber from their tenures, which had the effect of contributing to the suppression of private stumpage prices in the province.

179. <u>To the United States</u>: At paragraph 156 of its second written submission, Canada states, in relevant part, that:

> **[…] Commerce mismatched the data it used in its calculation. The harvested volumes used in its numerator and denominator *excluded* pulpwood, while the allocated volumes used in its**

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[171] Lumber Final I&D Memo, pp. 79-80 (Exhibit CAN-010).

[172] *See, e.g.*, Canada's Second Written Submission, paras. 154-161; Canada's Second Opening Statement, paras. 90-94.

[173] Lumber Final I&D Memo, p. 83 (Exhibit CAN-010).

numerator *included* pulpwood.

Further, at footnote 243 of its second written submission Canada states, in relevant part, that:

> **Canada recalls that Commerce appears to have calculated the overhang by taking (allocated - harvested)/harvested.**

Please confirm, pointing to record evidence, whether, in calculating the supply "overhang", the harvested volumes that the USDOC used in its numerator and denominator *excluded* pulpwood, while the allocated volumes used in its numerator *included* pulpwood.

Response:

117. The United States acknowledges that the harvested volumes used by the USDOC in the numerator and denominator of its supply "overhang" calculation for New Brunswick likely excluded pulpwood because the volume data reported by the GNB corresponded to "Timber Processed by Sawmill,"[174] while the allocated volumes used in its numerator may have included pulpwood because [[***]].[175] For the reasons stated above in the U.S. response to question 178, subpart (b), any error in the precise calculation is not material to the USDOC's analysis, for which the existence, not the extent, of the "overhang" is the relevant consideration.

180. To Canada: At paragraph 208 of its response to the Panel's question no. 64, the United States asserts, in relevant part:

> **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. 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.**

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[174] *See* Government of New Brunswick Verification Exhibit VE-1 ("Minor Corrections"), pp. 8-9 (Table 2) (Exhibit CAN-267 (BCI)).

[175] *See* Government of New Brunswick Verification Exhibit VE-1 ("Minor Corrections"), pp. 6-7 (Table 1) (Exhibit CAN-267 (BCI)).

Please respond to the United States' assertions above.

Response:

118. This question is directed to Canada.

181. To the United States: At paragraph 557 of its first written submission, Canada states, in relevant part, that:

> **Commerce's claim that the volume of unharvested Crown supply suppresses private standing timber prices rests on an unspoken and incorrect assumption that private woodlot owners will continue to supply standing timber to the market in the face of suppressed prices. The record evidence before Commerce demonstrates that this is not the case. In fact, private woodlot owners are highly responsive to price changes, meaning that if private prices in New Brunswick are suppressed by Crown supply or for any other reason, private woodlot owners will withdraw supply from the market.**

Please respond to Canada's assertions above.

Response:

119. Canada's first written submission makes a number of seemingly contradictory and unsupported assertions about the responsiveness or unresponsiveness of private woodlot owners, including the excerpt above. First, Canada asserts that the USDOC erred by considering that "private woodlots are responsive to the price-setting behaviour of the privately-owned mills" and "responsive to the price setting behaviour of the Crown."[176] Canada then asserts that the private woodlot owners are "resistant" to these forces because they are "highly responsive to price changes."[177] Canada asserts, with no evidentiary basis, that private woodlot owners "will withdraw supply from the market" if prices are suppressed.[178] The only support for this assertion that Canada provides is a further assertion, also with no evidentiary basis, that "[p]rivate woodlot owners own their private woodlots for a host of non-financial reasons."[179] From this, Canada concludes, "[t]his means that private woodlot owners are flexible and sell their timber when and

[176] Canada's First Written Submission, para. 532.

[177] Canada's First Written Submission, para. 557.

[178] Canada's First Written Submission, para. 557.

[179] Canada's First Written Submission, para. 558.

if they choose."[180] Canada then goes on to argue that "price data from that time period imply a high level of price sensitivity for private woodlot owners."[181]

120. Taken together, Canada's assertions appear to present a contradictory picture of its argument that the USDOC erred by considering that "private woodlots are responsive to the price-setting behaviour of the privately-owned mills" and "responsive to the price setting behaviour of the Crown."[182] A review of the underlying source documents demonstrates that Canada has attempted to pull isolated statements out of context as if they support its assertion, even when those isolated statements contradict each other or do not have any particular significance when view in the context within which they appear.

121. For example, among the purported evidentiary bases for Canada's assertion that "private woodlot owners are highly responsive to price changes, meaning that if private prices in New Brunswick are suppressed by Crown supply or for any other reason, private woodlot owners will withdraw supply from the market" is a section of the *2012 Private Forest Task Force Report* (*2012 PFTF Report*)[183] identifying "Characteristics of woodlot owners and their land."[184] At most, these survey results indicate that "financial return" may not be a "principal reason" for owning forest land among certain woodlot owners in New Brunswick.[185] But more to the point, the *2012 PFTF Report* acknowledges that "ownership motivation varies significantly with woodlot size," with large woodlot owners more likely to cite financial reasons as their reason for owning woodlots.[186] The conclusions that Canada attempts to draw from these observations are not borne out in the underlying source documents in any meaningful way.

122. Likewise, Canada's assertions about the responsiveness of private woodlot owners to price changes also rely upon the Kelly Report.[187] But as the United States has previously explained, the USDOC had good reason to give diminished weight to the Kelly Report, in addition to the fact that it was prepared exclusively for purposes of the investigation.[188] When

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[180] Canada's First Written Submission, para. 558.

[181] Canada's First Written Submission, para. 560.

[182] Canada's First Written Submission, para. 532.

[183] "New Approaches for Private Woodlots – Reframing the Forest Policy Debate, Private Task Force Report" ("*2012 Private Forest Task Force Report*" or "*2012 PFTF Report*") (Exhibit CAN-245).

[184] Canada's First Written Submission, paras. 558-559 (citing *2012 PFTF Report*, p. 8 (Exhibit CAN-245)).

[185] *2012 PFTF Report*, p. 8 (Exhibit CAN-245).

[186] *2012 PFTF Report*, p. 8 (Exhibit CAN-245).

[187] Canada's First Written Submission, paras. 560-561 (citing New Brunswick, Kelly Report (Exhibit CAN-265 (BCI))).

[188] *See* U.S. Second Written Submission, paras. 75-77.

the USDOC asked about the report during verification, 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.[189]

123. The USDOC explained in the final determination, therefore, that "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."[190]

124. Contrary to what Canada has argued in the excerpt in the question, the USDOC's determination is not based on "an unspoken and incorrect assumption," but rather is grounded in the reports upon which the USDOC justifiably placed greater weight – the reports prepared by the GNB in the ordinary course of business: *Report of the Auditor General – 2008*,[191] the *2012 PFTF Report*, and the *Report of the Auditor General – 2015*.[192] Each of those reports lends support to the USDOC's finding that the market for private stumpage in New Brunswick is distorted.[193] In particular, the *Report of the Auditor General – 2008* states as follows:

> 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….[194]

125. Rather than relying upon "an unspoken and incorrect assumption", as Canada alleges, the USDOC's determination with respect to the private stumpage market in New Brunswick is rooted in ample record evidence.

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[189] 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)).

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

[191] "Report of the Auditor General – 2008, Chapter 5: Department of Natural Resources Timber Royalties" (Petition Exhibit 228) ("*Report of the Auditor General – 2008*") (Exhibit CAN-282).

[192] "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*") (Exhibit CAN-235).

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

[194] *Report of the Auditor General – 2008*, paras. 5.33 and 5.37 (Exhibit CAN-282).

182. To the United States: At paragraph 558 of its first written submission, Canada states, in relevant part, that:

> **Private woodlot owners own their private woodlots for a host of non-financial reasons and a large majority of them do not rely on timber as their primary source of income. A 2012 report commissioned by New Brunswick indicated that only 18% of private woodlot owners generate income from their woodlots and that most private woodlot owners own their forest land for non-financial reasons such as family legacy and ecological values. Although motivation changes as lot sizes increase, "even among the owners of large woodlots, nonfinancial motives are important for a relatively high proportion of owners". (footnotes omitted)**

Please indicate where on the record the USDOC engaged with the findings of the 2012 private forest task force report which Canada refers to in its assertions above.

Response:

126. The USDOC addressed the *2012 PFTF Report* in both the preliminary and final determinations.[195] As explained in the U.S. response to question 181, the conclusions that Canada attempts to draw from these observations about "non-financial reasons" are not borne out in the underlying source documents in any meaningful way. These references are made in passing, but do not support drawing any further conclusion on the basis that woodlot owners value "family legacy and economical values."

127. The USDOC extensively addressed prices available for standing timber from private woodlot owners in New Brunswick in its final issues and decision memorandum.[196] Specifically, the USDOC identified several factors – including that the government accounts for approximately half of the softwood harvest volume during the 2015-2016 harvesting season, that the consumption of Crown-origin standing timber was concentrated among a small number of corporations that also dominate the consumption of standing timber harvested from private lands, and that there was a supply "overhang" from available tenures – as contributing to the suppression of private stumpage prices in New Brunswick.

128. In reaching that conclusion, the USDOC considered several reports prepared by the

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[195] *See* Lumber Preliminary Decision Memorandum, pp. 32-34 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 79 and 81-83 (Exhibit CAN-010).

[196] *See* Lumber Final I&D Memo, pp. 79 and 81-83 (Exhibit CAN-010).

Government of New Brunswick in the ordinary course of business, including the *2012 PFTF Report*. The USDOC also explained that it had considered and relied upon the *2012 PFTF Report* in the *SC Paper from Canada – Expedited Review* proceeding and continued to find the report to be relevant in this investigation.[197] As the USDOC explained in the preliminary decision memorandum, "In particular, the Department [in *SC Paper*] credited the *2012 PFTF Report*, published by the GNB in 2012, which evaluated the concerns cited in the *Report of the Auditor General – 2008* and concurred with the Auditor's findings."[198] The USDOC specifically relied upon the *2012 PFTF Report* to support its conclusion that "the GNB is the dominant supplier, and the mills remain the dominant consumers, of stumpage in New Brunswick, such that the oligopsony effect persists in the province."[199]

183. <u>To Canada</u>: At paragraph 225 of its response to the Panel's question no. 69, Canada states, in relevant part, that:

> **Given that New Brunswick does not provide operational adjustments for transportation costs, high transportation costs can mean that the Crown stumpage rate is simply too high to make the stand economic to harvest. (footnotes omitted)**

a. In support of the above assertion, Canada refers to page 23 of Exhibit CAN-262 (BCI). Could Canada please explain whether, and if so, how this document expressly shows that New Brunswick did not provide operational adjustments of transportation costs in the period of investigation.

b. Please indicate any other record evidence (aside from page 23 of Exhibit CAN-262 (BCI)) showing that New Brunswick did not provide operational adjustments for transportation costs in the period of investigation.

<u>Response</u>:

129. This question is directed to Canada.

184. At paragraph 550 of its first written submission, Canada states, in relevant part, that:

> **Indeed, the indexing methodology that New Brunswick employs may have contributed to some Crown timber being uneconomical to harvest. SPF sawlog stumpage rates, for**

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[197] *See* Lumber Preliminary Decision Memorandum, pp. 32-34 (Exhibit CAN-008).

[198] Lumber Preliminary Decision Memorandum, p. 32 (Exhibit CAN-008).

[199] Lumber Final I&D Memo, p. 79 (Exhibit CAN-010).

example, which are indexed to North American softwood lumber prices between New Brunswick market surveys, were 62% higher than the New Brunswick market average survey price in 2015, even though the Crown rate had started at the same level as the surveyed New Brunswick private price in 2012.

a. <u>To the United States</u>: Please respond to Canada's argument above.

<u>Response</u>:

130. Canada's argument is nothing more than conjecture without evidentiary support. Canada starts from an unsubstantiated premise about whether certain Crown timber is uneconomical to harvest before speculating that New Brunswick's indexing methodology "may have contributed" to unharvested allocations. Canada provides no evidence to support that position. Nor does Canada's argument contradict the existence of a supply "overhang," which the USDOC considered as part of its analysis of private stumpage prices in New Brunswick. Further, as explained in the final issues and decision memorandum, the USDOC found deficiencies in the New Brunswick market survey, specifically that approximately fifty percent of total private harvest in the province was deliberately not included in the survey results.[200] As such, Canada's comparison of the provincial stumpage rates to the private market rates (from the New Brunswick market survey) is of little value.

131. The United States additionally refers to its earlier written response to question 73, which is reproduced in relevant part below:

> 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. Accordingly, the price indices are only one component of the Crown stumpage price.[201]

b. <u>To Canada</u>: The USDOC, at page 84 of its final determination, found that "private stumpage prices for non-SPF species were frequently higher than the stumpage prices charged on Crown land". Please explain, pointing to record evidence, why indexing Crown stumpage rates to North American softwood lumber prices may have led to increasing stumpage rates for some

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[200] Lumber Final I&D Memo, pp. 84-85 (Exhibit CAN-010). *See also* U.S. First Written Submission, para. 216.

[201] U.S. Responses to the First Set of Panel Questions, para. 225.

but not all types of standing timber.

Response:

132. This subpart of the question is directed to Canada.

185. To Canada: At paragraph 223 of its first written submission, the United States argues, in relevant part, that:

> **The USDOC's determination that a small number of firms dominate the market so as to suppress private transaction prices was corroborated by a number of additional observations. These included[…] the ability of private parties including JDIL to import sawlogs[…]**

Please respond to the United States' assertion above.

Response:

133. This question is directed to Canada.

186. To Canada: At footnote 138 of its first written submission, the United States asserts, in relevant part, that:

> **Canada does not dispute that the stumpage market in Nova Scotia reflects prevailing market conditions in New Brunswick. *See* Canada's First Written Submission, para. 600 ("For its part, New Brunswick, while similar to Nova Scotia in certain respects, should have been benchmarked to private market prices in New Brunswick, which reflected prevailing market conditions there. However, the discussions in the following sections are limited to . . . the Washington State log price benchmark and the Nova Scotia benchmark survey").**

a. Please respond to the United States' assertion above that Canada does not dispute that the stumpage market in Nova Scotia reflects prevailing market conditions in New Brunswick.

b. If Canada does not dispute that the stumpage market in Nova Scotia reflects prevailing market conditions in New Brunswick, please explain why New Brunswick, if it was "similar to Nova Scotia in certain respects", "should have been benchmarked to private market prices in New Brunswick, which reflected prevailing market conditions there".

Response:

134. This question is directed to Canada.

187. To the United States: At paragraph 158 of its second written submission, Canada states, in relevant part, that:

> **As a result of the fact that volumes [[***]], it would not have been possible for Commerce to remove pulpwood from the allocated volumes. Commerce therefore could not have calculated the "overhang" for softwood timber excluding pulpwood.**

Please respond to Canada's assertion above.

Response:

135. As indicated above in the U.S. response to question 179, the United States acknowledges that, based upon information provided to the USDOC by the GNB, allocated volumes to be used in calculating the supply "overhang" in New Brunswick may have included pulpwood.[202] For the reasons stated above in the U.S. response to question 178, subpart (b), any error in the precise calculation is not material to the USDOC's analysis, for which the existence, not the extent, of the "overhang" is the relevant consideration.

188. To both parties: At page 34 of its preliminary determination (Exhibit CAN-008), the USDOC stated, in relevant part, that:

> **[S]orting the log processing data for FY2015-2016 in descending order by volume of Crown-origin standing timber consumed reveals that a small number of corporations accounted for the predominant percentage of Crown-origin consumption, and that these same three corporations accounted for a predominant percentage of private-origin standing timber consumption. (emphasis added)**

Please explain if this statement indicates that the USDOC assessed the volume of sawmills' private-origin *stumpage* consumption through the sawmills' consumption of *logs*. Please supplement your explanation with any relevant record evidence.

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[202] *See* Government of New Brunswick Verification Exhibit VE-1 ("Minor Corrections"), pp. 6-7 (Table 1) (Exhibit CAN-267 (BCI)).

Response:

136. The respondents reported to the USDOC their log processing volumes, including the origin of the logs, *i.e.*, the origin of the timber from which the logs were made.[203] Specifically, this information consists of the "Annual Volume of Timber Processed by Sawmill Sourced from Private Land," as reported by the GNB.[204] This reported data is a valid and reliable source of information upon which the USDOC based the observations quoted in the excerpt above.[205] Among other evidence, this data supports the USDOC's finding that the same three corporations accounted for the predominant percentage of Crown-origin standing timber consumption and private-origin standing timber consumption in New Brunswick.[206] Sawmills process wood fiber as logs, not as standing timber, and it is entirely appropriate that the USDOC assessed the volume of sawmills' private-origin stumpage consumption through the sawmills' consumption of logs.

189. To the United States: At page 79 of its final determination, the USDOC found, in relevant part, that:

> **[T]he corporations that dominate the consumption of Crown-origin standing timber also dominate the consumption of standing timber harvested from private lands. (footnotes omitted)**

Further, at paragraph 584 of its first written submission, Canada states, in relevant part, that:

> **In fact, private woodlots owners made less than [[***]]% of their sales directly to private mills. The remainder was sold to the hundreds of independent harvesters who are the primary purchasers of standing timber in the province—not the mills. (footnotes omitted)**

Please respond to Canada's assertions above. Please explain how private sawmills could be considered as dominant consumers of *standing timber* in New Brunswick if

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[203] *See* New Brunswick, "Stumpage Tables" (Exhibit NB-STUMP-1), Table 2 (Exhibit CAN-269 (BCI)). *See also* Market Memorandum, New Brunswick attachment, Table 2.1 (Exhibit USA-088 (BCI)).

[204] *See* New Brunswick, "Stumpage Tables" (Exhibit NB-STUMP-1), Table 2 (Exhibit CAN-269 (BCI)). *See also* Market Memorandum, New Brunswick attachment, Table 2.1 (Exhibit USA-088 (BCI)).

[205] *See* New Brunswick, "Stumpage Tables" (Exhibit NB-STUMP-1), Table 2 (Exhibit CAN-269 (BCI)). *See also* Market Memorandum, New Brunswick attachment, Table 2.1 (Exhibit USA-088 (BCI)).

[206] *See* Lumber Final I&D Memo, pp. 79-80 (Exhibit CAN-010).

independent harvesters, rather than sawmills, were primary purchasers of standing timber in the province.

Response:

137. The key word in the excerpted passage from paragraph 584 of Canada's first written submission is "directly." Canada itself has acknowledged that:

> Independent harvesters 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.[207]

138. The "middleman" role played by independent harvesters in New Brunswick in no way undermines the USDOC's findings that private sawmills are the dominant consumers of standing timber in New Brunswick. Data provided by the GNB to the USDOC confirm that just three companies account for [[***]] of Crown-origin timber consumption as processed by sawmills and [[***]] of private-origin timber consumption as processed by sawmills.[208] Independent harvesters do not process timber in sawmills.

139. Canada's misguided attempt to elevate the role of independent harvesters in New Brunswick beyond that of a "middleman" is a diversion from evidence that firmly establishes the dominance exercised by certain companies with respect to the consumption of Crown-origin and private-origin standing timber in New Brunswick. As the United States previously explained in the U.S. response to question 74:

> 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 Force Report* and the reports by the Auditor General. 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.[209]

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[207] Canada's First Opening Statement (Day 1), para. 202 (underline added).

[208] *See* Market Memorandum, New Brunswick attachment, Table 2.1 (Exhibit USA-088 (BCI)). *See also* New Brunswick, "Stumpage Tables" (Exhibit NB-STUMP-1), Table 2 (Exhibit CAN-269 (BCI)).

[209] U.S. Responses to the First Set of Panel Questions, para. 227.

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

190. To the United States: At paragraph 274 of its first written submission, Canada asserts, in relevant part, that:

> **The logs captured in the TDA Survey data mirror the sizes and species of trees common in Alberta and were sourced from trees which grew in Alberta's climate and conditions. (footnotes omitted)**

Pointing to the record please indicate where in its determination, the USDOC explained why log prices in Alberta, provided they were market-determined, could not be used to derive a benchmark which would more accurately reflect the *prevailing market conditions* for stumpage in Alberta than would stumpage prices in Nova Scotia.

Response:

140. The premise of Canada's argument is flawed. As the United States has demonstrated, the relevant question under Article 14(d) of the SCM Agreement is whether the benchmark that the USDOC selected reflects prevailing market conditions for the good in question in the country of provision.

141. Further, Canada's argument assumes that it would have been appropriate not to use a third-tier benchmark for a good other than the good in question only if the USDOC had reached a determination that log prices "could not be used to derive a benchmark." This apparent assumption reflects the line of thinking that Canada has sought to use as a substitute for the applicable standard of review and as a substitute for proper legal interpretation of the treaty text. In other words, Canada appears to assume that where an alternative was possible and sought by one of the parties, some obligation exists on the part of the investigating authority to have adopted the alternative. Canada's Article 14(d) argument is premised on the erroneous assumption that if an investigating authority may prefer to use a regional or local benchmark price, it somehow must do so.

142. The purpose of the standard of review is to shield the adjudicator's review from the erroneous assumptions on which Canada's arguments are premised. The troubling effect of accepting Canada's erroneous assumptions in reviewing the underlying determination would be to put the panel in the place of the initial trier of fact. The existence and even attractiveness of an alternative approach cannot lawfully be a basis for finding that an objective and unbiased investigating authority could not have reached a conclusion not to adopt the alternative approach. As noted at the second substantive meeting with the parties, entertaining this line of thinking is an invitation to error because of the great and serious temptation that arises to re-weigh the evidence "to more accurately reflect" something.

143. In this instance, the record conclusively demonstrates that the USDOC considered the proffered alternatives, but found they did not compel a different result, *i.e.*, the USDOC determined that the alternative did not outweigh the chosen benchmark. As the United States has demonstrated in its submissions, Canada's assertion is flawed in several ways.[210] First, Canada's focus on logs instead of stumpage is misplaced because the USDOC's analysis was concerned primarily with stumpage, the good in question. 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.[211] The USDOC determined that this evidence reflected "near complete Crown dominance of the market for standing timber in Alberta,"[212] 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."[213]

144. 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).[214] The USDOC determined that these stumpage prices were "relatively inconsequential as compared to the total volume of sales"[215] and, upon further examination, found these transactions not to be reflective of freely determined prices between buyers and sellers, for a host of reasons.[216]

145. The USDOC's determination could have stopped with the analysis of stumpage prices,

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[210] *See* U.S. First Written Submission, paras. 315-343; U.S. Responses to the First Set of Panel Questions, paras. 118-123; U.S. Second Written Submission, paras. 249-253.

[211] *See* Lumber Preliminary Decision Memorandum, p. 28 (Exhibit CAN-008); Lumber Final I&D Memo, p. 51 (Exhibit CAN-010). *See also* Alberta Preliminary Market Memorandum, Table 3 (Exhibit USA-028), unchanged in Alberta Final Market Memorandum, p. 2 (Exhibit USA-029).

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

[213] 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).

[214] 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).

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

[216] *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).

but the Canadian parties requested that the USDOC further consider the possibility of using log 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).[217] 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.[218] 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.[219]
>
> * * *
>
> 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

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

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

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

> "salvage" transactions of logs that were not offered for sale on the 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.[220]

146. Further, as addressed in response to the Panel's first set of questions to the parties, a second flaw in Canada's arguments is the implication that Canadian interested parties did not have the opportunity to comment on the operation of section 153.[221] The Government of Alberta submitted the exhibit containing section 153 among its very first submissions at the beginning of the investigation.[222] 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.[223]

147. 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

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

[221] *See* U.S. Responses to the First Set of Panel Questions, paras. 121-123.

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

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

salvage timber under threat of having the volume charged against its [annual allowable cut] for refusal to do so."[224] 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 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.

148. 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"[225] simply is not credible.

191. <u>To Canada</u>: At page 50 of its final determination, the USDOC stated, in relevant part, that:

> **[T]he 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.**

Please explain, pointing to record evidence, (a) whether salvage timber was not cut according to the approved cutting plan in Alberta; and (b) whether trees cut in accordance with an approved cutting plan in Alberta need to have reached a particular level of maturity before they can be cut.

<u>Response</u>:

149. This question is directed to Canada.

192. <u>To the United States</u>: At paragraphs 159-160 of its response to the Panel's question no. 40, Canada asserts that:

> **However, the record establishes that timber removed from industrial dispositions and included in the log price data must adhere to the relevant provincial utilization standards.**
>
> **Should undersized timber from an industrial disposition be included in an arm's-length transaction, it would be assigned a timber dues rate pursuant to the *Timber Management***

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

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

> ***Regulation*** **and would be disposed of or utilized for products other than sawlog production.**

Please respond to Canada's assertion above. In your response, please indicate where the USDOC considered the utilization standards, to which Canada refers, in finding that the prices of salvage timber are not a fair representation of the price of mature standing timber.

Response:

150. The premise of Canada's argument is flawed, for the reasons discussed above in the U.S. response to question 190. The United States respectfully refers the Panel to the discussion in that response. The United States also respectfully refers the Panel to the discussion in paragraph 339 of the U.S. first written submission, which identified where the USDOC considered the utilization standards to which Canada refers.

193. To the United States: At paragraph 147 of its response to the Panel's question no. 36 Canada asserts that:

> **Finally, Canada does not agree with the premise in the U.S. submission that liens "would not exist in an open market situation". Private timber owners certainly could encumber their assets, including their timber and logs. The fact that the Crown as seller retains a security interest in a valuable good until it is paid does not impugn the Alberta private log market or establish that these logs are not sold in an open market. Indeed, the existence of liens on timber and logs is not at all unusual in the forestry industry. For example, various Canadian provinces, including both Alberta and Nova Scotia, have legislation that provides for a lien on timber or logs on behalf of any person who performs labour or services with respect to those logs or timber for the amount due for their services.**

Please respond to Canada's assertions above.

Response:

151. The premise of Canada's argument is flawed, for the reasons discussed above in the U.S. response to question 190. The United States respectfully refers the Panel to the discussion in that response. The United States also observes that the USDOC identified the existence of Crown liens in a footnote as additional support for its finding that 60 percent of TDA transactions by

volume are sales of Crown-origin logs, resulting in a circular comparison.[226] Even if Canada could establish (which it has not), that government-mandated liens covering, by default, all log sales had no potentially distortive effect, that would in no way undermine the evidence establishing that 60 percent of TDA transactions by volume are sales of Crown-origin logs, which is the primary basis for the USDOC's finding of circularity, nor does it undermine any of the other three bases upon which the USDOC determined that log prices in Alberta were not usable as a benchmark.

194. To the United States: At paragraph 145 of its response to the Panel's question no. 36 Canada asserts that:

> **[T]here is no record evidence on which Commerce could have made a determination that such liens have an impact on log prices.**

Please respond to Canada's assertion above.

Response:

152. The premise of Canada's argument is flawed, for the reasons discussed above in the U.S. responses to questions 190 and 193. The United States respectfully refers the Panel to the discussion in those responses.

195. To the United States: At paragraph 146 of its response to the Panel's question no. 36, Canada asserts that:

> **Indeed, if Commerce had actually investigated the issue, it would have learned that buyers of logs from standing timber harvested on Crown lands in Alberta typically ensure that Crown timber dues are paid on the resulting logs by agreeing with the seller that the buyer will withhold the Crown timber dues owed on the timber from the agreed-upon price paid for the logs, and remit this payment to the Crown itself.**

Please respond to Canada's assertion above.

Response:

153. The premise of Canada's argument is flawed, for the reasons discussed above in the U.S. responses to questions 190 and 193. The United States respectfully refers the Panel to the

[226] *See* Lumber Final I&D Memo, p. 50, footnote 308 (Exhibit CAN-010).

discussion in those responses.

196. <u>To Canada</u>: At paragraph 279 of its first written submission Canada asserts 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….. 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 explain why Dr. Kalt's report was "relevant" evidence for the USDOC's inquiry in question.

<u>Response</u>:

154. This question is directed to Canada.

197. <u>To Canada</u>: At paragraph 284 of its first written submission, citing to pages 35 and 36 of the Brattle Report, (Exhibit CAN-093), Canada asserts, in relevant part, that:

> **Moreover, *all* of the log transactions used to derive the proposed benchmark reflect competitive prices received at the mill gate, prices that were found to be "between independent, private parties and thus represent prices established by willing participants independent of government intervention". (emphasis added)**

Please explain the basis on which the Brattle Report concluded that the log prices in question were found to be "between independent, private parties and thus represent prices established by willing participants independent of government intervention".

<u>Response</u>:

155. This question is directed to Canada.

198. <u>To the United States</u>: At footnote 308, page 50 of its final determination, the USDOC found, in relevant part, that:

> **Further, these transactions 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….. This encumbrance creates risks for both the tenure holder and the buyer which would not exist in an open market transaction.**

Pointing to record evidence, please indicate whether the USDOC investigated whether liens could also encumber transactions involving private-origin logs in Alberta before making a finding that the encumbrance ensuing from a Crown lien creates risks for the tenure holder and the buyer "which would not exist in an open market transaction".

Response:

156. The United States respectfully refers the Panel to the discussion above in the U.S. response to question 190. That response describes how the USDOC considered the alternative benchmarks proffered by interested parties, but found that they did not compel a different result, *i.e.*, the USDOC determined that the alternative did not outweigh the chosen benchmark. For the reasons discussed in that response, the premise of Canada's argument that the USDOC was obligated to engage in an additional, alternative analysis is flawed.

157. The United States also respectfully refers the Panel to the discussion above in the U.S. response to question 193. That response explains how the manner in which the USDOC considered the issue of Crown liens in no way undermines the evidence establishing that 60 percent of TDA transactions by volume are sales of Crown-origin logs, which is the primary basis for the USDOC's finding of circularity, nor does it undermine any of the other three bases upon which the USDOC determined that log prices in Alberta were not usable as a benchmark.

199. To the United States: At paragraph 56 of its opening statement at the second substantive meeting of the Panel, Canada argued:

> **The United States does not contest that logs are a product similar to standing timber or that the in-market log prices reflect critical prevailing market conditions in Alberta, such as species composition and harvesting and transportation costs.**

Please respond to Canada's assertions.

Response:

158. The premise of Canada's argument is flawed, for the reasons discussed above in the U.S. response to question 190. The United States respectfully refers the Panel to the discussion in that response.

200. To Canada: At paragraph 57 of its opening statement at the second substantive

meeting of the Panel, Canada argued:

> **Now we see the determination that Commerce actually made: "We have *not* made a determination concerning distortion in the Alberta log market"; and "we need *not* evaluate whether log prices are also distorted as a result of dominance of the government in the market for stumpage". (footnote omitted) (emphasis original)**

Please explain why a determination that log prices are "distorted as a result of dominance of the government in the market for stumpage" is relevant?

Response:

159. This question is directed to Canada.

201. To the United States: Please indicate where the USDOC explained why the TDA survey (Exhibit CAN-103 (BCI), p. 1-2) would include salvage transactions in which the tenure holder is "required" to take part "at the direction of the non-timber concession holder" when the TDA survey categorically instructed respondents to not report salvage transactions [[***]], and further to report only arm's length transactions, which it defined as [[***]].

Response:

160. The United States respectfully refers the Panel to the discussion above in the U.S. response to question 190. That response describes how the USDOC considered the alternative benchmarks proffered by interested parties, but found that they did not compel a different result, *i.e.*, the USDOC determined that the alternative did not outweigh the chosen benchmark. For the reasons discussed in that response, the premise of Canada's argument that the USDOC was obligated to engage in an additional, alternative analysis is flawed.

6 THE USDOC'S REJECTION OF AUCTION PRICES IN BRITISH COLUMBIA AS A STUMPAGE BENCHMARK

202. To both parties: At paragraph 250 of its response to the Panel's question no. 79, the United States mentions that the share of Crown timber during the period of investigation harvested under licenses won at the BCTS auction prices was 15.4 percent. At paragraph 236 of its response to the Panel's question no. 79, Canada states that the share of the total volume of the Crown timber harvest in British Columbia sold through BCTS auctions in the period of investigation was 17 percent. Please reconcile the difference in the two figures.

Response:

161. The BCTS auctions are divided into two categories that differ with respect to the bidders who can participate. Category 1 has no bidder restrictions, whereas Category 2 is limited to small operators.[227] The unrestricted Category 1 sales are used to set the MPS pricing,[228] and the USDOC used only Category 1 sales to derive a 15.4 percent harvest volume sold through the BCTS auction. Specifically, the USDOC divided the total Category 1 BCTS coastal and interior softwood harvest volumes of 1,827,097 cubic meters and 7,421,341 cubic meters, respectively, by the overall provincial crown harvest volume of 60,177,813 cubic meters.[229]

162. Given that the Government of British Columbia maintains separate MPS systems for the Interior and the Coast, it is also useful to look at the Category 1 sales in each region as a percentage of the harvest in those regions. In the Interior, the unrestricted Category 1 softwood lumber harvest of 7,421,341 cubic meters represents 15.7 percent of the Interior softwood harvest of 47,271,423 cubic meters. The percentage edges up to 15.9 percent if one measures the Interior Category 1 softwood, deciduous, and special forest products harvest, 7,764,410 cubic meters, as a percentage of total Interior softwood, deciduous, and special forest products harvest, 48,950,840 cubic meters.[230]

163. Canada derived a figure of 17 percent by adding the timber harvest volume from both unrestricted Category 1 and restricted Category 2 sales in both the Coast and the Interior, and then dividing this aggregate volume of 10,516,100 cubic meters by the combined total provincial Crown harvest volume of 62,008,629 cubic meters.[231] Whereas the USDOC only included sales of softwood, the product relevant to the investigation, Canada's calculation includes softwood, deciduous, and special forest product timber.[232]

203. <u>To the United States</u>: At paragraph 384 of its first written submission, in support of its view that the three-sale limit made the BCTS auctions uncompetitive, the United States asserts:

> **The fact that excluding bidders impacts price is obvious and, indeed, undisputed. For instance, British Columbia stated in**

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[227] 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)").

[228] Verification of the Government of British Columbia, p. 11 (Exhibit CAN-088) ("[O]nly Category 1 sales are used in MPS pricing.").

[229] Lumber Final I&D Memo, p. 54 and footnote 330 (Exhibit CAN-010) (citing GBC Verification Exhibit 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).

[230] GBC Supplemental QR, Exhibit BC-Supp3-12 (Exhibit USA-053).

[231] GBC Supplemental QR, Exhibit BC-Supp3-12 (Exhibit USA-053).

[232] GBC Supplemental QR, Exhibit BC-Supp3-12 (Exhibit USA-053).

> **its Initial Questionnaire Response that "[g]enerally, there is a statistically positive correlation between the number of bidders and the winning bid. Data indicate, however, that the winning bid increases at a decreasing rate relative to the number of bidders."**

The complete quote from British Columbia's questionnaire response (Exhibit CAN-018 (BCI), pages I-178 and I-179) that the United States has partially quoted in paragraph 384 of its first written submission is:

> **Generally, there is a statistically positive correlation between the number of bidders and the winning bid. Data indicate, however, that the winning bid increases at a decreasing rate relative to the number of bidders. The cause of any correlation between the number of bidders and winning bid is not clear or obvious. For example, auctions that contain more valuable timber may attract more bidders and the higher bids may well simply reflect the higher value of such stands. However due to the secret nature of the bid process, the bidders never knows how many other bidders may bid on any particular tract of timber. This requires the bidder to bid with the expectation that there is other competition for the timber.**

The complete quote suggests that the design of the BCTS auctions was such that the bidders would expect competition despite the three-sale limit, as they would not know how many other bidders will bid on a particular timber stand. Please comment.

Response:

164. As the USDOC explained in the final issues and decision memorandum, the three-sale limit inhibits competition by precluding the largest mills from bidding directly in the BCTS auctions, thereby removing the parties with the greatest need for timber and the most significant resources for bidding.[233] For instance, in 2015 in the Interior there were 52 lumber mills with a total capacity of 10.4 billion board feet, and Canfor owned 12 of those mills with a combined capacity of 3.29 billion board feet, or 31.6 percent of the entire annual lumber capacity of the Interior.[234] Tolko owned 7 of the mills with a combined capacity of 1.47 billion board feet, or

[233] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

[234] Ministry of Forests, Lands and Natural Resource Operations, "Major Primary Timber Processing Facilities in British Columbia, 2015" (Exhibit CAN-032).

14.1 percent of the Interior capacity, and West Fraser owned 7 mills with a total capacity of 1.75 billion board feet, or 16.8 percent of Interior capacity.[235] The three respondents thus accounted for 26 of the 52 mills in the interior and 62.5 percent of the capacity in the Interior. As the USDOC explained in the final issues and decision memorandum, there was a tight supply of timber during the period of investigation, yet the three-sale limit removed the most motivated participants from directly participating in the bidding process. The large mills then partnered with independent harvesters to submit what amount to joint bids, which turned parties that should have been competing to submit the highest bid in a blind auction into essentially one party submitting a joint bid in which the parties have knowledge that one of their main competitors is not bidding against them for the resource.[236] As the USDOC put it in the final issues and decision memorandum, the dominant firms managed to work around the restrictions of the three-sale limit "by making 'straw purchases' through proxy bidders, thus maintaining effective dominance in these auctions."[237]

165. As explained in more detail below in the U.S. response to question 206, while independent loggers constitute the majority of participants in the BCTS auctions, five of the largest firms consumed up to 64.8 percent of the harvests sold at auction. The USDOC explained in the final issues and decision memorandum that the consequence of such proxy arrangements between independent loggers and the dominant firms is that "the three-sale limit has failed to significantly diversify the entities harvesting from TSLs won on the auction in the manner intended."[238] Therefore, the three-sale limit does not raise the expectation of competition because, due to the use of proxy bidders, only a few firms dominate the consumption of logs sold at auction, while at the same time the three-sale limit introduces an element of distortion into the bidding process, as explained in more detail in the U.S. responses to questions 205 and 213.

204. <u>To Canada</u>: Is there a minimum number of bidders that must participate in the BCTS auctions for each stand? Were there any auctions where only one bidder participated? Please answer pointing to any relevant record evidence.

<u>Response</u>:

166. This question is directed to Canada.

205. <u>To the United States</u>: At page 58 of the final determination, the USDOC observed:

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[235] Ministry of Forests, Lands and Natural Resource Operations, "Major Primary Timber Processing Facilities in British Columbia, 2015" (Exhibit CAN-032).

[236] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

[237] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

[238] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

> **[W]hile the three-sale rule has, in practice, failed to deliver the intended policy result of broadening participation in the TSL harvest, it has, at the same time, introduced an additional source of market distortion, in the form of cutting rights fees necessitated by "straw purchases" or proxy bidding. When reporting their harvest-related costs, all three mandatory respondents with operations in British Columbia have reported that in obtaining the right to harvest a TSL won by a third party at auction, they pay a cutting rights fee to the third party.**

In relation to this observation of the USDOC, Canada states at paragraph 67 of its second written submission:

> **The United States also reiterates Commerce's speculation that, when a large firm bids directly in BCTS auctions, it "offer[s] the full amount it is willing to pay", but a contract harvester 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". No evidence exists to support this conjecture. What Commerce and the United States fail to understand is that sawmills rely on contract harvesters to harvest all of the licences won in BCTS auctions, regardless of who actually bids in the auctions. If a large firms bids directly in a BCTS auction, it will take into account what it will have to pay the contract harvester in a similar manner.**

Please respond to Canada's argument quoted above.

Response:

167. Contrary to Canada's assertion, record evidence from the investigation supports the USDOC's conclusion that the BCTS bids do not reflect the full value of the harvest purchased through the auction due to the three-sale limit. In getting around the restrictions of the three-sale limit, the mandatory respondents routinely turn to middlemen and proxies, and the use of proxies introduces distortions to the market that are more than just theoretical.[239] For instance, as explained in the U.S. second written submission, one mandatory respondent operating in British Columbia [[***]].[240]

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[239] U.S. Responses to the First Set of Panel Questions, paras. 264-265.

[240] U.S. Second Written Submission, para. 278 (citing Canfor Corporation Verification Exhibit VE-3, p. 20 (Exhibit

168. As also explained in the U.S. first written submission, mandatory respondents reported costs associated with obtaining these additional licenses won by third parties at auction.[241] Specifically, "Tolko reported stumpage costs associated with 'third-party won BCTS auction purchases,' and West Fraser costs for stumpage purchased by its employees."[242] Furthermore, at Tolko's verification:

> Company officials described in detail their obligations and the reported expenses broken down by transaction type according to our instructions in questionnaires … Table B2 describes all third-party BCTS purchases; for these transactions, Tolko meets all the tenure holder's obligations to the province and pays fees to the tenure holder.[243]

169. Canada asserts that "Tolko does not pay specific cutting fees to third parties, but may in some limited circumstance pay an amount that 'includes an element of profit, equivalent to cutting right fees on […] tenures' managed on behalf of third parties."[244] However, in the above referenced Table B2 of Tolko's questionnaire responses, Tolko reported fees in a specific "cutting rights fee" field.[245]

170. Furthermore, Canfor reported "purchase costs" that "reflect any additional payments that are made to the tenure holder for obtaining the standing timber."[246]

171. As the USDOC explained in the final issues and decision memorandum, "companies who pay these cutting rights fees to harvest a TSL from a third party are incurring an additional cost that they would not otherwise incur if bidding for the TSL directly – a cost that is likely factored into the auction in the form of lower bids, as the bidder would expect the companies to discount

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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)).

[241] U.S. First Written Submission, para. 385.

[242] U.S. First Written Submission, para. 385 (citing Lumber Final I&D Memo, p. 57 (citing Tolko May 30, 2017 QR, Part 1 at 25; West Fraser Mar. 14, 2017 QR, Part 1 at 158) (Exhibit CAN-010)).

[243] Tolko Verification Report, p. 16 (Exhibit CAN-316 (BCI)).

[244] Canada's First Written Submission, para. 187.

[245] Tolko Supplemental Questionnaire, Table B2 (CAN-085 (BCI)).

[246] Canfor 4th Supplemental Questionnaire Narrative Response (May 31, 2017) at 18, 28 (Exhibit USA-089).

their purchase price accordingly."[247] The U.S. first written submission further explained how the payment of additional cutting rights fees are not reflected in the bids at the BCTS auction:

> [P]art of the market value of the timber that would otherwise be offered at auction was instead being diverted into cutting rights fees, resulting in BCTS winning prices that do not reflect the full value of the timber. The USDOC's conclusion reasonably interprets the record evidence. That evidence demonstrates that the respondents incurred additional costs to acquire the same goods from third-party tenure holders as opposed to bidding directly in the BCTS auction. Thus, the relevant third-parties would likely submit bids that undervalue the actual market price of the stumpage. Therefore, the USDOC concluded that the stumpage rates resulting from the BCTS auction, on top of which the respondents also pay cutting rights fees, do not reflect market prices.[248]

172. The U.S. responses to the first set of panel questions also explained:

> 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.[249]

173. These findings are corroborated by a study by the BCLTC that demonstrated that non-harvesting third-party bidders at auction "base their auction bids on what the tenure-holding companies are willing to pay for auction-origin logs."[250]

174. The USDOC accordingly "granted an adjustment for cutting rights fees paid by the three mandatory respondents with operations in British Columbia in measuring whether the province provided stumpage for less than adequate remuneration."[251] As the USDOC explained in the

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[247] Lumber Final I&D Memo, p. 58 (Exhibit CAN-010).

[248] U.S. First Written Submission, para. 386.

[249] U.S. Responses to the First Set of Panel Questions, para. 264.

[250] Lumber Final I&D Memo, p. 58 (Exhibit CAN-010).

[251] U.S. First Written Submission, para. 385, footnote 710.

final issues and decision memorandum:

> [I]t is reasonable to account for a mark-up in [the] benefit calculations when the benefit is provided through an intermediary. In instances where the respondents purchase Crown stumpage rights from a third-party tenure holder or licensee, and the respondent is itself harvesting the standing Crown timber (or through a contractor), the respondent pays the tenure holder or licensee a fee in order to harvest the Crown timber. By charging a cutting rights fee, the tenure holder or licensee is capturing some of the benefit of the subsidized input. Therefore, the [USDOC] must adjust for the amount that the respondents must pay to the third-party tenure holder or licensee to best capture the amount of the benefit that is actually conferred upon the respondents.[252]

175. Accordingly, for Tolko and West Fraser, the USDOC adjusted "the benchmark delivered log price by [Tolko and West Fraser's] costs associated with accessing, harvesting, and hauling stumpage purchases to the sawmill, including all legally obligated expenses and cutting rights fees paid to third parties."[253] For Canfor, the USDOC "included an adjustment for Canfor's payments to the unaffiliated third-party for the ability to harvest under their tenure/license (cutting rights and purchase cost)…".[254]

176. Therefore, contrary to Canada's assertions, the record evidence indicates that the mandatory respondents pay costs associated with accessing licenses won by third parties that are not fully reflected in the BCTS bids and therefore not included in the MPS pricing.

206. <u>To the United States</u>: At footnote 693 of the its first written submission, the United States noted:

> **There is an apparent typographical error in the final determination, in which the USDOC stated that "a small number of large lumber companies dominate the BCTS auction market." Lumber Final I&D Memo, p. 57 (Exhibit CAN-010). The USDOC cited data supporting the conclusion that a small number of companies dominate the BCTS consumption volume, where it referred to companies dominating the auctions at bidders. Lumber Final I&D Memo,**

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[252] Lumber Final I&D Memo, p. 74 (Exhibit CAN-010).

[253] Tolko Final Determination Calculations, p. 6 (Exhibit CAN-381 (BCI)); West Fraser Final Determination Calculations, p. 4 (Exhibit CAN-382 (BCI)).

[254] Canfor Final Determination Calculations, p. 4, footnote 17 (Exhibit CAN-380 (BCI)).

p. 57, footnote 341 (Exhibit CAN-010). This is consistent with the USDOC's explanation in the preliminary determination that independent loggers win the majority of BCTS purchases. Lumber Preliminary Decision Memorandum, pp. 38-39 (Exhibit CAN-008).

Please confirm, pointing to record evidence, whether the five companies that consumed the majority of non-auctioned Crown timber participated directly in the BCTS auctions, or did not participate in the auctions themselves but consumed a majority of logs produced from auctioned timber harvested by loggers who participated in the auctions.

Response:

177. The five companies consuming the majority of non-auctioned Crown timber were largely excluded from participating directly in the BCTS auctions, but obtained licenses from smaller, non-sawmill operators (*e.g.*, independent loggers).[255] The Government of British Columbia submitted data showing that independent loggers purchased the majority of BCTS auction volume sold.[256] However, the data also indicate that the tenure-holding sawmills consumed the largest volume of these BCTS sales.[257] Specifically, five companies account for 64.8 percent of the cruise-based volume and 43.6 percent of the scale-based volume consumed from the BCTS auction sales.[258] Accordingly, as explained in the U.S. first written submission, "'the record evidence supports a conclusion that the auction markets are likewise concentrated among a small number of companies' and that 'a handful of tenure-holding sawmills account for the majority of Crown-origin standing timber acquired via the BCTS auctions.'"[259] As explained more fully below in the U.S. response to question 213, the dominance of these tenure-holding firms led the USDOC to conclude that "the prices paid for logs in the BCTS auctions, prices that are primarily paid by loggers, key off the price tenure-holding sawmill companies are willing to pay."[260]

207. To the United States: The Appellate Body recently made the following findings at paragraph 5.141 *US – Countervailing Measures (China) (Article 21.5)*:

[T]he central inquiry under Article 14(d) in choosing an

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[255] U.S. Responses to the First Set of Panel Questions, para. 260.

[256] U.S. Responses to the First Set of Panel Questions, para. 260.

[257] U.S. Responses to the First Set of Panel Questions, para. 260.

[258] Lumber Final I&D Memo, p. 57, footnote 341 (Exhibit CAN-010) (citing Market Memorandum, BC Attachment at Tables 1.1 and 1.2).

[259] U.S. First Written Submission, para. 364.

[260] U.S. Responses to the First Set of Panel Questions, para. 260.

> **appropriate benefit benchmark is whether government intervention results in *price distortion* such that recourse to out-of-country prices is warranted, or whether instead in-country prices of private enterprises and/or government-related entities are *market-determined* and can therefore serve as a basis for determining the existence of benefit. Thus, what would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, not the presence of government intervention in the market itself. Indeed, various types of government interventions may lead to price distortion, such that recourse to out-of-country prices is warranted, beyond the situation in which the government is so predominant that it effectively determines the prices of the goods in question. Therefore, the decision to reject in-country prices as a benchmark should be made case by case and based on the relevant evidence on the record in the particular investigation.**

Please comment on these recent observations of the Appellate Body.

Response:

178. The original panel and Appellate Body reports in *US – Countervailing Measures (China)* recognized the logic in the reasoning in the *US – Softwood Lumber IV* Appellate Body report, and did not call into question any part of the reasoning in that earlier report. As addressed during the second substantive meeting, the observations Canada points to in the recent appellate report in *US – Countervailing Measures (China) (Article 21.5 – China)*[261] were more specifically concerned with the question of state-owned enterprises and forms of government influence that are not at issue in this dispute. Unlike disputes in which parties have argued that a state-owned enterprise should be treated as if it were a private commercial actor, the facts of this dispute relate to circumstances in which there is no (even purportedly) commercial entity involved, nor does Canada purport to argue that the provision of lumber under examination cannot be linked to the provincial governments. Here, there is no such question presented: the province of British

[261] The Panel's question refers to "recent observations of the Appellate Body". This response addresses statements made by the "majority" in the recent appellate report in *US – Countervailing Measures (China) (Article 21.5 – China)*. For purpose of this response, the United States sets aside its concerns as stated in the Dispute Settlement Body ("DSB") that a former Appellate Body member served on the appeal, and thus the appeal was not decided by three Appellate Body members; that the "majority" may have included the former Appellate Body member and thus may not have been a majority of the Division at all; and that the report was issued well beyond the mandatory 90-day time limit for Appellate Body reports, as provided in Article 17.5 of the DSU.

Columbia directly holds over 90 percent of the entire supply of the good in question and provides over 90 percent of the good consumed by producers in that province.[262]

179. This is the prototypical scenario the Appellate Body described when it discussed the consequences of such predominant government ownership of nearly all the supply of the good in the country of provision.[263] Yet, Canada argues that "the potential for a circular price comparison does not arise in such an auction based system."[264] It simply is not credible for Canada to say that even "the potential" for circularity does not arise when it has been recognized over and over that 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.[265]

208. <u>To both parties</u>: The United States argues that the export regulations in British Columbia forced log exporters in British Columbia to enter into informal agreements with log consumers within the province whereby the exporters would sell logs to consumers at lowered prices as a *quid pro quo* for the consumers refraining from blocking exports. In support of this argument, the United States refers to statements made by two log exporters, Merrill & Ring and TimberWest, to the effect that the two exporters sold logs domestically at unprofitable prices as a result of informal agreements (see United States' response to the Panel's question no. 78).

a. Please comment on whether this evidence was sufficient to establish that these two exporters entered into informal agreements with domestic log consumers to prevent having their export applications blocked by any of those domestic consumers. Could the USDOC have referred to evidence other than statements made by these two exporters, for example their accounting books, in order to establish that they sold logs at a loss to multiple domestic consumers?

<u>Response</u>:

180. Without question, this evidence was sufficient to establish that <u>these two exporters</u> entered into informal agreements with domestic log consumers to prevent having <u>their export applications</u> blocked by any of those domestic consumers. The information from the producers directly relates to their own experiences and there is no evidence on the record even hinting that

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[262] *See* U.S. Responses to the First Set of Panel Questions, para. 67.

[263] *See, e.g.*, Canada's Responses to the First Set of Panel Questions, para. 106 (discussing *US – Softwood Lumber IV (AB)*, para. 102).

[264] *See* Canada's Second Written Submission, para. 54.

[265] *See, e.g., US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 444.

the producers' representations were untruthful.

181. Merrill & Ring explained that the company "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."[266] Furthermore, the company explained that:

> 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.[267]

182. Significantly, the quotation above comes from a sworn affidavit of a representative of Merrill & Ring.[268] It would be a criminal act for the company representative to have given untruthful information in making the sworn statement. It is shocking that Canada would suggest, without any evidence whatsoever, that the company representative committed perjury in making the statement.

183. Similarly, the USDOC relied upon a September 2014 article in a timber industry publication by BC logging company TimberWest, which discusses the experience of the company. Citing the surplus criterion and the ability of processors to block its exports, TimberWest explained that 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.[269] The statements made by a TimberWest representative about the experience of the company, while not made under oath, nevertheless are not contradicted by any record evidence and there is no basis to question the veracity of the statements about the company's experience.

184. Rather, as explained below in the U.S. response to subpart (b) of this question, the experiences of TimberWest and Merrill & Ring are corroborated by other evidence related to the

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[266] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 12 (Exhibit USA-019).

[267] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 32 (pp. 134-136 of the PDF version of Exhibit USA-019).

[268] *See* Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 32 (pp. 134 and 136 of the PDF version of Exhibit USA-019).

[269] Lumber Final I&D Memo, pp. 143-44 and footnote 860 (Exhibit CAN-010) (citing Petition, Exhibit 252 (Exhibit USA-010)). *See also ibid.*, Exhibit 253 (Exhibit USA-010).

general practice of "blocking". In that sense, the USDOC did refer to evidence other than statements made by these two exporters. It was unnecessary, however, for the USDOC to refer the accounting books of the two producers to establish that they sold logs at a loss to multiple domestic consumers, because there was no evidence calling into question their statements, and there was evidence that tended to corroborate their statements.

185. Additionally, in countervailing duty investigations, if it is not practicable to establish individual subsidy rates for each known exporter or producer of the subject merchandise, the SCM Agreement contemplates that the investigating authority may limit its investigation to a limited number of respondents that can reasonably be examined.[270] In this investigation, the UDOC selected four mandatory respondents and one voluntary respondent, none of which included Merrill & Ring or TimberWest.[271] According to its standard investigation procedures, the USDOC only solicited information from the voluntary and mandatory respondents and verified their questionnaire responses.[272]

186. The statements by Merrill & Ring and TimberWest are on the USDOC's record because the petitioner submitted them to the USDOC.[273] While the USDOC considered this record evidence in making its final determination, the USDOC had neither the authority nor the resources to compel additional information from Merrill & Ring and TimberWest because they were not mandatory or voluntary respondents in the investigation. In any event, once again, there was no need because there was nothing on the record to cause the USDOC to doubt TimberWest and Merrill & Ring's accounts regarding their experiences with "blocking".

187. The U.S. second written submission addressed Canada's argument concerning affidavits from two other British Columbia log suppliers who state that they have not experienced "blocking" when exporting logs.[274] It is self-evident that the mere existence of two log suppliers that have not personally experienced "blocking" does not demonstrate that the "blocking" practice does not exist, and it says nothing at all about the veracity of the statements of producers who have represented that they have experienced "blocking".

b. Please comment on whether this evidence was sufficient to establish that it is a pervasive occurrence for multiple log exporters in Nova Scotia exporters to enter into informal agreements with multiple domestic log consumers to

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[270] *See* SCM Agreement, Art. 19.3 (referring to "[a]ny exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate").

[271] Lumber Final I&D Memo, p. 6 (Exhibit CAN-010).

[272] Lumber Preliminary Decision Memorandum, p. 37 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 6-7 (Exhibit CAN-010).

[273] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibits 12, 13 and 32 (Exhibit USA-019); Petition, at Exhibit 252 and 253 (Exhibit USA-10).

[274] *See* U.S. Second Written Submission, para. 368.

prevent having their export applications blocked by any of those domestic consumers?

Response:

188. The United States has not argued and the USDOC did not find that the evidence referenced in the question – *i.e.*, the statements made by two log exporters, Merrill & Ring and TimberWest, to the effect that those two exporters sold logs domestically at unprofitable prices as a result of informal agreements – was sufficient in and of itself to establish that it is a pervasive occurrence for multiple log exporters in British Columbia to enter into informal agreements with multiple domestic log consumers to prevent having their export applications blocked by any of those domestic consumers. Rather, the statements are pieces of evidence that, together with other evidence on the record, tend to support that proposition. As the Appellate Body has observed, "[a] proper assessment by the Panel" would consider "whether the individual piece of evidence being examined could tend to support – not establish in and of itself – the *particular intermediate factual conclusion* that the USDOC was seeking to draw from it."[275]

189. 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 informal agreements that lower export volumes and domestic prices."[276] In addition to the statements by Merrill & Ring and TimberWest, the USDOC also discussed and relied upon 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.[277] 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

[275] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 152 (italics in original; underline added).

[276] 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)).

[277] 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).

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.

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%.[278]

190. The petition contained extensive additional information, including a report prepared for the British Columbia Minister of Forests and Range, which is consistent with the explanations given by Merrill & Ring and TimberWest of their experiences with "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.[279]

191. In addition to relying on the sources described above, the USDOC also reasoned 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."[280]

192. Furthermore, the United States underscores that "blocking" was only one part of the USDOC's determination that the LER system suppresses log prices in British Columbia. The other factors are explained in more detail in the U.S. response to question 210 below. The USDOC's finding concerning the LER system, in turn, does not constitute the totality of the USDOC's distortion finding, but rather is one of several factors the USDOC cited in determining that the prices for standing timber generated by BCTS auctions were not market-determined. As explained in the U.S. first written submission:

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[278] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 11, pp. 8-9 (internal footnote omitted) (Exhibit USA-019).

[279] Petition, Exhibit 242, p. 5 (Exhibit USA-010). *See also ibid.*, Exhibit 249 (Exhibit USA-010).

[280] U.S. First Written Submission, para. 593.

> The USDOC's finding that the BCTS auction prices were not a viable tier-one benchmark relied on three distinct grounds: auction prices were limited by the Crown stumpage prices paid by dominant tenure-holding firms; the three-TSL maximum artificially limited the number of bidders in BCTS auctions and created other, additional distortions; and provincial and federal log export restraints suppressed log prices, which impacted stumpage prices.[281]

193. All of the above evidence, taken in its totality, supported the USDOC's conclusions concerning "blocking". And the totality of the evidence, including the presence of "blocking", informed the USDOC's determination that the log prices in British Columbia were distorted.

209. <u>To the United States</u>: Record evidence indicates that during the period of investigation, a significant percentage of export authorizations in British Columbia remained unutilized (see Overview of British Columbia log export process, Exhibit CAN-072 (BCI), page 20).

In this light, please respond to the following:

a. Can domestic consumers block exports once an export authorization has been granted? If not, how did the USDOC respond to the possibility that the unutilized export authorizations indicate that the British Columbia exporters were able to export timber in proportion to demand in the exports market, and hence the export regulations did not suppress exports?

<u>Response</u>:

194. Domestic consumers cannot block exports once an export authorization has been granted. The opportunity to block exports arises when private BC log suppliers are forced by the governments of BC and Canada to offer their logs for sale to consumers in BC before they may be granted the opportunity to export their logs. During the two-week period when a BC log supplier must advertise its logs for sale to BC consumers, a BC consumer may make an offer for the logs, and if that offer is deemed fair by a government committee then the export of the logs would be blocked.[282]

195. The USDOC responded to the arguments of Canadian interested parties concerning, *inter alia*, unutilized export authorizations, by explaining that:

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[281] U.S. First Written Submission, para. 375. *See also generally*, "Overview of BC Log Export Process" (Exhibit CAN-072 (BCI)).

[282] *See, e.g.*, U.S. First Written Submission, para. 536 (discussing the BC log export permitting process).

> [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.[283]

196. 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."[284]

b. Can the in-lieu of manufacturing fees and the duration of the export authorization process be considered to be a factor in log producers' export decisions if the producers did not utilize a significant percentage of their export authorizations despite having paid the fees and having gone through the authorization process?

Response:

197. Yes. An unbiased and objective investigating authority could consider the in-lieu of manufacturing fees and the duration of the export authorization process to be factors in log producers' export decisions even though certain producers did not utilize a significant percentage of their export authorizations despite having paid the fees and having gone through the authorization process.

198. 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-

[283] Lumber Final I&D Memo, p. 141 (Exhibit CAN-010) (footnotes omitted).

[284] Lumber Final I&D Memo, p. 142 (Exhibit CAN-010) (underline added).

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.[285]

> 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.[286]

199. 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.

200. The USDOC also explained 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

[285] Lumber Final I&D Memo, p. 141 (Exhibit CAN-010).

[286] 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 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)).

> with foreign purchasers.[287]

For instance, in comparing itself to companies in British Columbia that were able to export under blanket OICs and were thus not subject to the surplus test, Merrill & Ring explained that:

> Canada's less favorable treatment of Merrill & Ring forces it to manage its private land, conduct its log harvesting, and sell its resources from that land in accordance with the log export regime. It is not permitted to freely alienate its logs at the international price. It must incur significant compliance costs, including advertising, sorting and storing the logs.[288]

201. Additionally, a 2014 study by the Fraser Institute, which was on the administrative record of the USDOC's softwood lumber countervailing duty investigation,[289] explained that:

> [T]he current export approval process, and the Surplus Test in particular, adds significant delays and uncertainty into the operations of logging companies. The current log export process prevents log owners from securing long-term contracts with foreign buyers to shelter from price volatility, prevents log owners from sorting logs per customer request, and imposes delays that increase log-handling costs and ties up capital.[290]

202. The totality of the evidence on the record and the explanations provided by the USDOC provide ample support for the conclusion that the in-lieu of manufacturing fees and the duration of the export authorization process were factors in log producer's export decisions.

203. This would be true even for producers that ultimately decided not to utilize export authorizations. The USDOC did not address the question the Panel has asked directly. The USDOC gave its reasons for its determination and the Panel must take those reasons as they are and review them. The question for the Panel is whether the USDOC's conclusions are supported by evidence and are such conclusions as an objective and unbiased investigating authority could make, even if another investigating authority or the Panel itself might have reached a different conclusion.

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[287] Lumber Final I&D Memo, p. 154 (Exhibit CAN-010).

[288] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 12 (Exhibit USA-019).

[289] *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 (Exhibit USA-010).

[290] 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).

204. That being said, the United States offers some additional comments in response to this question, which expressly are not intended to be in the nature of an *ex post* rationalization for the USDOC's determination. Again, the USDOC did not directly address the Panel's question in precisely the way that the Panel has framed the question. But, one can apply logic and draw certain conclusions about why a log supplier might go through the process of getting an export authorization but then not use it. One potential reason is that the log supplier was not able to get a better price for those specific logs on the export market. This is consistent with the view that a rational company would seek to obtain an export authorization for its logs to ensure that it would be able to export those logs in the event it obtained a better price for those logs in an export market than in the domestic market. However, because companies would not necessarily sell all their logs in an export market if they obtained a better price domestically, it is expected that companies would not use all of their export authorizations. Another logical explanation is that the log suppliers that went through the process found that they, indeed, as the Fraser Institute report suggested, were stymied in their ability to secure long-term contracts and the delays entailed in the log export permitting process resulted in lost export sales, so the log suppliers were left to look for sales opportunities in BC.[291] These would be reasonable (if speculative) conclusions to draw, and they would be consistent with the USDOC's explanation that "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."[292]

205. However, the USDOC's primary concern was not unutilized export authorizations, but the side agreements that log suppliers must enter into with timber mills before obtaining an export authorization. As the USDOC explained in the final issues and decision memorandum, there is record evidence that companies are forced to enter into such side agreements to supply timber to BC mills to ensure that when the companies apply for export authorizations, the BC mills do not "block" the export authorizations by offering bids on those logs. These side agreements are a concern because they result in a depression of prices and distort the market in British Columbia.

210. In response to the Panel's questions during the second substantive meeting, Canada asserted that evidence concerning the existence of the "blocking system" in British Columbia pertained to companies in the British Columbia Coast, and not British Columbia Interior. Furthermore, Canada asserted that evidence concerning Merrill & Ring was derived from their legal submissions in arbitration proceedings that Merrill & Ring lost.

a. To Canada: Please point to record evidence that supports these assertions.

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[291] *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).

[292] Lumber Final I&D Memo, p. 141 (Exhibit CAN-010) (footnotes omitted).

Response:

206. This subpart of the question is directed to Canada.

b. To the United States: Please respond to these assertions.

Response:

207. With respect to Canada's first assertion that evidence concerning the existence of the "blocking system" in British Columbia pertained to companies in the British Columbia Coast, and not British Columbia Interior, Canada's assertion is belied by evidence on the USDOC's record. In particular, a report on the USDOC's administrative record, which was prepared for the British Columbia Minister of Forests and Range, expressly references information obtained from "interior log producers".[293] Specifically, that report, entitled "Generating More Wealth from British Columbia's Timber: A Review of British Columbia's Log Export Policies," states that:

> 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.[294]

208. Similarly, the Wilson Report explains that "[a]lmost every timber harvester has negotiated side agreements to keep its exports from being blocked."[295] Based on this explanation in the Wilson Report, the USDOC concluded in its final determination that "this practice [of

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[293] Petition, Exhibit 242, p. 5 (Exhibit USA-010). *See also ibid.*, Exhibit 249 (Exhibit USA-010).

[294] Petition, Exhibit 242, p. 5 (Exhibit USA-010). *See also ibid.*, Exhibit 249 (Exhibit USA-010) (underline added).

[295] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 11, p. 9 (Exhibit USA-019).

blocking] is wide spread throughout the province."[296]

209. Furthermore, Joel Wood's Report for the Fraser Institute, "Log Export Policy for British Columbia," quoting from a 2002 report by Haley, explained that:

> Haley (2002) argues that in the interior the Surplus Test being applied to standing timber leads to "blocking":
>
> > This takes place when a wood processor who does not "need" the logs being advertised nevertheless puts in a bid for them simply to prevent or block, their export ... When logs are advertised for export as "standing green" the bidder is unlikely to be required to take delivery at the bid price since, in most cases, in the absence of an export permit the stand in question is simply not harvested. Under these circumstances, frivolous bids bear no consequences and are difficult to detect.[297]

210. With respect to Canada's second assertion concerning the evidence from Merrill & Ring, Canada seems to imply that the final disposition of the earlier arbitration impugns the accuracy or weight of the statements Merrill & Ring provided during the course of that proceeding. However, the accuracy of statements submitted during a proceeding and the final outcome of that proceeding are separate issues. Canada has offered no evidence that Merrill & Ring's statements were inaccurate, or the extent to which they affected the final decision in the NAFTA proceeding.

211. Additionally, as explained above in the U.S. response to question 208, subpart (a), the statements by Merrill & Ring that were before the USDOC came not only from filings in an arbitration, but also from a sworn affidavit of a representative of Merrill & Ring.[298] It would be a criminal act for the company representative to have given untruthful information in making the sworn statement. It is shocking that Canada would suggest, without any evidence whatsoever, that the company representative committed perjury in making the statement.

212. There simply is no evidence whatsoever that calls into question the veracity of the company's statements about its own experience with "blocking". Accordingly, the USDOC had no reason not to believe that those statements, on which it relied in the final issues and decision

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[296] Lumber Final I&D Memo, p. 140 (Exhibit CAN-010).

[297] 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).

[298] *See* Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 32 (pp. 134 and 136 of the PDF version of Exhibit USA-019).

memorandum,[299] nor does Canada offer any evidence establishing or even suggesting that the company's statement were inaccurate. Furthermore, as demonstrated above in the U.S. response to question 208, Merrill & Ring's statements were corroborated by additional record evidence.

213. Once again, Canada has made assertions that not only lack support in the evidence, but that are directly contradicted by the evidence on the record.

211. <u>To both parties</u>: In responding to one of the Panel's questions during the second substantive meeting of the Panel, the United States and Canada expressed different viewpoints regarding the nature of the BCTS auctions. Canada stated that the BCTS auctions system was designed for the purpose of maximizing revenue, in a manner a private timber seller would. The United States stated that the BCTS auction system was designed to achieve other public policy purposes related to constituent interests.

Can both parties confirm if this characterization describes your view? If so, please provide the evidentiary basis for your characterization of the purpose of the BCTS auction system.

<u>Response</u>:

214. The United States confirms that the Panel's characterization of the U.S. statement during the second substantive meeting is correct. The BCTS auction system was designed to achieve other public policy purposes, and this is confirmed by record evidence.

215. Specifically, the supplemental questionnaire response submitted by the Government of British Columbia on May 30, 2017, Exhibit BC-SUPP3-6, "BC Timber Sales Opportunity Review: Final Report" at page 4, states that "While BCTS aims to maximize net revenues, its ability to pursue market opportunities and to reduce fibre supply in weak market conditions is limited by its pricing mandate which requires it to harvest the profile and continually test the market in all market conditions."[300]

216. The USDOC, in explaining why it disagreed that BCTS auction prices should serve as a tier-one benchmark, noted in the final issues and decision memorandum that the Canadian parties "argue that these BCTS auctions generate valid market prices . . . which in turn set the stumpage

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[299] Lumber Final I&D Memo, p. 140, footnote 844 (Exhibit CAN-010) (citing Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibits 12, 13, and 32 (Exhibit USA-019)).

[300] *See* "BC Timber Sales Opportunity Review: Final Report", p. 4 (Exhibit BC-SUPP3-6 attached to BC Supplemental Questionnaire Response (May 30, 2017) (Exhibit USA-090).

prices for the rest of the province."[301] The USDOC then noted that "[t]he petitioner contends, in rebuttal, that the Department was correct in not using BCTS auction prices for tier-one benchmarks in the *Preliminary Determination*, and should continue not to use these prices in the final determination."[302] The USDOC cites pages 15-21 of the petitioner's rebuttal brief as the reference for that statement.[303] The petitioner's rebuttal brief, at page 20, highlights the quote from the BC supplemental questionnaire response as evidence that the BCTS auction program was designed to achieve other public policy purposes related to constituent interests:

> Finally, as the GBC's own study acknowledges, the BCTS program operates under multiple mandates – not simply to maximize revenue in the manner of a private landowner, but also to generate prices for the tenure system: "While BCTS aims to maximize net revenues, its ability to pursue market opportunities and to reduce fibre supply in weak market conditions is limited by its pricing mandate which requires it to harvest the profile and continually test the market in all market conditions." [quoting Exhibit BC-SUPP3-6, "BC Timber Sales Opportunity Review: Final Report" at page 4] In other words, BCTS is constantly aware, when choosing which stands to auction and when to auction them, of not only how to maximize its own revenues, but also how the quantity, type, and location of the timber it sells will generate auction prices that have an impact on determining future tenure prices. These multiple mandates mean that BCTS auction sales are <u>not</u> fully market transactions of the type that would be generated in a truly private market. And the very existence of these mandates confirms that the BCTS price is intertwined with BC tenure prices, such that it cannot serve as an independent benchmark.[304]

217. The statement in BC's own study illustrates that, despite what Canada has argued about BC's auction system, the BCTS program is still an instrument of public policy and one that operates according to a government mandate, even when contraindicated by market conditions. The fact that the USDOC recognizes that some auctions will qualify as potential benchmark sources does not mean that the USDOC had an obligation to overlook these features in the BCTS auctions.

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[301] Lumber Final I&D Memo, p. 55 (Exhibit CAN-010).

[302] Lumber Final I&D Memo, p. 55 (Exhibit CAN-010).

[303] Lumber Final I&D Memo, p. 55 (Exhibit CAN-010).

[304] *See* Petitioner's Rebuttal Brief, pp. 20-21 (pp. 41-42 of the PDF version of Exhibit USA-071) (underline in original).

212. <u>To both parties</u>: In responding to one of the Panel's questions during the second substantive meeting of the Panel, the parties disagreed on the role that government predominance plays in the assessment of whether local prices are distorted and an out-of-market benchmark is necessary.

Please explain your position on this issue in light of the text of Article 14 of the SCM Agreement and any relevant jurisprudence.

<u>Response</u>:

218. As the United States observed during the second substantive meeting, Canada has erred greatly in reaching the conclusion that government predominance is irrelevant to the question of distortion.[305]

219. Canada asserts that, even where the government controls over 90 percent of the supply, because British Columbia has an auction system, the "level of government 'predominance' in B.C. is therefore completely irrelevant."[306] Based on this erroneous premise, Canada argues that "market concentration . . . is likewise irrelevant" because "government predominance is irrelevant."[307] These statements reflect a total disregard for the facts in this dispute, the applicable law, and the relevant analysis that the USDOC, together with the parties, undertook in the investigative process. As if to suggest that these were not the central issues examined in the investigation, Canada argues: "The United States continues to insist, however, that both government predominance and market concentration were relevant to Commerce's distortion analysis."[308]

220. But the relevance of government predominance and market concentration is not the result of U.S. "insistence". Rather, this is what the USDOC explained in its determination.[309] As set out in the U.S. first written submission,[310] the USDOC concluded "that the prices generated from the BCTS auctions (and, in turn, the MPS stumpage rates that are calculated <u>using these auction prices</u> for the remainder of the province) do not produce valid market-determined prices"[311]

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[305] *See*, *e.g.*, U.S. Second Opening Statement, paras. 13-14 (quoting Canada's Second Written Submission, paras. 53, 57, and 58).

[306] *See* Canada's Second Written Submission, para. 53.

[307] *See* Canada's Second Written Submission, para. 57.

[308] *See* Canada's Second Written Submission, para. 58.

[309] *See* U.S. Second Written Submission, paras. 267-272; Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

[310] *See* U.S. First Written Submission, paras. 363-366.

[311] Lumber Final I&D Memo, p. 56 (Exhibit CAN-010).

because the auction "prices are effectively limited by the prices that large tenure-holders paid for Crown stumpage under their own tenures."[312] Thus, the USDOC reasoned that "these prices cannot serve as benchmarks to measure the adequacy of remuneration for Crown-origin standing timber, because they do not reflect market-determined prices from competitively run government auctions."[313]

221. In spite of the total absence of ambiguity on this point of law, Canada persisted in arguing at the second substantive meeting that predominance is irrelevant whether or not the BC government supplies 90 percent of the timber, because, according to Canada's assertions at the meeting, the presence of an auction system prevents the BC government from influencing prices by exerting its market power. But the Appellate Body in *US – Softwood Lumber IV* very clearly set out why this kind of thinking is incorrect and would result in a reading of Article 14(d) that is unsound and could undermine the effectiveness of the subsidies disciplines to which Members agreed in the SCM Agreement.[314] In that report, the Appellate Body explained:

> In analyzing this question, we have some difficulty with the Panel's approach of treating a situation in which the government is the sole supplier of certain goods differently from a situation in which the government is the predominant supplier of those goods. In terms of market distortion and effect on prices, there may be little difference between situations where the government is the sole provider of certain goods and situations where the government has a predominant role in the market as a provider of those goods. 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, inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices. This would be so even if the government price does not represent adequate remuneration. The resulting comparison of prices carried out under the Panel's approach to interpreting Article 14(d) would indicate a "benefit" that is artificially low, or even zero, such that the full extent of the subsidy would not be captured, as the Panel itself acknowledged. As a result, the subsidy disciplines in the *SCM Agreement* and the right of Members to countervail subsidies could be undermined or

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

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

[314] *See US – Softwood Lumber IV (AB)*, para. 100.

> circumvented when the government is a predominant provider of certain goods.[315]

222. In addition to overlooking the concerns described in the Appellate Body report in *US – Softwood Lumber IV*, Canada compounded its error by further arguing that all the prices in British Columbia should be considered as a benchmark because the BCTS auction sets all the prices. In other words, Canada has argued that all prices in British Columbia will reflect the alleged subsidies, because it argues that all stumpage prices for Crown timber are set using the same government pricing mechanism. Canada is explicitly arguing that the government price should be compared to itself. The Appellate Body explained in *US – Softwood Lumber IV* why comparing the allegedly subsidized price to a price that reflects the same government pricing mechanism would lead to a circular comparison, which would be meaningless and could not provide any information about whether the good was provided for less than adequate remuneration. This, the Appellate Body found, would be an incorrect application of the terms of Article 14(d) of the SCM Agreement.[316] Canada's attempt to revive such an approach should be rejected in this lumber dispute as well.

223. Finally, the United States respectfully refers the Panel to the U.S. first written submission at paragraphs 46-47, 75-78, and 85-102, the U.S. responses to the Panel's first set of questions at paragraphs 18-19 and 22, and the U.S. second written submission at paragraphs 264-272, wherein the United States further discusses the issues raised by this question.

213. <u>To the United States</u>: Canada argued that BCTS auction prices cannot be limited by what the tenure holders are willing to pay because BCTS auction prices are what determine long-term tenure prices, and not the other way around.

Please respond to this argument, pointing to record evidence.

<u>Response</u>:

224. Canada's argument ignores the key point, explained in the U.S. first written submission, that "[t]he common identity of the dominant firms consuming TSL-harvested timber and harvesting timber from TFLs and FLs informed the USDOC's analysis of whether the BCTS auction prices were competitive and open and independent, particularly in a market where the government is virtually the only seller of significance."[317]

225. As explained in the U.S. response to question 206 above, while most of the participants in

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[315] *US – Softwood Lumber IV (AB)*, para. 100 (footnotes omitted) (underline added).

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

[317] U.S. First Written Submission, para. 378.

the BCTS auctions are independent loggers, five dominant tenure-holding firms consume a significant volume of timber sold at auction. Those same firms also hold the majority of TFL and FL harvests, which are comparatively much larger and are priced according to the BCTS winning bids.[318] Therefore, as explained in the U.S. second written submission, "the prices paid by these loggers key off prices that the dominant tenure-holding sawmills are willing to pay."[319]

214. To Canada: At paragraphs 39 and 42 of its opening statement at the second substantive meeting of the Panel, Canada argues that the USDOC failed to show that the BCTS auction prices were "actually distorted" due to the LEP process. Similarly, in paragraph 40, Canada argues that the USDOC erred by "simply assum[ing] [that the LEP process exerted] an unspecified degree of 'downward pressure' on B.C. log prices".

Is Canada suggesting that the USDOC ought to have quantified the impact of LEP auction prices on BCTS auction prices and log prices in British Columbia? If so, how does Canada reconcile this view with the Appellate Body observation in *US – Countervailing Measures (China) (Article 21.5)* (paragraph 5.154) that "[d]epending on circumstances, a qualitative analysis may also appropriately establish how government intervention actually results in price distortion, provided that it is adequately explained"?

Response:

226. This question is directed to Canada.

7 THE EXPORT PERMITTING PROCESS FOR BRITISH COLUMBIA LOGS

215. To Canada: At paragraph 129 of Canada's first written submission, Canada notes:

> **If the offer is deemed fair, the logs will not be authorized for export and the offeror is bound to pay what they bid. However, the seller is not similarly constrained, and could choose to sell to someone else…**

a. Please explain, pointing to record evidence, the criteria used to determine the fairness of these offers.

b. Please clarify who are the other buyers, if the seller decides not to sell logs to

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[318] *See* Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 57-58 (Exhibit CAN-010).

[319] U.S. Second Written Submission, para. 269.

the offeror.

Response:

227. This question is directed to Canada.

216. To both parties: Article 1.1(a)(1)(iv) of the SCM Agreement provides:

> **[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. (emphasis added)**

Please elaborate on your understanding of the meaning and purpose of the second element of this provision (underlined). How does consideration of this requirement depend on the Panel's finding on the first requirement regarding entrustment and direction?

Response:

228. Per the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the meaning of the covered agreements, including the second element of Article 1.1(a)(1)(iv) of the SCM Agreement, is to be discerned by applying customary rules of interpretation of public international law.[320] Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") has been recognized as reflecting such customary rules.[321] Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Accordingly, the United States discusses below considerations relevant to the Panel's application of customary rules of interpretation to the portion of the provision underlined in the Panel's question.

229. The second element of Article 1.1(a)(1)(iv) calls for consideration of whether the "type of function[]" "carr[ied] out" by "a private body", which is referenced in the first element of Article 1.1(a)(1)(iv) and which is under examination in the context of a financial contribution analysis, "would normally be vested in the government and the practice, in no real sense, differs from

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[320] *See* DSU, Art. 3.2 (Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.").

[321] *US – Gasoline (AB)*, p. 17.

practices normally followed by governments."

230. The term "type" is defined as "[t]he general form, structure, or character distinguishing a particular group or class of things … [a] class of people or things distinguished by common essential characteristics; a kind, a sort … [a] person or thing showing the characteristic qualities of a class; a representative specimen".[322] The term "function" is defined as "a particular activity or operation (among several)".[323] These dictionary definitions suggest that the ordinary meaning of the term "type of functions" is broad and refers to the "kind" or "sort" or "class" of "activity or operation" "which would normally be vested in the government".

231. The term "type of functions" also is associated with the term "illustrated in (i) to (iii) above", which plainly is a reference to the activities described in Articles 1.1(a)(1)(i), (ii), and (iii). The use of the term "illustrated" again suggests that type of function carried out by a private body[324] may not necessarily be the same, actual, precise function "which would normally be vested in the government", but needs to be among the "kind … sort … [or] class" of such functions.

232. Furthermore, Article 1.1(a)(1)(iv) refers to "one or more of the type of functions … which would normally be vested in the government."[325] Article 1.1(a)(1)(iv) does not refer to one or more of the type of functions which are vested in the government. The term "would" as it is used in Article 1.1(a)(1)(iv) is a modal verb[326] in the present unreal conditional form.[327] The present unreal conditional form "is used to talk about what you would generally do [or what would generally be the case] in imaginary situations."[328] The use of the term "would normally be" instead of the term "are" indicates that it is not necessary to establish that the government alleged to have entrusted or directed a private body actually performs the precise function carried out by the private body, but that the government normally would be vested with that type of function, and also "the practice, in no real sense, differs from the practices normally followed by

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[322] Definition of "type" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 3441 (Exhibit USA-079).

[323] Definition of "function" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1042 (Exhibit USA-080).

[324] The term "carr[ied] out" means to "perform, conduct to completion, put into practice". Definition of "carry out" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 343 (Exhibit USA-081).

[325] SCM Agreement, Art. 1.1(a)(1)(iv) (underline added).

[326] *See* Definition of "would" from englishpage.com (Exhibit USA-008).

[327] *See* Explanation of Present Conditionals from englishpage.com (Exhibit USA-009).

[328] Explanation of Present Conditionals from englishpage.com (Exhibit USA-009).

governments."[329]

233. The term "normally" means "[i]n a regular manner; regularly … [u]nder normal or ordinary conditions; as a rule, ordinarily"[330] and the term "vested" means "[s]ecured or settled in the possession of or assigned to a person etc."[331] Again, these terms support the understanding that the "type of function[]" "carr[ied] out" by "a private body" "ordinarily" – though perhaps not always – would be "assigned" to "the government". That is, the government would have the power or authority to perform the type of function, even if the government does not actually use that authority to perform that type of function.

234. The parties appear to agree on the meaning of the terms "a government", "the government", and "governments" in Article 1.1(a)(1)(iv).[332] In sum, "a government" refers to the government or public body that allegedly has entrusted or directed a private body, "the government" refers back to the same, and the term "governments" at the end of the provision refers to governments other than the government under examination, for example governments in other jurisdictions within the Member or even governments in other Members of the WTO. As Canada observed, the term "governments" "must refer to governments more generally."[333]

235. Article 1.1(a)(1)(iv) also refers "practices" which would normally be vested in the government and which do not differ, in any real sense, from "practices" normally followed by governments. The use of the term "practice" implies that entrustment or direction is not limited to any particular official or formal program, but also includes broader "practices" in which governments engage. Furthermore, the phrase "in no real sense" also suggests that Members were seeking to avoid circumvention. The practice of a private body need not necessarily be identical to a practice of the particular government at issue or even the practices normally followed by governments, but rather must be determined to, "in no real sense," differ from such practices – *i.e.*, not differ in any real sense.

236. In sum, the terms of the second element of the provision, which are underlined in the question, indicate that what is called for is an examination of whether the "kind … sort … [or]

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[329] SCM Agreement, Art. 1.1(a)(1)(iv).

[330] Definition of "normally" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 1940 (Exhibit USA-082).

[331] Definition of "vested" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 3570 (Exhibit USA-083).

[332] *See* U.S. Responses to the First Set of Panel Questions, paras. 397-401; Canada's Responses to the First Set of Panel Questions, para. 357.

[333] Canada's Responses to the First Set of Panel Questions, para. 357.

class"[334] of "activity or operation"[335] entrusted or directed to a private body to "perform"[336] is that which "ordinarily"[337] – though not always – would be "assigned"[338] to the government or public body in question, and that kind or sort or class of activity or operation does not differ in any real sense from the kinds or sorts or classes of activities or operations ordinarily followed by governments generally.

237. The Panel's consideration of this requirement in the second element of the provision "depend[s]", using the words of the question, "on the Panel's finding on the first requirement regarding entrustment and direction" in the sense that the Panel's understanding of the kind or sort or class of activity or operation that the USDOC found that private bodies were entrusted or directed to undertake will inform the Panel's review of the USDOC's application of the second element of the provision in the underlying countervailing duty investigation. Here, as Canada has agreed, the USDOC "found that the B.C. LEP process was the mechanism through which the Governments of British Columbia and Canada allegedly entrusted or directed private parties to provide goods (*i.e.* logs) to the B.C. respondent companies."[339] In other words, the kind or sort or class of activity or operation at issue is the provision of goods, which is a type of function illustrated in Article 1.1(a)(1)(iii) of the SCM Agreement.

238. The question also asks about the "purpose of the second element of this provision". The United States observes that, as noted above, Article 31 of the Vienna Convention has been recognized as reflecting customary rules of interpretation.[340] Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In Article 31 of the Vienna Convention, the word "its" refers to the "treaty," or in this case, the SCM Agreement. Article 31 does not contemplate consideration of the purpose of the provision itself in the interpretive analysis of the provision. Logically, the purpose of a provision can be discerned only after consideration of the terms of the provision in

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[334] Definition of "type" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 3441 (Exhibit USA-079).

[335] Definition of "function" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1042 (Exhibit USA-080).

[336] Definition of "carry out" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 343 (Exhibit USA-081).

[337] Definition of "normally" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 1940 (Exhibit USA-082).

[338] Definition of "vested" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 3570 (Exhibit USA-083).

[339] Canada's Responses to the First Set of Panel Questions, para. 332 (underline added).

[340] *See US – Gasoline (AB)*, p. 17.

their context and in light of the object and purpose of the treaty. Reasoning about the interpretation of a provision from the purported purpose of the provision could lead to an erroneous interpretation.

239. That being said, by its terms, Article 1.1(a)(1) of the SCM Agreement concerns whether there is a "financial contribution" by a government or any public body. It is, *inter alia*, an attribution provision. Ultimately, the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government. As the Appellate Body has reasoned, Article 1.1(a)(1):

> defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member.[341]

The Appellate Body has further reasoned that Article 1.1(a)(1)(iv) "is intended to ensure that governments do not evade their obligations under the SCM Agreement by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself. In other words, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision."[342]

240. The above reasoning from prior reports is logical and accords with the terms of Article 1.1(a)(1)(iv) of the SCM Agreement, and the Panel should take it into account when undertaking its own analysis pursuant to customary rules of interpretation. As it does so, the Panel should seek to avoid an interpretation that would permit circumvention of the disciplines of the SCM Agreement, *i.e.*, one that would permit Members to use private bodies to transfer value to recipients in a manner that, if the government did so directly, the transfer plainly would be subject to the SCM Agreement's rules, including the imposition of countervailing duties.

241. When Article 1.1(a)(1)(iv) of the SCM Agreement is properly interpreted, it is clear that Members did not intend that governments be able to evade the subsidy disciplines by using other means of granting subsidies – that is, means that differ in no real sense from those normally used by governments. To ensure that governments do not provide market-distorting subsidies through private bodies, it is necessary to accord a proper interpretation to the terms of Article 1.1(a)(1)(iv) under customary rules of interpretation. It is incumbent that this provision be interpreted in a manner that recognizes that there are many ways in which a government might exercise its leverage over private bodies to accomplish tasks that normally the government would

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[341] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.

[342] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 113.

undertake.

217. To the United States: At paragraph 380 of its second written submission, the United States argues:

> **As the USDOC explained, "logs are harvested from standing timber in forests." Providing a good – timber – is unquestionably a function normally vested in the Government of British Columbia, which provides access to government-owned timber through a licensing system. Given the low degree of processing required to create a log from standing timber, control over (and provision of) standing timber is closely linked to control over (and provision of logs).**

How does the United States reconcile its argument above with the USDOC's observation at page 48 of the final determination that standing timber is a different product from harvested logs?

Response:

242. As Canada itself has asserted, "[s]tanding timber and logs are similar goods".[343] That said, standing timber and logs are not the same good. The USDOC explained, in the context of the benefit analysis, that "the good at issue in this investigation is stumpage," *i.e.*, standing timber, and thus "a market-determined stumpage price is the preferred benchmark".[344] Of course, while it is preferable to use as a benchmark a market-determined price for the same good that is under investigation, it is also possible, when necessary, to use as a benchmark a market-determined price or a constructed price for a similar good. This is not a controversial proposition.

243. In the context of the financial contribution analysis, when examining whether there has been entrustment or direction within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, it is not relevant whether the particular good provided by the private body is the same as a particular good actually provided by the government. Canada, however, argues that the USDOC was "required to show … that the provision of logs was a function normally vested in the governments of B.C. and Canada",[345] but, Canada asserts, "British Columbia does not sell logs".[346] Canada misunderstands the requisite analysis under Article 1.1(a)(1)(iv) of the SCM

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[343] Canada's Second Opening Statement, para. 68. *See also ibid*., para. 56.

[344] Lumber Final I&D Memo, p. 48 (Exhibit CAN-010) (underline added).

[345] Canada's Responses to the First Set of Panel Questions, para. 358.

[346] Canada's Responses to the First Set of Panel Questions, para. 359 (underline added).

Agreement.

244. Article 1.1(a)(1)(iv) of the SCM Agreement provides, in relevant part, that a "financial contribution" exists where "a government … 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." The relevant type of function at issue here is the provision of goods,[347] and that type of function is illustrated in Article 1.1(a)(1)(iii) of the SCM Agreement. Article 1.1(a)(1)(iii) provides that a "financial contribution" exists where "a government provides goods or services other than general infrastructure, or purchases goods". Thus, it is relevant to examine whether the function of providing goods is a type of function that would normally be vested in the Government of British Columbia and the Government of Canada.

245. Additionally, Article 1.1(a)(1)(iv) reaches "practices" which would normally be vested in the government and which do not differ, in any real sense, from "practices" normally followed by governments. The use of the term "practice" implies that entrustment or direction is not limited to any particular official or formal program, but also includes broader "practices" in which governments engage.

246. Furthermore, the phrase "in no real sense" also suggests that Members were seeking to avoid circumvention. The practice of a private body need not necessarily be identical to a practice of the particular government at issue or even the practices normally followed by governments, but rather must be determined to, "in no real sense," differ from such practices – *i.e.*, not differ in any real sense.

247. Similarly, Article 1.1(a)(1)(iv) refers to "one or more of the type of functions … which would normally be vested in the government."[348] Article 1.1(a)(1)(iv) does not refer to one or more of the type of functions which are vested in the government. The use of the term "would normally be" instead of the term "are" indicates that it is not necessary to establish that the government alleged to have entrusted or directed a private body actually performs the precise function carried out by the private body, but that the government normally would perform that type of function, and also "the practice, in no real sense, differs from the practices normally followed by governments."[349]

248. The implication of Canada's argument is that a government must itself have previously undertaken the particular function – *i.e.*, providing the specific good – for that function ever to be considered "normally … vested in the government." In other words, if the government itself has not previously provided the particular good, then, according to Canada's argument, that

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[347] *See, e.g.*, Canada's Responses to the First Set of Panel Questions, para. 332.

[348] SCM Agreement, Art. 1.1(a)(1)(iv) (underline added).

[349] SCM Agreement, Art. 1.1(a)(1)(iv).

government could explicitly require a private body to provide the particular good to a particular recipient at a particular price – or for no compensation at all – and that government action would not be addressable under the SCM Agreement. Canada's position is untenable and plainly inconsistent with the terms of Article 1.1(a)(1)(iv) of the SCM Agreement.

249. The Government of British Columbia is, without question, normally vested with the function of providing goods, including, *inter alia*, providing timber. Canada makes no attempt to argue that this is not the case. Providing a similar good – logs – that is used for a similar purpose – the production of softwood lumber products – "in no real sense, differs from the practices normally followed" by the governments of British Columbia, Canada, and governments generally, many of which provide goods.

218. <u>To Canada</u>: At paragraph 52 of the United States' opening statement at the second substantive meeting of the Panel, the United States argues that "Canada continues to assert that the USDOC took an effects-based approach to its analysis of British Columbia's log export restraints. This is false, as the United States has demonstrated." (footnote omitted)

Please respond to the United States' argument above.

<u>Response</u>:

250. This question is directed to Canada.

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

219. At page 117 of the final determination, the USDOC noted:

> **[T]he source documents demonstrate that the non-sawmills paid a stumpage price for standing timber and not, as the Canadian Parties' claim, a price that reflects only a portion of a harvested log. Our review of source documents for other transactions contained in the NS Survey also reflect the purchase of standing timber, as opposed to the purchase of a portion of harvested log.**

a. <u>To Canada</u>: Please comment on this finding of the USDOC.

<u>Response</u>:

251. This subpart of the question is directed to Canada.

b. <u>To the United States</u>: Please point to evidence on the record on the basis of

which the USDOC made this finding.

Response:

252. The USDOC explained that it relied on the underlying source documents for the transactions examined at verification, which include [[***]], among other relevant documents, such as [[***]], as indicated in the USDOC's verification report for the Government of Nova Scotia.[350]

c. To both parties: Please clarify by pointing to record evidence if the timber sale transactions that the Nova Scotia benchmark was based on involved (a) the sale of all trees in a particular stand at same price; or (b) the sale of different trees within the same stand at different prices, but only a single price for a particular tree; or (c) the sale of different parts of an individual tree for different prices. Was Nova Scotia different from the other provinces in this respect?

Response:

253. As noted in response to subpart (b) of this question, the underlying source documents, which include [[***]], provide evidence that illustrates the kinds of sale transactions involved.[351] Canada has not presented any evidence of differences in this regard that would differentiate between Nova Scotia and other provinces, except for pointing to sale terms that differ as a result of government-imposed conditions.

220. To the United States: Page 4 of the Nova Scotia verification report (Exhibit CAN-318) states:

> **GNS officials explained that based on the general characteristics of a tree, the harvester can determine the best use of the tree. They added that trees can produce several different types of log types (*e.g.*, pulplog, studwood, sawlog). In such instances, the seller of the tree would sell the section of**

[350] *See* Lumber Final I&D Memo, p. 117 (Exhibit CAN-010) (citing Nova Scotia Verification Report (Exhibit CAN-511 (BCI)) and accompanying verification exhibits at Exhibit USA-051 (BCI) (containing 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)).

[351] *See* Lumber Final I&D Memo, p. 117 (Exhibit CAN-010) (citing Nova Scotia Verification Report (Exhibit CAN-511 (BCI)) and accompanying verification exhibits at Exhibit USA-051 (BCI) (containing 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)).

> **the tree to the appropriate mill for that quality of the wood (*e.g.*, the studwood length to a studmill, the sawmill length to a sawmill, etc.).**

Does this excerpt support Canada's argument at paragraph 797 of its first written submission that different parts of the same tree were sold for different prices in Nova Scotia?

Response:

254. The argument that Canada presents at paragraph 797 of its first written submission is misleading. Canada ignores that the purchaser gets value from the entirety of the tree, but in doing so, assigns the appropriate values to the appropriate parts – *i.e.*, sawlog value for the parts used/usable for sawlogs, and roadside value for the parts used/usable for other purposes that the mill is not interested in consuming itself (and thus can sell for value to another entity that is interested in consuming those parts, *e.g.*, pulpwood to a paper company). This makes sense, and this is what happens in practice. The purchaser values stumpage for the purpose that is relevant to the purchaser (*e.g.*, a mill purchasing for sawlogs) and transfers the remainder for value on the open market to another purchaser who values the size and type of those other parts of the tree. The USDOC addressed this in the final issues and decision memorandum:[352]

> Canadian Parties argue this fact demonstrates that the survey data do not, as the GNS claims, reflect use-based definitions for log types and that the survey data do not contain prices for standing timber but instead reflect prices paid for only part of the harvested tree. We disagree with the Canadian Parties' arguments. In discussing how sawmills use sawlogs and studwood logs in their production process and the types of mills that use softwood logs and studwood logs, the GNS stated the following:
>
> > . . . based on the general characteristics of a tree, the harvester can determine the best use of the tree. [The Government of Nova Scotia] added that trees can produce several different types of log types (*e.g.*, pulplog, studwood, sawlog). In such instances, the seller of the tree would sell the section of the tree to the appropriate mill for that quality of the wood (*e.g.*, the studwood length to a studmill, the sawmill length to a sawmill, etc.).
>
> At verification, the officials who conducted the NS Survey

[352] *See* Lumber Final I&D Memo, p. 117 (Exhibit CAN-010).

> explained that "Companies will sell the portion of the harvest not suited to their mill as roadside sales to other mills," . . . [T]he source documents demonstrate that the non-sawmills paid a stumpage price for standing timber and not, as the Canadian Parties' claim, a price that reflects only a portion of a harvested log. Our review of source documents for other transactions contained in the NS Survey also reflect the purchase of standing timber, as opposed to the purchase of a portion of harvested log.[353]

255. Canada's arguments on this point continue to lack merit.

221. <u>To Canada</u>: At paragraph 801 of its first written submission, Canada noted:

> **The strong presence of the pulp and paper industry in Nova Scotia is reflected in its consumption of the province's primary forest products. Pulp mills directly purchased 28% of the province's total primary forest product harvest and 39% of the harvest was intended for a pulp mill.**

At the same time, at paragraph 798 of Canada's first written submission, Canada also noted that harvesters in Nova Scotia did not expect to make profit on pulpwood sales. Please explain why harvesters in Nova Scotia are unable to sell pulpwood for a profit despite the strong demand for pulpwood in the province.

<u>Response</u>:

256. This question is directed to Canada.

222. <u>To Canada</u>: At paragraph 803 of its first written submission, Canada referred to the following portion of the Asker Report in order to support its claim that "the demand from pulp mills creates an alternative source of demand for standing timber in the province and fuels the demand for residual chips", which is a prevailing market condition that has a bearing on stumpage prices in Nova Scotia:

> **The existence of a nearby paper industry has meant that sawmills can find a purchaser for residual fiber that can be used as pulp. Competition for fiber supply and difficulties in procuring fiber have posed challenges for the pulp and paper sectors in Nova Scotia. The increased value for these residual products would be reflected in higher stumpage prices.**

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[353] *See* Lumber Final I&D Memo, p. 117 (Exhibit CAN-010).

Please indicate whether there was any record evidence before the USDOC other than this assertion in the Asker Report that would indicate that the demand for residual chips resulted in higher stumpage prices in Nova Scotia? Would sawmills necessarily use the additional income obtained through sale of residual chips to pay more for stumpage rights?

Response:

257. This question is directed to Canada.

223. To Canada: At paragraph 44 of its response to the Panel's question no. 8 Canada asserts:

> **Alberta and Ontario have stumpage prices that reflect the predominant SPF species in these provinces. Alberta and Ontario reflect the differences in the species harvested in their regional markets through the cost surveys of the provincial softwood industries, which are used to set stumpage rates in these provinces.**

Please explain precisely how the cost surveys referred to above show that Alberta and Ontario take into account differences in species in setting their respective Crown timber prices.

Response:

258. This question is directed to Canada.

224. To Canada: At paragraph 62 of its response to the Panel's question no. 11, Canada states that "each tree can produce different timber products, and every tree includes smaller, lower-quality and lower-value timber." In light of this statement, please confirm the understanding that the terms "sawlog", "studwood" and "pulpwood" refer to different parts of the same tree, and not to different types of trees.

Response:

259. This question is directed to Canada.

225. At paragraph 812 of its first written submission, Canada asserts that:

> **Commerce also failed to consider the cost to lumber producers of transporting lumber from mills to market, despite Alberta having raised the fact that this cost was significant in that province. The price of transporting lumber from mill to**

market affects what mills are willing to pay harvesters for logs, and in turn what harvesters are willing to pay to harvest standing timber.

a. <u>To Canada</u>: Please explain by referring to record evidence how the cost of transporting manufactured lumber to the market is linked to stumpage prices.

<u>Response</u>:

260. This subpart of the question is directed to Canada.

b. <u>To the United States</u>: Please explain the basis on which the USDOC considered this factor to not have a bearing on the comparability of the Nova Scotia benchmark to stumpage prices in Alberta.

<u>Response</u>:

261. In the context of a tier-one benchmark, the downstream transportation costs are not relevant to determining the adequacy of remuneration for the good in question, which is stumpage.[354] Canada's argument that transporting finished products to market may be more costly in other provinces, thereby potentially affecting harvesting decisions, reflects Canada's misunderstanding of the relevant inquiry under Article 14(d) of the SCM Agreement. In essence, Canada argues that a proper benchmark price should be established based on consideration of the purchaser's "willingness to pay" (*i.e.*, taking into account the subsidy recipient's full range of financial or economic circumstances) – rather than based on observed actual transaction prices that other producers paid to obtain the good in question on the market, as opposed to obtaining the good from the government. Nothing in the text of Article 14(d) of the SCM Agreement supports the approach for which Canada argues.[355]

226. <u>To Canada</u>: At paragraph 782 of its first written submission, Canada argues that because of "longer growing season and faster regeneration" in Nova Scotia, "Nova Scotia sawmills will likely require a smaller forested geographic area to sustain their operations and will have lower transportation costs."

Please refer to record evidence that shows that longer growing season and faster regeneration have an impact on stumpage prices.

<u>Response</u>:

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[354] *See* U.S. Second Written Submission, Section II.B.1.

[355] *See* U.S. Second Written Submission, Section II.B.1.

262. This question is directed to Canada.

227. <u>To both parties</u>: Where an investigating authority selects a benchmark, please indicate whether the burden of proof lies with the investigating authority to substantiate the suitability of the benchmark or with the responding party to disprove the suitability of the benchmark?

<u>Response</u>:

263. An investigating authority must explain the basis for its findings, including the evidence supporting those findings. Throughout the investigation process, what is necessary to support a finding will depend on the evidence and argument developed on the record of the investigating authority. This process includes, for example, the initial allegations that form the basis for the petition and the evidence supporting those allegations. The United States refers the Panel to the U.S. response to question 155 above, for example, describing the initiation checklist and the process of considering and then investigating the petitioner's allegations of subsidization.

264. The chapeau of Article 14 of the SCM Agreement also provides that the method to calculate the benefit to the recipient shall be set out in the Member's domestic law:

> *Article 14*
>
> *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines: . . .

265. As explained, in addition to the information provided in the petitioner's initial allegation (and the evidence required to support the allegation), the USDOC's benchmark method is set out in the USDOC's regulations. The USDOC explained its regulatory approach to the benefit determination under U.S. law as follows:

> Under 19 CFR 351.511(a)(2), the Department sets forth the basis for identifying benchmarks to determine whether a government good or service is provided for LTAR. These potential benchmarks are listed in hierarchical order by preference: (1) a market-determined price from actual transactions within the country under investigation (tier-one); (2) world market prices that

> would be available to purchasers in the country under investigation (tier-two); or (3) assessment of whether the government price is consistent with market principles (tier-three). This hierarchy reflects a logical preference for achieving the objectives of the statute. In addition, as provided in 19 CFR 351.511(a)(2)(i), we take into consideration product similarity, quantity sold, imported or auctioned, and other factors affecting comparability.[356]

266. The USDOC explained further that:

> The most direct means of determining whether the government received adequate remuneration is a comparison with private transactions for a comparable good or service in the investigated country (*i.e.*, using a tier-one benchmark). We base this on an observed market price for a good, in the country under investigation, from a private supplier (or, in some cases, from a

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[356] Lumber Preliminary Decision Memorandum, pp. 26-27 (Exhibit CAN-008). The United States notes that, in *US – Carbon Steel (India) (AB)*, the Appellate Body upheld the Panel's rejection of India's "as such" challenges to the U.S. benchmark regulation, 19 C.F.R. § 351.511(a)(2)(i)–(iv), which implements U.S. statutory provisions in 19 U.S.C. § 1677(5)(E). *See US – Carbon Steel (India) (AB)*, paras. 4.129, 4.136, 4.177. The relevant statute was included as part of the *Uruguay Round Agreements Act*, 19 U.S.C. § 1677(5)(E), and was implemented to make U.S. law consistent with Article 14 of the SCM Agreement. The hierarchy is set forth in 19 C.F.R. § 351.511(a)(2)(i)-(iii), which provides:

> (2) "Adequate Remuneration" defined -
>
> (i) *In general.* [the USDOC] will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price from actual transactions in the country in question. Such a price could include prices stemming from actual imports or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, [the USDOC] will consider product similarity; quantities sold, imported or auctioned; and other factors affecting comparability.
>
> (ii) *Actual market determined prices unavailable.* If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, [the USDOC] will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, [the USDOC] will average such prices to the extent practicable, making due allowance for factors affecting comparability.
>
> (iii) *World market prices unavailable.* If there is no world market price available to purchasers in the country in question, [the USDOC] will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

> competitive government auction) located either within the country or outside the country (the latter transaction would be in the form of an import). As provided in our regulations, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation. This is because such prices generally would be expected to reflect more closely the commercial environment of the purchaser under investigation.
>
> Based on the hierarchy, we must first determine whether there are market-determined prices from actual sales transactions that can be used to determine whether the provincial governments sold stumpage to the respondents for LTAR. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where the Department finds that the government provides the majority or, in certain circumstances, a substantial portion of the market for a good or service, it may consider prices for such goods and services in the country to be significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit. This is because, where the government's role as provider of the good or service is so predominant, it, in effect, determines the prices for private sellers of the same or similar goods or services such that comparing the government prices to private prices would amount to comparing the financial contribution to itself.[357]

267. The USDOC also addressed the following:

> Concerning 19 CFR 351.511(a)(2)(i), the *CVD Preamble* states that the Department may use actual private or government-run competitive auction prices provided they are comparable and represent a significant portion of the good sold. In the case of government-run auctions, the Department will further consider whether they are open to all prospective buyers, protect confidentiality, and are based solely on price. The *CVD Preamble* also states that the Department will not use tier-one benchmark prices, such as prices from private parties or government-run auctions, in instances in which it is reasonable to conclude that tier-one prices are significantly distorted as a result of the

[357] Lumber Preliminary Decision Memorandum, pp. 26-27 (citations omitted) (Exhibit CAN-008).

government's involvement in the market.[358]

268. The USDOC explained that "[t]he *CVD Preamble* indicates that we will normally assume that government distortion is minimal unless the government's sale of the good accounts for a majority or, in certain circumstances, a substantial portion of the market."[359]

269. Thus, it is through this process that the USDOC determines, in the words of the Panel's question "the suitability of the benchmark." Where the information on the record provides a benchmark that is suitable in this light, the USDOC has discharged its burden as an investigating authority, and it would be for a party in the investigation to demonstrate otherwise. This would be true whether the unsatisfied party is a petitioner or a respondent.

228. <u>To the United States</u>: In its oral response to the Panel's questions at the second substantive meeting, Canada indicated that: (a) investigated producers would have no reason to obtain information in the ordinary course of business about differences in prevailing market conditions between Nova Scotia and the province they operate in to submit as evidence in future investigations; and (b) it is unreasonable to expect from Canada quantification of their observations regarding errors in the Nova Scotia Survey since the data in that survey were not available to them.

Please comment.

<u>Response</u>:

270. The USDOC explained that Canada failed – in both qualitative and quantitative terms – to demonstrate differences in prevailing market conditions between Nova Scotia and other provinces. First, Canada failed to establish in the first place that each province is a different market or on what other basis any boundaries should be drawn to delineate between the so-called different markets. So, one reason Canada can assert that there is no reason to obtain information in the ordinary course of business about differences in prevailing market conditions between Nova Scotia and other provinces is that that construct is one that Canada has sought to establish in this dispute settlement proceeding, but not one that would be identified as such in the real world. The USDOC's finding was that private transaction prices in Nova Scotia for the same (or similar) good could be considered to reflect prevailing market conditions in Canada. It is Canada that has argued for the existence of identifiable and meaningful differences between Nova Scotia and other provinces, but Canada has failed to establish that such differences exist.

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[358] Lumber Preliminary Decision Memorandum, pp. 26-27 (citations omitted) (Exhibit CAN-008). The "*CVD Preamble*" provides descriptions of the USDOC's CVD regulations. *See* Commerce, "Countervailing Duties," 63 Fed. Reg. 65,348 (Nov. 25, 1998) ("*CVD Preamble*") (Exhibit CAN-021).

[359] Lumber Preliminary Decision Memorandum, pp. 26-27 (citations omitted) (Exhibit CAN-008).

271. With respect to Canada's allegations and characterization of the verification process for the Nova Scotia survey, Canadian interested parties had access, through their lawyers, to the survey's underlying data via an anonymized database[360] as well as access to the source documents for the transactions examined at verification.[361] That information involved the business confidential information of individual companies in Nova Scotia that were not respondents in the investigation. Consistent with the balance of rights and obligations reflected in the SCM Agreement and, specifically, Article 12.4 concerning the appropriate treatment of confidential information,[362] the USDOC took appropriate steps to protect that information from public disclosure by subjecting it to an administrative protective order.[363] As a result, the Canadian interested parties had access to this data and the underlying source documents through their counsel.

272. Additionally, Canada is aware that the alleged errors are insignificant, just as the other errors found in the verification process for other provinces in this investigation were insignificant.[364] Such minor corrections to information initially reported to the USDOC are common (if not expected) and are evident across the other verifications in this investigation.

273. For **Alberta**, the verification report indicates that at least five minor corrections were recorded.[365]

274. For **British Columbia**, the verification report indicates that at least seven minor

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[360] *See* Nova Scotia, "Deloitte Summary Database April 1, 2015 to December 31, 2015" (Exhibit CAN-510 (BCI)).

[361] *See* Nova Scotia Verification Report (Exhibit CAN-511 (BCI)) and accompanying verification exhibits at Exhibit USA-051 (BCI) (containing 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).

[362] Article 12.4 of the SCM Agreement provides that:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[42]
>
> [42] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

[363] *See* USDOC Administrative Protective Order (November 25, 2016) (Exhibit USA-091).

[364] *See* U.S. Second Written Submission, paras. 184-186.

[365] *See* GOA Verification Report, pp. 2-3 (five corrections) (Exhibit CAN-110).

corrections were recorded.[366]

275. For **New Brunswick**, the verification report indicates that at least five minor corrections were recorded.[367]

276. For **Ontario**, the verification report indicates that at least six minor corrections were recorded.[368]

277. For **Quebec**, the verification report indicates that at least 17 minor corrections were recorded.[369]

278. For **Canfor**, the verification report indicates that at least 12 minor corrections were recorded.[370]

279. For **JDIL**, the verification report indicates that at least 10 minor corrections were recorded.[371]

280. For **Tolko**, the verification report indicates that at least eight minor corrections were recorded.[372]

281. For **West Fraser**, the verification report indicates that at least six minor corrections were recorded.[373]

282. Just as with Nova Scotia, 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 the USDOC.[374] Canada's

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[366] *See* GBC Verification Report, pp. 2-3 (seven corrections) (Exhibit CAN-088).

[367] *See* GNB Verification Report, p. 2 (five corrections) (Exhibit CAN-268).

[368] *See* GOO Verification Report, pp. 2-3 (six corrections) (Exhibit CAN-160).

[369] *See* GOQ Verification Report, pp. 2-3 (17 corrections) (Exhibit CAN-184).

[370] *See* Canfor Verification Report, pp. 2-3 (12 corrections) (Exhibit CAN-357).

[371] *See* JDIL Verification Report, p. 2 (10 corrections) (Exhibit CAN-241).

[372] *See* Tolko Verification Report, pp. 2-3 (eight corrections) (Exhibit CAN-316).

[373] *See* West Fraser Verification Report, pp. 2-4 (six corrections) (Exhibit CAN-362).

[374] *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

argument is an attempt to discredit the entire concept of a spot check or verification. There is no merit to Canada's argument.

229. <u>To Canada</u>: At paragraph 783 of its first written submission, Canada argues:

> **Nova Scotia also has a favourable terrain and climate that allows for year-round harvesting access. These conditions result in different (and lower) harvesting costs in Nova Scotia than in the northern boreal forest.**

Please refer to record evidence that supports this argument.

<u>Response</u>:

283. This question is directed to Canada.

230. In its oral response to the Panel's questions in the second substantive meeting, the United States indicated that the particular conditions of particular producers need not be taken into consideration in the term "prevailing market conditions in the country of provision".

a. <u>To Canada</u>: Please comment.

<u>Response</u>:

284. This subpart of the question is directed to Canada.

b. <u>To the United States</u>: Please indicate whether the Appellate Body's interpretation of Articles 19.3 and 19.4 of the SCM Agreement (*see for instance* Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 601) suggests that an investigating authority should take into consideration the particular circumstances of each compulsory respondent in determining the individual margin of subsidy for that respondent.

<u>Response</u>:

285. With respect to the selection of a stumpage benchmark, Canada has argued that the term "prevailing market conditions" in Article 14(d) of the SCM Agreement should be read as if that term refers to the "conditions" (unqualified) of a particular producer, rather than the "prevailing

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Report, pp. 2-4 (six corrections) (Exhibit CAN-362).

market conditions" "for the good in question" "in the country of provision."[375] In response, the United States has demonstrated that the terms of Article 14(d) refer to determining the adequacy of remuneration in relation to the prevailing market conditions for the good in question in the country of provision and those terms do not, as Canada has asserted, refer to the amount a particular producer would be willing to pay for stumpage based on modeling a theoretical constructed cost build-up.[376]

286. With respect to the reference in subpart (b) of the question to Articles 19.3 and 19.4 of the SCM Agreement, the reasoning of the Appellate Body in paragraph 601 of the report in *US – Anti-Dumping and Countervailing Duties (China)* does not have any bearing on the meaning of "prevailing market conditions" in Article 14(d).[377] The relationship between Article 14 and Articles 19.3 and 19.4 more generally relates to the imposition and collection of the appropriate amount of duty, which depends, in part, on how the amount imposed or collected reflects the amount of benefit determined under Article 14.[378]

287. As it is, Article 14 of the SCM Agreement provides "guidelines" for determining the benefit amount. Articles 19.3 and 19.4 are informed by Article 14 and relate to whether the amount of duty imposed or collected is in excess of the amount of subsidy found to exist.[379] The provisions of Articles 19.3 and 19.4 do not speak to how a benefit is calculated, nor has Canada argued that a duty has been imposed or collected in excess of the amount of subsidy found to

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[375] SCM Agreement, Art. 14(d). *See also generally*, U.S. Second Written Submission, paras. 163-169 (addressing various formulations of Canada's argument on this point).

[376] *See, e.g.*, U.S. Second Written Submission, paras. 163-169 (addressing various formulations of Canada's argument on this point).

[377] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 601.

[378] *See* U.S. First Written Submission, paras. 496-503 (discussing the correct interpretation of Articles 19.3 and 19.4 of the SCM Agreement).

[379] *See* SCM Agreement, Article 19.3 ("When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter."); Article 19.4 ("No countervailing duty shall be levied[fn51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product."); note 51 to Article 19.4 ("As used in this Agreement 'levy' shall mean the definitive or final legal assessment or collection of a duty or tax."). *See also* General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article VI:3 ("No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product.").

exist in this sense. Rather, Canada argues that the amount of subsidy found to exist is incorrect because, according to Canada, the "prevailing market conditions" must include, for example, whether a producer has experience with "the construction of ice roads by water spray trucks" or "can only access some Crown forests via winter ice bridge."[380] Article 14 contains no such requirement to take into account such unique circumstances of particular producers, and the terms of Article 14(d) are clear in stating that the relevant "conditions" are the "prevailing market conditions" – not for the producer, but "for the good in question" "in the country of provision."

288. Articles 19.3 and 19.4 have no bearing on the assessment of the adequacy of remuneration as determined in relation to the prevailing market conditions for the good in question in the country of provision, and Canada itself acknowledges that the "amounts" referred to in Articles 19.3 and 19.4 depend on the outcome of the Article 14 assessment and not the other way around.[381]

231. <u>To Canada</u>: At page 137 of the final determination, the USDOC noted:

> **[T]he petitioner proposes adding the C$3.00/m^3 silviculture fee to the Nova Scotia benchmark when calculating the benefit Resolute received for Crown stumpage purchases in Ontario or Québec, alleging that silviculture costs are incorporated by those provincial governments into the provincial stumpage purchase prices. As discussed in Comment 42, we have not included the fee in our calculation of the Nova Scotia benchmark.**

Please indicate whether Canada is challenging this aspect of the USDOC's determination.

<u>Response</u>:

289. This question is directed to Canada.

232. <u>To the United States</u>: At page 136 of the final determination, the USDOC noted:

> **The respondents further argue that the Department should adjust their purchase prices of Crown origin stumpage to add certain administrative costs. However, such costs are considered overhead expenses, which are not directly related to**

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[380] Canada's First Written Submission, para. 783 (footnotes omitted). *See also* U.S. Second Written Submission, paras. 167-169.

[381] *See* Canada's Second Written Submission, para. 16.

stumpage prices.

Please clarify which specific costs the USDOC refers to as "administrative costs" in the quoted excerpt.

Response:

290. As can be seen at page 15 of the stumpage questionnaire, the USDOC requested information regarding "administrative costs", among other things:

> For each type of tenure arrangement in effect in the province, explain how the following factors are taken into account in adjusting the stumpage price after an appraisal has been made:
>
> a. maximization of revenue from stumpage;
>
> b. administrative costs;
>
> c. reforestation, silviculture, other environmental considerations, including clear cutting, stream pollution, etc., and fire prevention and suppression costs, insect and disease protection;
>
> d. anticipated future sales (f.o.b. values) of end products used in appraisal process;
>
> e. "opportunity cost" of selling stumpage at a later date;
>
> f. long-term sustained yield policy;
>
> e. historical pattern of stumpage prices and revenue;
>
> f. provincial budget requirements;
>
> g. regional development; and
>
> h. employment in the region.[382]

291. The reference to "administrative costs" at page 136 of the final determination refers to these costs as reported by the respondent parties in response to the USDOC's questionnaires, for which they advocated adjustments to stumpage prices paid by respondents in Alberta, Ontario,

[382] Stumpage Questionnaire, p. 15 (Exhibit USA-063).

Quebec, and New Brunswick.[383]

233. <u>To Canada</u>: At paragraph 57 of its response to the Panel's question no. 11, Canada notes:

> **The classification thus depends principally on the purchaser's subjective decision about how to use a log rather than the log's objective, measurable physical characteristics. For example, a defect-free log with a 17 cm diameter could be classified as "pulpwood" in Nova scotia if it is purchased by a pulp mill that intends to process it into pulp. However, that same log would be classified as a "sawlog" if it is purchased by a sawmill that intends to process it into lumber. The only determinant of how a log is classified is the purchaser's subjective decision of how to classify it. The classification of a log in Nova Scotia thus depends on who purchases it and how that purchaser intends to use it.**

Does Canada agree that just as a pulp mill could sometimes use logs of the quality that is generally used by sawmills, a sawmill could also sometimes use logs of the quality that is generally used by pulp mills? Or do sawmills use the top-quality logs exclusively? Please support your response with record evidence.

<u>Response</u>:

292. This question is directed to Canada.

234. At paragraph 54 of its response to the Panel's question no. 15, the United States argues that:

> **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).**

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[383] *See* Lumber Final I&D Memo, pp. 127-135 (Exhibit CAN-010).

a. <u>To Canada</u>: Please respond to the United States' argument.

<u>Response</u>:

293. This subpart of the question is directed to Canada.

b. <u>To the United States</u>: Assuming Canada is right in asserting that the minimum DBH for harvestable logs in Nova Scotia was 17.8 centimetres, why would the DBH of timber Nova Scotia be comparable to that of timber in Ontario, considering that even the minimum DBH of harvestable timber in Nova Scotia is 2.5 centimetres bigger than that in Ontario.

<u>Response</u>:

294. Given the range of DBH values that are evident across the provinces for species that are considered to be in the same SPF basket,[384] Canada evidently has not considered that differences as minor as 2.5 centimeters, in those ranges, should be considered significant. The USDOC addressed the issue of DBH with respect to each province and no province or party established that these differences signified any difference in the kinds of timber being compared.

295. As explained, the USDOC found that the SPF species group dominates standing timber in Nova Scotia, New Brunswick, Quebec, Ontario, and Alberta based on responses that the provincial governments provided to the USDOC's questionnaires.[385] Nova Scotia reported that SPF is "by far the predominant group of trees harvested in Nova Scotia."[386] Accordingly, the USDOC found that "SPF are the primary species that are harvested on private lands in Nova Scotia."[387] 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:[388]

- 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

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[384] *See* U.S. Responses to the Panel's First Set of Questions, para. 26.

[385] *See* U.S. Responses to the Panel's First Set of Questions, paras. 24-27.

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

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

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

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).

296. 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.[389]

297. 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 DBH.[390] The USDOC's findings in this regard are explained at page 45 of the preliminary decision memorandum and page 112 of the final issues and decision memorandum, and relied on the following evidentiary basis:[391]

- 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.

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

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

[391] *See* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008); Lumber Final I&D Memo, p. 112 (Exhibit CAN-010). The United States notes 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).

- 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.

298. As is evident, the ranges reported by Alberta and Quebec for the DBH of SPF exceed the 2.5-centimeter difference between the minimum DBH of harvestable timber in Nova Scotia and the reported DBH for Ontario, which would indicate that the difference should not be considered significant.

299. 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.[392]

235. <u>To the United States</u>: The Deloitte Survey Report (Exhibit CAN-312) noted at page 4:

> **As part of the testing process, we specifically sought to validate several data elements, including: Confirmation that the reported transactions were limited to purchases of stumpage by Registered Buyers from unaffiliated private landowners;[3]**
>
> ---
>
> **[3] In some limited cases, Registered Buyers recorded 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 parties, harvesting costs, trucking costs, etc. (footnote original).**

Please answer the following questions in respect of this aspect of the Deloitte Survey Report:

a. What percentage of transactions contained in the survey was examined by Deloitte in this verification process?

<u>Response</u>:

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

300. Deloitte did not provide that percentage. However, the description of Deloitte's verification process indicated:

- [[***]]
- [[***]]
- [[***]][393]

301. Based on those established criteria and the fact that Deloitte reported that [[***]],[394] it can be deduced that Deloitte examined at least [[***]].[395] However, because Deloitte's testing also included [[***]], the precise number of transactions verified through site visit was likely considerably higher.

b. What percentage of the examined transactions did the "limited cases" in which prices for standing timber were found to be lumped with other costs represent?

Response:

302. Deloitte did not provide that percentage.

303. However, the United States respectfully observes that the excerpt from the Deloitte Survey Report (Exhibit CAN-312) quoted in the question misplaces the location of footnote 3. The relevant excerpt is correctly quoted as follows:[396]

> As part of the testing process, we specifically sought to validate several data elements, including:
>
> - Confirmation that the reported transactions were limited to purchases of stumpage by Registered Buyers from unaffiliated private landowners;
> - Confirmation that 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

[393] *See* Nova Scotia Verification Exhibit NS-VE-6, pp. 13, 28 (Exhibit CAN-512 (BCI)).

[394] *See* Nova Scotia Verification Exhibit NS-VE-6, p. 10 (Exhibit CAN-512 (BCI)).

[395] *See* Nova Scotia Verification Exhibit NS-VE-6, p. 17 (Exhibit CAN-512 (BCI)).

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

Registered Buyer's records[3];

[3] In some limited cases, Registered Buyers recorded 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 parties, harvesting costs, trucking costs, etc. (footnote original).

304. When read correctly, Deloitte unambiguously represents that it took steps as part of its verification process to confirm that "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."[397]

c. Did Deloitte rectify the errors found in those "limited cases"? Did Deloitte apply their findings in this verification to the rest of the data set in some way?

Response:

305. In response to the first question of this subpart, yes. Deloitte unambiguously represents that it took steps as part of its verification process to confirm that "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."[398]

306. In response to the second question of this subpart, it is not apparent based upon information provided to the USDOC whether Deloitte applied its verification findings to the rest of the data in some way.

d. If Deloitte rectified all such errors found in the survey data, why were such errors found to exist during the USDOC's own verification?

Response:

307. There is no basis to presume that the USDOC found the same "such errors" at verification. Nova Scotia reported different errors as minor corrections at verification, which differ from the "limited cases" described in footnote 3 of the Deloitte Survey Report (Exhibit CAN-312). The USDOC summarized the minor corrections with respect to the Deloitte survey

[397] Deloitte Survey, p. 4 (Exhibit CAN-312). *See also* Nova Scotia Verification Exhibit NS-VE-6, pp. 30-34 (Exhibit CAN-512 (BCI)).

[398] Deloitte Survey, p. 4 (Exhibit CAN-312). *See also* Nova Scotia Verification Exhibit NS-VE-6, pp. 30-34 (Exhibit CAN-512 (BCI)).

as follows in its verification report:

> *3. Minor Correction to Survey Database and Survey Results*
>
> Deloitte officials explained that in preparation for verification they reviewed [[***]]. According to Deloitte officials, the survey respondent indicated that the [[***]]. Deloitte knew about the existence of [[***]] at the time of the private stumpage survey and discussed [[***]] in the private stumpage survey report covering the period April 1, 2015, through December 31, 2015, which the GNS submitted in IQR Exhibit NS-5, at page 4, footnote 3. We collected copies of the relevant pages of the April 1, 2015, through December 31, 2015, survey in Attachment 3 of **NS-VE-1**. When compiling the survey results, Deloitte, based on information from the survey respondent, determined to [[***]] from the stumpage prices included in the survey results. However, in preparing for verification, Deloitte determined that the amount [[***]]. As a result, Deloitte determined to [[***]] *See* discussion at **NS-VE-1** at 2-3; *see also* **NS-VE-1** at Attachment 4, which identifies the survey data impacted by this revision; *see also* **NS-VE-1** at Attachment 5, which contains the entire revised database. The last column of the data in Attachment 5 identifies whether the stumpage changed due to the mark-up revision. Deloitte officials explained that the revision results in a weighted average [[***]] percent upward adjustment of overall transaction values for the period April 1, 2015, through December 31, 2105.
>
> Deloitte officials stated that they confirmed that the mark-up at issue affected [[***]]. At verification, we randomly selected and examined 12 transactions (six pre-selects and six on-site selects). Of these examined transactions, [[***]] involved [[***]] revision. As discussed in further detail below, we found no discrepancies during our examination of these transactions.[399]

236. <u>To the United States</u>: Deloitte's Nova Scotia Survey Engagement Summary (Exhibit CAN-512 (BCI)) defines the term [[***]] in the following manner:

> **[[***]]**

[399] Government of Nova Scotia Verification Report, pp. 2-3 (Exhibit CAN-511 (BCI)).

Please reconcile your view that the Nova Scotia Survey recorded pure stumpage prices and not log prices with the fact that the survey defined a [[***]] as [[***]], considering that harvested logs, but not standing timber, can be delivered.

Response:

308. As an initial matter, the United States calls to the Panel's attention the fact that certain information in this question is BCI, but that information was not marked with double brackets when the written questions were transmitted to the parties. In the question reproduced above, the United States has marked BCI in double brackets.

309. Notwithstanding that the survey defined a [[***]] as [[***]], the USDOC confirmed at verification that the prices in the survey only reflect the purchase prices for private-origin standing timber in Nova Scotia. The USDOC summarized its findings as follows:

> Deloitte officials provided supporting documentation confirming that the prices in the survey only reflected the purchase prices for private origin standing timber in Nova Scotia. We noted that Deloitte's instructions included in the following regarding log volumes: [[***]]." *See* **NS-VE-6** at 30-34. GNS officials explained that total intake referred to all fiber (*e.g.*, logs and stumpage), whereas pure stumpage was limited to standing timber purchases. The survey provided similar instructions with regard to purchase values.[400]

310. Additional record evidence supports the USDOC's finding. In addition to what was noted in the USDOC's verification report, the survey instructions emphasized to participants:

> Input all transactions for the purchase of private stumpage from Nova Scotia that occurred during the period April 1, 2015 through March 31, 2016. <u>It is essential that the survey only cover transactions for the purchase of private stumpage – not the purchase of harvested logs</u> – and that the amount reported is exclusive of private silviculture fees.[401]

311. Moreover, source documents for the transactions examined by the USDOC at verification

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[400] Government of Nova Scotia Verification Report, pp. 6-7 (Exhibit CAN-511 (BCI)).

[401] Nova Scotia Verification Exhibit NS-VE-6, p. 33 (Exhibit CAN-512 (BCI)) (underline added).

further establish that reported prices were for stumpage, not harvested logs.[402]

237. <u>To the United States</u>: At para. 841 of its first written submission, Canada argued:

> **Nova Scotia's sample was not based on a survey of the 162 registered buyers of primary forest products in the province. Instead, Nova Scotia directed the consulting firm it retained to limit its survey to 26 specific registered buyers, of which 21 provided responses. Nova Scotia provided no evidence as to how or why these registered buyers were identified or why it did not direct the consulting firm to survey other registered buyers. In fact, it is clear that the survey respondents were not selected on the basis of their representativeness. The survey acknowledged that the sample volumes were not representative, geographically, of the harvest volumes in Nova Scotia. (footnotes omitted)**

Please respond to this argument, explaining the basis on which the sample was chosen and how the survey could be considered reliable if it was not geographically representative.

<u>Response</u>:

312. As explained, 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.[403] The 26 registered buyers selected as potential participants in the survey were the [[***]] in Nova Scotia.[404] 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.

313. In the preliminary decision memorandum, the USDOC analyzed the Deloitte survey and observed that it provided robust data for benchmark purposes:[405]

> In preparing the *GNS Private Stumpage Survey*, Deloitte collected detailed information pertaining to purchases by Registered Buyers

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[402] *See, e.g.*, Nova Scotia Verification Exhibit NS-VE-7 (Exhibit CAN-551 (BCI)) ([[***]]); Nova Scotia Verification Exhibit NS-VE-8-C (Exhibit CAN-552 (BCI)) ([[***]]).

[403] Lumber Final I&D Memo, p. 123 (Exhibit CAN-010). *See* U.S. First Written Submission, para. 165; U.S. Responses to the First Set of Panel Questions, paras. 107-110.

[404] *See* Nova Scotia Verification Exhibit NS-VE-6, p. 10 (Exhibit CAN-512 (BCI)).

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

> (*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. 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.[406]

314. With respect the subsequent verification of Nova Scotia and Deloitte, information examined by the USDOC demonstrated the steps undertaken to ensure that the survey results were representative, including with regard to geography.[407] 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.[408] 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**

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

[407] *See* Nova Scotia Verification Exhibit NS-VE-6, pp. 7, 17 (Exhibit CAN-512 (BCI)).

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

at 46-47.[409]

315. 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.

316. 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").[410] The USDOC identified an additional six transactions for examination during the verification ("the surprise transactions") for a total of thirteen transactions.[411] 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.[412]

238. <u>To Canada</u>: At paragraph 861 of its first written submission, Canada argues:

> **In its analysis, Commerce improperly dismissed concerns regarding the accuracy of the conversion factor, relying on the fact that the conversion factor is used in the ordinary course of business by Nova Scotia. However, Commerce had no evidence that the Nova Scotia industry used this conversion factor. The fact that Nova Scotia used the conversion factor in government business does not show that the survey respondents actually used this conversion factor in the ordinary course of business. It is the survey respondents, not the government, that have an incentive to accurately measure and price their private timber in the ordinary course of**

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

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

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

[412] *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)).

business. (footnotes omitted)

Please explain why in Canada's view:

a. the government does not have an incentive to accurately measure and price Crown timber; and

b. the conversion factor used by the government is inaccurate, although the factor's accuracy was reconfirmed in 2005 following a sampling program conducted by NSDNR (see Exhibit CAN-313, p. 14).

Response:

317. This question is directed to Canada.

239. To the United States: One of the reasons the USDOC rejected the MNP Ontario survey as a basis for determining the benchmark with respect to Ontario was that the USDOC considered that the small number of respondents reporting private timber purchases in the MNP Ontario survey made the survey results unrepresentative. However, at page 121 of the final determination, the USDOC considered that "the [Nova Scotia] Survey, in terms of the number of respondents and the absolute volume of SPF timber reported by the survey respondents, is on par with the private-origin standing timber harvest data contained in the MNP Ontario Survey".

Please comment on the apparent difference in the USDOC's treatment of the two surveys.

Response:

318. As explained, Canada misrepresents the USDOC's concerns with the MNP survey and draws a false equivalence between the MNP survey and the Nova Scotia survey.[413] The private stumpage market in Ontario constituted only 3.5 percent of the market.[414] In contrast, the private stumpage market in Nova Scotia constituted [[***]] percent of the Nova Scotia stumpage market (or approximately 65 percent of the Nova Scotia softwood stumpage harvest).[415] This difference means that the MNP survey covered approximately 65 percent[416] of 3.5 percent of Ontario's

[413] *See* U.S. Second Written Submission, para. 96.

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

[415] *See* U.S. Responses to the First Set of Panel Questions, para. 211.

[416] *See* Ontario, "MNP LLP, A Survey of the Ontario Private Timber Market" (Exhibit ON-PRIV-1), p. 2

softwood sawable stumpage market; that is, approximately 2.275 percent of the Ontario softwood sawable stumpage market. The Deloitte survey "included approximately 36% of private softwood sawable volume purchased in Nova Scotia" during the survey period, *i.e.*, approximately 36 percent of [[***]] percent, that is, over [[***]] percent of the Nova Scotia private softwood sawable stumpage market.[417]

240. <u>To the United States</u>: At paragraph 266 of its second written submission, Canada argues:

> **[T]he United States claims that Commerce found no evidence of lump-sum transactions in the thirteen transactions it verified. […] [T]he absence of lump-sum transactions in a verification of [[***]] of transactions is not evidence that such transactions did not exist in the remaining [[***]] of the transactions. (footnote omitted)**

Please respond to this argument.

<u>Response</u>:

319. As explained above in the U.S. response to question 237, Canada's arguments and characterization of the alleged errors are misleading.[418] The United States respectfully refers the Panel to the U.S. response to question 237.

320. The United States additionally observes that the basis for the [[***]] percent figure relied upon by Canada appears to be in error. Canada introduced that number in its confidential opening statement on the third day of the first panel meeting.[419] Canada arrived at that figure by comparing the thirteen transactions examined at verification to the number of transactions identified in the Deloitte summary database.[420] However, thirteen divided by the [[***]] transactions making up the Nova Scotia survey results in a percentage of [[***]] percent, not

(Exhibit CAN-144 (BCI)).

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

[418] *See* U.S. Responses to the First Set of Panel Questions, paras. 107-116.

[419] *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. 121.

[420] *See* Nova Scotia, "Deloitte Summary Database April 1, 2015 to December 31, 2015" (Exhibit CAN-510 (BCI)) (listing [[***]] transactions). *See also* Nova Scotia Verification Exhibit NS-VE-6, p. 17 (Exhibit CAN-512 (BCI)) (reporting [[***]] "[s]ample transactions").

[[***]] percent.[421] Canada's mathematical error misstates the actual coverage of the USDOC's verification of the Nova Scotia survey on a transaction basis by nearly a factor of ten.

241. <u>To both parties</u>: Please indicate whether an objective and unbiased investigating authority could rely on transaction data where it verified [[***]] of those transactions, found a number of errors in these transactions and did not verify additional transactions.

<u>Response</u>:

321. Yes, an objective and unbiased investigating authority could rely on a verification audit process to spot check the accuracy of responses provided in the investigation.

322. A useful analogy can be drawn to verifications in the antidumping duty context, for which the substantive provisions of the SCM Agreement and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") related to verifications mirror each other.[422] One can easily imagine a Canadian softwood lumber producer reporting tens of thousands of export sales, but an investigating authority at verification having the ability to spot check no more than a small handful of those sales to ensure that they were accurately reported, resulting in a coverage percentage considerably less than that alleged by Canada for the verification of the Nova Scotia survey. The extent of coverage, however, does not undermine the reliability of the spot check.

323. Canada's mischaracterization of the verification and audit process must be rejected. As explained above in the U.S. responses to questions 237 and 240, Canada's arguments and characterization of the alleged errors are misleading.[423] The United States respectfully refers the Panel to the U.S. responses to questions 237 and 240.

242. <u>To the United States</u>: What percentage of the total sales volume which formed part of the Nova Scotia Survey was covered by the [[***]] of the transactions that was verified by the USDOC?

<u>Response</u>:

324. There is no merit to Canada's argument that, because a spot check only examines certain transactions within a larger database, the spot check or the information examined should be

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[421] For example, 70 divided by 100 is 0.70, which can also be expressed as 70 percent. Again, 13 divided by [[***]] is [[***]], which is correctly expressed as [[***]] percent, rounded; not [[***]] percent.

[422] *Compare* SCM Agreement, Art. 12.6 and Annex VI *with* AD Agreement, Art. 6.7 and Annex I.

[423] *See* U.S. Responses to the First Set of Panel Questions, paras. 107-116.

considered unreliable. As explained above in the U.S. responses to questions 237, 240, and 241, Canada's arguments and characterization of the alleged errors are misleading.[424] The United States respectfully refers the Panel to the U.S. responses to questions 237, 240, and 241.

325. That being said, the percentage of the total sales volume which formed part of the Nova Scotia Survey that was covered by the [[***]] percent[425] of the transactions that was verified by the USDOC was [[***]] percent. The United States arrived at that percentage by summing the volumes of the thirteen transactions examined at verification, [[***]],[426] and dividing that amount by the total private stumpage softwood sawable volume reported in the Deloitte survey, [[***]].[427]

243. To Canada: In paragraph 777 of its first written submission, Canada argues:

> **Commerce did not have DBH statistics pertaining to standing timber harvested from Nova Scotia lands. Unlike Alberta and Ontario, which provided information on the diameter of harvested trees, Nova Scotia provided a broader forest inventory statistic of the DBH of all standing timber with a DBH over 9.1 cm (its measurement of "merchantable" trees)**

Please confirm that the DBH figure for Alberta and Ontario was based on the diameter of harvested trees, but not the DBH figure for Québec.

Response:

326. This question is directed to Canada.

244. To the United States: The United States contends that [[***]]. Please explain with evidence whether all timber that has a [[***]] is economically harvestable for use as sawlogs in sawmills.

Response:

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[424] *See* U.S. Responses to the First Set of Panel Questions, paras. 107-116.

[425] *See supra*, U.S. Response to Question 241.

[426] *See* Exhibit USA-051 (BCI) (containing 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)) and Exhibit CAN-551 (BCI) (containing Government of Nova Scotia Verification Exhibit NS-VE-7).

[427] *See* Nova Scotia Verification Exhibit NS-VE-6, p. 17 (Exhibit CAN-512 (BCI)).

327. Respectfully, this question does not present a contention of the United States. Rather, the question presents a statement of facts that appear in the record evidence.[428] As explained, Nova Scotia defines "merchantable" trees to be those of a certain size, *i.e.*, [[***]].[429] Based on this evidence and explanation, as indicated in the verification report, the USDOC concluded that, in Nova Scotia, trees [[***]] were "large enough to be sold for stumpage."[430] Thus, 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."[431]

9 THE USDOC'S THE USDOC'S USE OF THE WASHINGTON STATE LOG PRICE BENCHMARK FOR BRITISH COLUMBIA

245. <u>To the United States</u>: Pointing to record evidence, can the United States please explain why the USDOC chose to use a *log* price to derive the benchmark for British Columbia as opposed to a stumpage price as it did with the other provinces subject to investigation?

<u>Response</u>:

328. The USDOC did not use a stumpage price as a benchmark for British Columbia because U.S. log prices were the only available option under the tier-three benchmark the USDOC selected.[432] The USDOC's explanation of the regulatory approach to the benefit determination under U.S. law provides further context for the USDOC's determination:

> Under 19 CFR 351.511(a)(2), the Department sets forth the basis for identifying benchmarks to determine whether a government good or service is provided for LTAR. These potential benchmarks are listed in hierarchical order by preference: (1) a market-determined price from actual transactions within the country under investigation (tier-one); (2) world market prices that would be available to purchasers in the country under investigation (tier-two); or (3) assessment of whether the government price is consistent with market principles (tier-three). This hierarchy

[428] *See* Government of Nova Scotia Verification Report, Exhibit NS-VE-4 (Exhibit USA-026 (BCI)), [[***]]; and [[***]]. *See also* U.S. Responses to the Panel's First Set of Questions, paras. 41-44 and 51-55.

[429] *See* Government of Nova Scotia Verification Report, Exhibit NS-VE-4 (Exhibit USA-026 (BCI)), [[***]]. *See also* U.S. Responses to the Panel's First Set of Questions, paras. 41-44 and 51-55.

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

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

[432] Lumber Preliminary Decision Memorandum, pp. 48-49 (Exhibit CAN-008).

> reflects a logical preference for achieving the objectives of the statute. In addition, as provided in 19 CFR 351.511(a)(2)(i), we take into consideration product similarity, quantity sold, imported or auctioned, and other factors affecting comparability.[433]

329. In assessing possible tier-one benchmarks in this investigation, the USDOC first "found that the prices for standing timber generated by the BCTS auctions were not market-determined, and thus, were not appropriate to use as a tier-one benchmark."[434] In examining the other possible benchmark sources within Canada, the USDOC explained that "the standing timber that grows in Nova Scotia is not sufficiently comparable to the standing timber that grows on Crown lands in British Columbia."[435] The USDOC likewise explained that the species of timber in British Columbia was not comparable to the species in nearby provinces such as Alberta.[436]

330. The USDOC also found that U.S. stumpage prices were not an appropriate tier-two benchmark. As the USDOC explained in its preliminary determination:

> In the first and second reviews of *Lumber IV*, we explained that in considering the tier-two regulatory hierarchy under 19 CFR 351.511(a)(2), we were cognizant of the fact that a NAFTA Panel, considering the benchmark in British Columbia employed in the underlying investigation, found that standing timber is not a good that is commonly traded across borders. In *Lumber IV*, we also explained, in considering U.S. standing timber prices as a benchmark under our regulatory hierarchy, that using those prices would require complex adjustments to the available data. We, therefore, turned our analysis to U.S. log prices. In this investigation, there are no U.S. stumpage prices on the record. Furthermore, for purposes of our preliminary findings, we find that the record of the investigation does not contain any new evidence that would warrant…reconsidering our approach on this matter from *Lumber IV*. Therefore, we preliminarily determine that U.S. standing timber prices are neither an available nor appropriate tier-two benchmark to measure whether the GBC sells Crown-origin

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[433] Lumber Preliminary Decision Memorandum, p. 26 (Exhibit CAN-008).

[434] Lumber Final I&D Memo, p. 56 (Exhibit CAN-010).

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

[436] Lumber Preliminary Decision Memorandum, p. 46 (Exhibit CAN-008).

> standing timber for LTAR.[437]

331. In the final determination, the USDOC continued to find that there were no available tier-one or tier-two stumpage benchmarks.[438] With no usable tier-one or tier two benchmarks, the USDOC then determined that U.S. log prices from the Pacific Northwest would constitute the most appropriate tier-three benchmark, explaining that:

> [T]he species that grow in British Columbia, and more particularly the species harvested by the B.C.-based respondent firms,…match the species that grow in the U.S. PNW. Further, we…determine that the forestry conditions in the area that encompasses the U.S. PNW and British Columbia have not changed since *Lumber IV* such that log prices in the U.S. PNW and British Columbia are no longer comparable. Furthermore, we find that the log prices that comprise the U.S. benchmark are market determined and, therefore, are suitable for benchmark purposes. Specifically, information on the record demonstrates that U.S. log prices that comprise the benchmark are from private transactions between log sellers and buyers for logs harvested from private lands. As such, we find the U.S. log prices are market-determined prices and, therefore, may serve as a [tier-three] benchmark.[439]

332. The record contained only two sources of U.S. log prices from the Pacific Northwest that the USDOC could use as a tier-three benchmark: (1) WDNR data on monthly, per-unit prices for logs sold in Washington; and (2) proprietary annual pricing data collected by Mason, Bruce & Girard, Inc. for Forest2Market.[440] The USDOC's final issues and decision memorandum explains why the USDOC determined that the WDNR log prices provided a more appropriate benchmark than the log prices reported by Forest2Market.[441] Therefore, the USDOC used a log, rather than a stumpage, price, because its selected tier-three benchmark, the WDNR data, contained only log prices.

246. <u>To Canada</u>: Does the Dual Scale Study (Exhibit CAN-020(BCI)) explain the criteria used to select the sample sites? Please explain.

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[437] Lumber Preliminary Decision Memorandum, p. 48 (Exhibit CAN-008) (footnotes omitted).

[438] Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[439] Lumber Preliminary Decision Memorandum, pp. 49-50 (Exhibit CAN-008) (footnotes omitted). *See also* Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[440] *See* Lumber Preliminary Decision Memorandum, pp. 49-50 (Exhibit CAN-008).

[441] *See* Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010). *See also* U.S. Second Written Submission, paras. 119-121.

Response:

333. This question is directed to Canada.

247. To Canada: Please elaborate on the difference between "purposive sampling" (Canada's responses to the Panel's question no. 94, paragraph 278) and "stratified random sampling" (Canada's first written submission, paragraph 655) as they relate to sample site selection in the Dual Scale Study.

Response:

334. This question is directed to Canada.

248. To Canada: At paragraph 188 of its second written submission, Canada argues:

> **Instead, [USDOC] claimed for the first time in its Final Determination that it was unable to "determine that the information in the [Dual Scale] study provides a representative sample". (footnotes omitted)**

Please explain the relevance of Canada's arguments, above, to its claims in this dispute.

Response:

335. This question is directed to Canada.

249. To Canada: At paragraph 305 of its response to the Panel's question no. 99, the United States asserts that "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."

Please comment on the U.S. assertion.

Response:

336. This question is directed to Canada.

250. To the United States: At paragraph 304 of its response to the Panel's question no. 99, the United States argues that "the information presented by Jendro & Hart at verification did not resolve the USDOC's questions and concerns about the origin and reliability of the study[…]".

Were any of these "questions and concerns" raised with Mr. Jendro and Mr. Hart, or interested parties, at verification, or at any other time? Did any of these

questions relate to the sampling methodology used in the Dual Scale Study?

Response:

337. The respondent parties determined for themselves what kinds of information they prepared in anticipation of the investigation and determined for themselves how to present that information to the USDOC. During this investigation, the Canadian respondents had the opportunity to establish the reliability of the conversion factor in the Dual Scale Study but failed to do so. The Canadian parties' initial questionnaire responses, which were submitted on March 14, 2017, and which contained the Dual Scale Study, failed to provide an explanation of Mr. Jendro and Mr. Hart's sampling methodology.[442] Furthermore, because the SCM Agreement provides that an investigating authority must complete its investigation within 12 months of the initiation or, in exceptional circumstances, within 18 months,[443] and the same requirement is mirrored in U.S. law, the USDOC operates under a strict timeframe for completing investigations. Accordingly, the purpose of verification is simply to confirm information contained in a respondent's questionnaire responses,[444] not to extensively examine the methodology underlying information already submitted. Furthermore, as the USDOC explained, "verification is not intended to be an opportunity for submission of new factual information."[445]

338. Prior to verification of the Government of British Columbia, the USDOC requested that Ministry Officials be ready to address any of the information they had submitted in their questionnaire responses up to that point in time. The USDOC instructed, specifically: "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."[446] At verification, Mr. Jendro and Mr. Hart made a presentation on the Dual Scale Study and its methodology.[447] The purpose of verification is not to substantively evaluate and discuss the merits of the study methodology, but simply to confirm and clarify the methodological procedures used. As part of this process, Mr. Jendro and Mr. Hart explained their methodology on site selection and the USDOC summarized this methodology in the verification report.[448] As further noted in the verification report, "[t]his report does not draw conclusions about whether

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[442] U.S. Responses to the First Set of Panel Questions, para. 302.

[443] *See* SCM Agreement, Art. 11.11 ("Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.").

[444] British Columbia Verification Report, p. 1 (Exhibit CAN-088).

[445] *See* Government of British Columbia Verification Agenda, pp. 1-2 (Exhibit USA-065).

[446] British Columbia Verification Report, p. 15 (Exhibit CAN-088).

[447] British Columbia Verification Report, pp. 15-16 (Exhibit CAN-088).

[448] British Columbia Verification Report, pp. 15-16 (Exhibit CAN-088).

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."[449]

339. Furthermore, the Canadian respondents availed themselves of the opportunity to comment on the Dual Scale Study in their case briefs submitted between verification and the final determination. As the United States explained in the U.S. response to question 99, 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.[450] Case briefs submitted to the USDOC by respondent companies Canfor, Tolko, and West Fraser also addressed the Dual Scale Study.[451] Canada's argument that Canadian interested parties did not have opportunity to comment is without merit.

340. In the USDOC's public hearing, the Canadian parties also spent a significant amount of time discussing the Dual Scale Study.[452] However, after careful consideration of the record evidence, at the final determination the USDOC continued to have significant concerns regarding the Dual Scale Study and its sampling methodology, which rendered the study unreliable.[453]

251. To the United States: In its response to the Panel's question no. 105, at paragraph 322, the United States asserts that:

> **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.**

Can the United States please explain what it means by "responsive" evidence? How did the USDOC meet this requirement in the present case?

Response:

341. Responsive evidence is information pertinent to the investigation and requested by the

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[449] British Columbia Verification Report, p. 1 (Exhibit CAN-088).

[450] *See* U.S. Responses to the First Set of Panel Questions, para. 305.

[451] *See* U.S. Responses to the First Set of Panel Questions, para. 305.

[452] USDOC Memorandum, "Hearing Transcript on CVD Issues," dated August 24, 2017, pp. 53-81 (Exhibit USA-072).

[453] *See* Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010).

investigating authority, *i.e.*, "information which the authorities require".[454] Article 12.1 of the SCM Agreement obligates an investigating authority "give[] notice of the information which the authorities require" and afford "ample opportunity" to provide such information in writing.

342. As the United States outlined in the U.S. second written submission, from January 2017 through June 2017, the USDOC issued hundreds of pages of initial and supplemental questionnaires to the respondent governments and company parties, and then conducted 11 separate verifications *in situ* of those questionnaire responses.[455] At those verifications, the USDOC met with hundreds of company and government representatives and collected over 300 exhibits.[456]

343. The USDOC then provided interested parties the opportunity to file case and rebuttal briefs commenting on issues they believe should be addressed in the final determination.[457] The USDOC received nearly 50 case and rebuttal briefs and considered the comments contained therein in making its final determination.[458]

344. Therefore, the extensive amount of information the USDOC requested and collected from interested parties throughout the course of the investigation satisfied the USDOC's obligations under Article 12.1 of the SCM Agreement.

252. <u>To the United States</u>: Given that the Dual Scale Study was rejected as an instrument to assess the impact of beetle epidemics on the quality of logs obtained in British Columbia relative to those in U.S. P.N.W., please explain, pointing to record evidence, what other effort did the USDOC make to quantify the impact of these epidemics on the matters under investigation.

<u>Response</u>:

345. The USDOC considered the potential impact of beetle infestation in its benchmark determinations, but ultimately decided not to make an adjustment to the benchmark for beetle-kill.[459] Undisputed record evidence establishes that beetle infestation exists in the U.S. PNW

[454] SCM Agreement, Art. 12.1.

[455] *See* U.S. Second Written Submission, paras. 23-30.

[456] *See* U.S. Second Written Submission, para. 31.

[457] *See* U.S. Second Written Submission, para. 32.

[458] *See* U.S. Second Written Submission, para. 32; Lumber Final I&D Memo (Exhibit CAN-010).

[459] *See* Lumber Final I&D Memo, pp. 64, 75-76 (Exhibit CAN-010).

among the same species as in British Columbia, although those species are less prevalent,[460] and Canada's own consultants obtained price quotes for beetle-killed logs from several mills in the United States.[461] Beetle-killed condition, like other quality issues, relates to log grade, and the WDNR benchmark did distinguish between three Washington State grades.[462] Because the WDNR data are species-specific, the data capture log quality issues that are unique to a given species.

346. Furthermore, as the USDOC also explained in the final issues and decision memorandum, "the GBC, Canfor, and Tolko have not provided evidence that blue-stained timber prices are not already included in the U.S. PNW log price benchmarks, nor have parties provided other reliable blue-stained timber prices."[463] As addressed in the U.S. first written submission, the USDOC could not use the price sheets from U.S. mills contained in the Dual Scale Study.[464] The prices reported by Jendro and Hart were not reliable because they were obtained for the purpose of the investigation and not in the ordinary course of business, and because the authors did not indicate how companies were selected for participation in the survey or how they were requested to present prices.[465] Furthermore, it was unclear whether the Jendro and Hart study included only certain of the prices that were reported to the consultants.[466]

347. Accordingly, the USDOC determined that it would be inappropriate to make a beetle-kill adjustment to account for British Columbia market conditions.[467]

253. <u>To the United States</u>: At paragraph 298 of its second written submission, the United States argues that:

> **The evaluation under Article 14(d) (at least under the facts of this dispute) entails comparing prices that have actually been paid to other prices that have actually been paid. To be clear,**

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[460] *See* GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, pp. 38-40 (Exhibit CAN-020 **(**BCI)).

[461] *See* GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 **(**BCI)).

[462] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

[463] Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

[464] *See* U.S. First Written Submission, para. 448.

[465] *See* Lumber Final I&D Memo, p. 76 (Exhibit CAN-010) (citing Dual Scale Study, p. 47 (Exhibit CAN-020 (BCI)).

[466] *See* Lumber Final I&D Memo, p. 76 (Exhibit CAN-010) (citing Dual Scale Study, p. 47 (Exhibit CAN-020 (BCI)).

[467] *See* Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

> **this means that the observed transaction prices have already cleared the threshold for the firm's willingness to pay. The benchmark prices reflect what was actually paid.**

At paragraph 310 of its response to the Panel's question no. 101, the United States explains that the "monthly, species-specific unit prices reported by WDNR combined the *quotes* it received, including a limited number of Utility grade log *quotes*" (emphasis added). And at page 62 of the final determination, the USDOC stated that:

> **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.**

Please explain whether the WDNR survey data consists of "actual transaction prices" or "quotes", and how this relates to the USDOC's finding about the reliability of the WDNR survey data.

Response:

348. The WDNR data consists of price quotes.[468] As explained in more detail above in the U.S. response to question 245, after the USDOC determined that there were no appropriate tier-one or tier-two benchmarks, it selected U.S. log prices as a tier-three benchmark. Under the U.S. regulatory benchmark hierarchy, once the USDOC found British Columbia auction prices for stumpage to be distorted, it no longer considered those prices and did not compare them against possible tier-three benchmarks. As also explained in the U.S. response to question 245, the WDNR and Forest2Market price data were the only tier-three benchmark data on U.S. log prices available to the USDOC.[469] In the final issues and decision memorandum, the USDOC explained why, under the totality of the circumstances, the WDNR price data constituted a more reliable basis to construct a benchmark even though it was not based on actual transaction prices:

> In the Preliminary Determination, the Department found that the source data underlying the prices reported by Forest2Market are not currently on the record. The petitioner argues that these prices are nonetheless preferable because they reflect a large number of

[468] Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010).

[469] Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010).

actual transactions, compiled from actual invoices provided by log sellers and buyers. The petitioner contends that the WDNR data, by contrast, reflect price quotes, and not actual transactions, contrary to the Department's general preference to use actual transaction prices as benchmarks, rather than offer prices or estimated prices, if actual transaction prices are available.

We disagree that the log prices reported by Forest2Market, as presented in a study prepared by Mason, Bruce & Girard for purposes of this investigation, are preferable to the WDNR data relied upon in the Preliminary Determination. The study conducted by Mason, Bruce & Girard, Inc. was based on information from several "customized" reports prepared by Forest2Market that summarized U.S. logs sold during the calendar year 2015. The Mason, Bruce, & Girard, Inc. study then took the summary U.S. log price information from Forest2Market and performed further calculations to derive U.S. log prices for BC coastal and inland species and grades. The Department continues to find that, since 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 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.[470]

254. <u>To the United States</u>: As set out in the final determination, page 60, the USDOC used the USFS/Spelter Study for the conversion factor because the USFS is based on trees in Washington state, and the benchmark is the price of a log in Washington

[470] Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010) (footnotes omitted).

state.

Why did the USDOC consider that the data set to which a conversion factor is applied relevant, or determinative of what conversion factor is used?

Response:

349. The USDOC's threshold decision to use the conversion factor in the Spelter Study was not due solely to the fact that the conversion factor is based on trees in Washington state. Rather, the USDOC determined that the Dual Scale Study, which was the only other conversion factor on the record besides the Spelter Study, was not useable.[471] As explained in the U.S. first written submission, the USDOC determined, in considering the available conversion factors, that the BC Dual Scale Study, conducted during the pendency of the investigation by British Columbia's consultants, forestry specialists David Jendro and Neal Hart, was not useable because the authors failed to explain their methodology for selecting the limited number of scaling sites included in the study.[472] The USDOC explained that the absence of such methodology was of particular concern, because the BC Dual Scale Study was commissioned specifically for use in this investigation, and was therefore at risk of exaggeration or fabrication to attain a desired result.[473]

350. Instead, the USDOC relied upon the only viable conversion factor study on the record, the U.S. Forest Service (or "USFS") study, which was prepared by an impartial government agency in the ordinary course of business.[474] This study was performed on logs in the PNW, consistent with the USDOC's benchmark price reflecting logs in that region of the United States.[475] As discussed above, in selecting the WDNR log price survey data as its benchmark, the USDOC explained that timber in the PNW is comparable to timber in British Columbia, because both areas are part of a single, vast forest region and contain similar tree species and growing conditions.[476]

351. After explaining its concerns regarding the potential bias and methodology underlying the Dual Scale Study, the USDOC stated in the final issues and decision memorandum that:

> 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

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[471] *See* Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010).

[472] *See* U.S. First Written Submission, paras. 429-430.

[473] *See* U.S. First Written Submission, paras. 429-430; Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010).

[474] *See* Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

[475] *See* Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).

[476] *See* Lumber Final I&D Memo, pp. 63-64 (Exhibit CAN-010).

> the USFS study is based on trees in Washington State.[477]

352. Although the trees upon which the Spelter Study conversion factor was based was not the only reason the USDOC selected that conversion factor, the specific trees to which the conversion factor applies is central to how the USDOC calculated the adequacy of remuneration. In response to a contention by an interested party that the USDOC should convert Washington state benchmark prices with a conversion factor based on tress in British Columbia, the USDOC explained in the final issues and decision memorandum:

> 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.[478]

255. To the United States: The Dual Scale Study at page 55 states that "[i]t is important to understand that the 5.93 m^3/MBF conversion ratio represents only a single diameter (9.96 inches, and therefore a single point, on Mr. Cahill's regression curve".

Please explain:

a. Specifically, why a conversion factor of 5.93 was chosen; and

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[477] Lumber Final I&D Memo, p. 60 (Exhibit CAN-010) (underline added).

[478] Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010) (footnotes omitted).

b. the assumptions, if any, on which the conversion factor of 5.93 was based.

Response:

353. The United States is responding subparts (a) and (b) of question 255 together. First, as explained above in the U.S. response to question 254, once the USDOC determined that the Dual Scale Study was not usable, the Spelter Study was the only other viable conversion factor on the record. The USDOC also explained that it had found the Spelter Study to be reliable in the prior *Lumber IV* investigation and *Supercalendared Paper from Canada – Expedited Review*, and the USDOC continued to find it reliable in the underlying investigation.[479]

354. With respect to subpart (b) of question 255, the USDOC used a conversion factor of 5.93 because that was the factor calculated in the Spelter Study for the Washington interior.[480] The Spelter Study derived the 5.93 conversion factor based on its calculation of an average log diameter for interior logs of 9.96 inches.[481]

256. To Canada: Please respond to the clarification made by the United States in paragraph 334 of its response to the Panel's question no. 110 that the limitations noted in the Spelter Study about conversion factors relate to valuations, not volumetric conversions, and therefore do not apply to the situation in this dispute.

Response:

355. This question is directed to Canada.

257. To the United States: At page 60 of the final determination the USDOC quotes the GBC as stating that "the relationship of volumes using BC Metric and Scribner scaling rules is complex and varies substantially depending on log diameter, shape and defect."

a. Does the United States agree with this assertion from GBC, namely that the relationship of volumes using BC Metric and Scribner scaling rules is complex and varies substantially depending the factors listed above?

b. The United States notes at paragraph 296 of its response to the Panel's question no. 97 that the Spelter Study was updated in 2002 to account for the "substantially decreased proportion of old growth, large diameter trees in

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[479] *See* U.S. Responses to the First Set of Panel Questions, para. 297.

[480] *See* U.S. First Written Submission, para. 439 (citing Henry Spelter, Conversion of Board Feet Scaled Logs to Cubic Meters in Washington State, USDA Forest Service (June 2002), pp. 3-5 (Exhibit CAN-287)).

[481] *See* Henry Spelter, Conversion of Board Feet Scaled Logs to Cubic Meters in Washington State, USDA Forest Service (June 2002), pp. 4, 6 (Exhibit CAN-287).

the Washington harvest." What other updates, if any, were made to the 1984 Cahill Study and where is this reflected on the record of investigation?

c. Was it the USDOC's position that the factors that were updated in the study in 2002 have remained constant in the Washington harvest since 2002?

Response:

356. The United States is responding to subparts (a), (b), and (c) of question 257 together. First, as a general principle, log diameter, shape, and defect affect the volume relationships between the British Columbia metric and Scribner scaling systems. The Spelter Study explained:

> The two measurement systems are fundamentally different. Board foot rules [Scribner System] project only the portion recoverable as lumber based on the small end diameter, whereas cubic rules [British Columbia metric] measure the total volume of sound wood, inclusive of lumber, chips, and sawdust, based on both end diameters. As such, the cubic rules are not affected by changes in sawing technology and lumber dimensions and are less affected by changes in log size.[482]

357. The record does not contain additional information regarding the Washington state harvests for 2015 that would have enabled the USDOC to evaluate whether the Washington state harvest has remained constant since 2002. However, as explained in the U.S. response to question 254, the USDOC determined that the Spelter study was the only viable conversion factor on the record for comparing log volumes under these two systems.

358. With respect to updates to the 1984 Cahill Study, the Spelter Study itself is the only information on the record that contains information on updates made to prior studies. 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.[483] 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.[484]

258. To the United States: At paragraph 313 of its response to the Panel's question no.

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[482] Henry Spelter, Conversion of Board Feet Scaled Logs to Cubic Meters in Washington State, USDA Forest Service (June 2002), p. 1 (Exhibit CAN-287).

[483] *See* Henry Spelter, Conversion of Board Feet Scaled Logs to Cubic Meters in Washington State, USDA Forest Service (June 2002), p. 1 (Exhibit CAN-287).

[484] *See* U.S. Responses to the First Set of Panel Questions, para. 296.

102, the United States asserts that:

> **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.**

At footnote 327 of the preliminary determination the USDOC states that it placed 3 months of WDNR data on the record as the petitioner in the underlying investigation submitted only 9 months of the period of investigation on the record.

a. Was the USDOC aware of the paucity of utility grade price quotes in the WDNR when it placed the data on the record?

b. Can the United States please elaborate on the statement that it was not "a decision by the USDOC that utility-grade prices should be excluded from its benchmark" when the USDOC itself placed the data on the record?

c. Is it correct to say that USDOC did not consider it was necessary to adjust for utility grades?

Response:

359. The United States is responding to subparts (a), (b), and (c) of question 258 together.

360. The USDOC placed the WDNR log prices for January 2015 through March 2015 on the record at the same time it issued its preliminary determination[485] to use the WDNR prices for the benchmark.[486] Because petitioner had only submitted data for April 2015 through December 2015 (9 of the 12 months of the period of investigation), the USDOC placed the additional three months on the record to be able to calculate preliminary subsidy rates.[487] Data for the additional months was obtained from a publicly available website – the same source of information for the data that the petitioner placed on the record.[488]

361. The USDOC simply obtained data for additional months of the investigation period using the same data source for the prices that were already on the record. The situation is distinct from soliciting information from companies not subject to the investigation, which the USDOC cannot

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[485] *See* Lumber Preliminary Decision Memorandum, p. I-19 (Exhibit CAN-008).

[486] *See* Lumber Preliminary Decision Memorandum, p. 50 (Exhibit CAN-008).

[487] *See* Lumber Preliminary Decision Memorandum, p. 52 (Exhibit CAN-008).

[488] *See* Washington Department of Natural Resources ("WDNR") Delivered Log Price Information (Exhibit CAN-284).

do, as explained in the U.S. response to question 208, or collecting additional data besides that submitted by respondents, upon which the investigating authority relies to create and build the administrative record. The USDOC's placement on the record of the WDNR log prices for January 2015 through March 2015 does not reflect an assessment as to the quality or quantity of the utility grade data contained in the WDNR prices, or how the utility grade data would ultimately be used in the USDOC's final benchmark calculations. Rather, it was an administrative step taken to ensure the record had a complete data set from a publicly available source for issuing the preliminary determination.

362. For the reasons explained in more detail in the U.S. response to question 253, the USDOC continued to conclude in the final determination that the WDNR price data was the most appropriate benchmark when selecting among the options on the record. Given that the USDOC could only consider the information available to it on the record, it is accurate to state that the low number of utility grade price quotes "reflects the limitations of the record data, not a decision by the USDOC that utility-grade prices should be excluded from its benchmark."[489]

363. With respect to subpart (c) of question 258, the United States respectfully refers the Panel to the U.S. response to question 261, below, explaining the USDOC's treatment of utility grade logs for purposes of adjustments.

259. To Canada: Please comment on the U.S. assertion at paragraph 327 of its response to the Panel's question no. 104 that beetle killed logs are typically of higher quality and price than utility grade non saw logs, and this is supported by the Jendro & Hart report?

Response:

364. This question is directed to Canada.

260. To Canada: Please respond to the U.S. position at paragraph 336 of its response to Panel's question no. 111 that figure 66 in Canada's first written submission is irrelevant in its entirety.

Response:

365. This question is directed to Canada.

261. To both parties: The parties disagree about the portions of the BC Interior harvest that would have been graded as utility grades. When averaged across eight species, the United States argues that [[***]] of the three BC-based respondents' harvest would have been utility, and not [[***]] as asserted by Canada. (*See* paragraph 316

[489] U.S. Responses to the First Set of Panel Questions, para. 313.

of the U.S. response to Panel's question no. 103.)

a. <u>To Canada</u>: Please comment on the U.S. argument, above.

b. <u>To the United States</u>: Please demonstrate where on the record USDOC took the volume of utility grade logs into consideration when deciding whether to make an adjustment to the benchmark.

<u>Response</u>:

366. As explained in the U.S. responses to questions 245 and 253, the WDNR log data was the only useable benchmark the USDOC had at its disposal after determining that there was no available tier-one or tier-two benchmark, and that the Forest2Market data did not qualify as a viable tier-three benchmark. The USDOC was unable to account for the volume of utility grade logs because the WDNR data the USDOC used for its benchmark calculation did not include volumetric information. The United States addressed the USDOC's treatment of utility grade logs in the U.S. first written submission.[490]

367. 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.[491] British Columbia uses four log grades: 1, premium sawlog; 2, sawlog; 4, lumber reject; and 6, undersized log.[492] The two systems utilize disparate criteria to categorize logs.

368. In the preliminary decision memorandum, the USDOC explained the limitations in its ability to address this difference in grading systems:

> [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.[493]

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[490] *See* U.S. First Written Submission, paras. 443-445.

[491] *See generally* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284).

[492] *See* Dual Scale Study, Attachment A (Exhibit CAN-020 (BCI)).

[493] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

This methodology remained unchanged in the final determination.[494]

369. Thus, the USDOC utilized all available prices for Camprun, CNS, and Utility grade logs for the "Eastside" region, *i.e.*, the interior of Washington, in deriving the benchmark it used.[495] The monthly, species-specific unit prices reported by WDNR combine the quotes it received, although the survey included a limited number of Utility grade log quotes.[496] Because none of the data included corresponding volumes, the USDOC calculated annual prices by simple-averaging the monthly unit prices.[497]

370. Furthermore, the USDOC could not apply the ratios of utility logs from the Dual Study Scale because the lack of a valid sampling methodology underlying the study called into question the reliability of the ratios.[498] Therefore, because the only other reliable data on the record was from the WDNR, and that data included utility grade prices, "there was no reliable basis in the record to weight-average the WDNR benchmark to correspond to the grades of the respondents' log inputs."[499]

10 THE USDOC'S DETERMINATION THAT THE ACCELERATED CAPITAL COST ALLOWANCE FOR CLASS 29 ASSETS WAS *DE JURE* SPECIFIC

262. <u>To Canada</u>: Please comment on the following argument of the United States in paragraph 760 of its first written submission:

> **Canada has failed to specifically identify any other tax provision to demonstrate that the industries and enterprises that were ineligible to receive benefits under the ACCA Class 29 assets program were able to receive the same subsidy under some other provision of the Income Tax Act and Income Tax**

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[494] *See* Lumber Final I&D Memo, pp. 64, 75-76 (Exhibit CAN-010).

[495] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008) (explaining that the USDOC "relied upon the overall unit price listed for each species" in the WDNR data).

[496] *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. *See* 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).

[497] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[498] *See* U.S. First Written Submission, paras. 446-447; Lumber Final I&D Memo, p. 75 (Exhibit CAN-010).

[499] U.S. First Written Submission, para. 449.

> **Regulations. As the Appellate Body has noted, a subsidy that is expressly limited to certain enterprises by law "does not become non-specific merely because there are other subsidies that are provided to other enterprises pursuant to the same legislation." (footnote omitted)**

Response:

371. This question is directed to Canada.

11 OFFSETS

263. To Canada: Could the USDOC have disregarded certain comparison results when determining the benefit amount by comparing individual transactions of the provision of the good in question to a monthly average benchmark price if the benchmark was based on BCTS auction prices? Could Canada give an example of a situation where the application of this method by an investigating authority would be consistent with Article 14(d) of the SCM Agreement even though the authority compares individual transactions of the provision of the good in question to a benchmark price that represents the average price of multiple transactions?

Response:

372. This question is directed to Canada.

264. To Canada: Does Canada agree that its suggested methodology for calculating the benefit amount would effectively require the USDOC to apply an average-to-average comparison method for determining the benefit amount? If so, please explain how Article 14(d) of the SCM Agreement provides the basis for the requirement that the authority ought to apply only a certain comparison method (average-to-average comparison) and not the other (transaction-to-average comparison).

Response:

373. This question is directed to Canada.

265. To both parties: At paragraph 16 the opening statement at the first substantive meeting of the Panel (day 3), the United States argued:

> **[E]ach time British Columbia and New Brunswick provided standing timber to one of the respondents for less than adequate remuneration, a benefit was conferred, a subsidy was deemed to exist, and, because the subsidized imports were**

> **found to be causing injury, the United States had the right to impose a countervailing duty equal to the amount of the benefit conferred. The fact that, at other times, Canadian provinces may have provided standing timber to these firms for adequate remuneration, and therefore no subsidy existed in those instances, is irrelevant.**

Responding to this argument, Canada noted at footnote 479 of its second written submission "that Commerce conducted its analysis regarding whether the subsidy amount for stumpage was *de minimis* on a program-wide basis, instead of examining each transaction".

Please comment on whether the USDOC examined the existence of a subsidy in each instance of provision of Crown timber to the investigated producers or examined the existence of subsidy on a programme-wide basis. Please refer to specific portions of the determination in support of your view. Does, for example, the USDOC's injury analysis shed any light on whether the USDOC was investigating the existence of a subsidy on an individual transaction basis or a programme-wide basis?

Response:

374. As an initial matter, Article 1.1 of the SCM Agreement provides, in relevant part, that "[f]or the purpose of this Agreement, a subsidy shall be deemed to exist if … there is a financial contribution by a government or any public body within the territory of a Member … and … a benefit is conferred." That is, per the express terms of the SCM Agreement, any time there is a financial contribution and a benefit, there is a subsidy.

375. During the countervailing duty investigation of softwood lumber products from Canada, when examining the provision of stumpage by the governments of New Brunswick and British Columbia, the USDOC established the existence of both transaction-specific benefits as well as the total benefit of the stumpage programs for each examined producer. This is explained in the USDOC's final calculation memoranda for the examined producers.

376. For example, with respect to JDIL, the USDOC explained that:

> For purchases for which we calculated a negative benefit, (*i.e.*, the actual payment for Crown stumpage was higher than the private Nova Scotia stumpage price benchmark) we set the benefit to zero. We then summed the transaction-specific benefits to calculate the total benefit for the program. We divided this total benefit … by JDIL's POI sales of subject merchandise, and sawmill by-products and co-products as discussed above.
>
> On this basis, we determine the countervailable subsidy rate to be

1.40 percent *ad valorem* for JDIL under this program.[500]

377. With respect to Canfor, the USDOC explained that:

> To calculate the benefit … for the purchases in tab "BCSTablesABE," we compared each timbermark/species-specific stumpage price for Canfor's POI purchases of BC Crown stumpage to the benchmark value (*i.e.*, the appropriate annual-average species-specific benchmark price multiplied by the volume on the timbermark/species-specific line) as adjusted for the benchmark cost adjustments to create a derived benchmark stumpage price. For purchases for which we calculated a negative benefit (*i.e.*, the actual payment at the adjusted stumpage price was higher than the benchmark value) we set the benefit to zero. We also removed any benefit calculated for Timbermark/Species aggregations where the stumpage purchase volume or value was negative. We summed the timbermark/species-specific benefits to calculate the total benefit for these purchases.
>
> To calculate a benefit for the purchases in tab "BCSTablesBF," we utilized the same calculation methodology used in the Preliminary Determintion because Canfor was unable to separate the stumpage price from the price paid to the third-party for these purchases. We compared each timbermark/species-specific cost-adjusted price for Canfor's POI purchases of BC Crown stumpage to the benchmark value (*i.e.*, the appropriate annual-average species-specific benchmark price multiplied by the volume on the timbermark/species-specific line). For purchases for which we calculated a negative benefit (*i.e.*, the actual payment for the adjusted stumpage price was higher than the benchmark), we set the benefit to zero. We also removed any benefit calculated for Timbermark/Species aggregations where the stumpage purchase volume or cost adjusted value was negative. We summed the timbermark/species-specific benefits to calculate the total benefit for these purchases.
>
> We added the benefits calculated in tabs "BCSTablesABECalc" and "BCSTablesBFCalc" to calculate a total benefit for the

[500] *Memorandum to the File, RE: J.D. Irving Limited Final Calculations* (November 1, 2017) ("JDIL Final Calculation Memorandum"), p. 6 (Exhibit CAN-264 (BCI)) (underline added).

> program. We then divided this total benefit by Canfor's FOB sales of subject merchandise, co-products and by-products for the POI.
>
> On this basis, we determine the countervailable subsidy rate to be 10.29 percent *ad valorem* for Canfor under this program.[501]

378. With respect to Tolko, the USDOC explained that:

> To calculate the benefit, we compared each timbermark/species-specific stumpage value to the benchmark value (*i.e.*, the appropriate annual-average species-specific benchmark price multiplied by the volume on the timbermark/species-specific line and adjusted by the benchmark cost adjustments). For purchases for which we calculated a negative benefit (*i.e.*, the actual payment for stumpage was higher than the derived stumpage benchmark) we set the benefit to zero. We also removed any timbermark/species aggregations where the stumpage purchase volume or value was negative. We summed the timbermark/species-specific benefits to calculate the total benefit for the program. We divided this total benefit by Tolko's FOB sales of subject merchandise, co-products and by-products for the POI.
>
> On this basis, we determine the countervailable subsidy rate to be 6.82 percent *ad valorem* for Tolko under this program.[502]

379. With respect to West Fraser, the USDOC explained that:

> To calculate the benefit, we compared each timbermark/species-specific stumpage value to the benchmark value, *i.e.*, the appropriate annual-average species-specific benchmark price multiplied by the volume on the timbermark/species-specific line and adjusted by the benchmark cost adjustments. For purchases for which we calculated a negative benefit, *i.e.*, the actual payment for stumpage was higher than the derived stumpage benchmark, we set the benefit to zero. We also removed any benefit calculated for Timbermark/Species aggregations where the stumpage purchase

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[501] *Memorandum to the File, RE: Final Determination Calculations for Canfor* (November 1, 2017) ("Canfor Final Calculation Memorandum"), p. 5 (Exhibit CAN-380 (BCI)) (underline added; citations omitted).

[502] *Memorandum to the File, RE: Final Determination Calculations for Tolko Marketing and Sales Ltd. and Tolko Industries Ltd. (collectively Tolko)* (November 1, 2017) ("Tolko Final Calculation Memorandum"), p. 7 (Exhibit CAN-381 (BCI)) (underline added; citations omitted).

> volume or value was negative. We summed the timbermark/species-specific benefits to calculate the total benefit for the program. We divided this total benefit by West Fraser's FOB sales of subject merchandise, co-products and by-products for the POI.
>
> On this basis, we determine the countervailable subsidy rate to be 7.42 percent *ad valorem* for West Fraser under this program.[503]

380. As demonstrated by the calculation memoranda excerpted above, for each examined producer, the USDOC properly established whether a benefit existed for each transaction before determining the total benefit of the stumpage program to the investigated producer.

381. Finally, under U.S. law, the USDOC does not conduct an injury analysis. A separate entity of the U.S. Government, the U.S. International Trade Commission ("USITC"), is responsible for making injury determinations in countervailing duty proceedings. The USITC's injury analysis has no relevance to the Panel's review of the USDOC's determination in the underlying countervailing duty investigation.

266. To Canada: At paragraph 924 of its first written submission, Canada argued that "to comply with Article 14(d), an investigating authority must ensure that the benchmark selected, and its method for comparing the benchmark to the examined transactions, relate to prevailing market conditions."

In support of this argument, Canada referred to the Appellate Body's observation in *US – Softwood Lumber IV* that Article 14(d) of the SCM Agreement "requires that the method selected for calculating the benefit must relate or refer to, or be connected with, the prevailing market conditions in the country of provision".

However, in making that observation, the Appellate Body was not explicitly examining the issue of whether the term "prevailing market conditions" pertains only to the selection of the benchmark or applies also to the benefit calculation method as a whole. Rather, the Appellate Body was examining the question of whether the benchmark has to be a private price in the country of provision of the good in question in all circumstances.

In light of this fact, please support by reference to the text of Article 14(d) of the SCM Agreement Canada's view that not just selection of the benchmark, but the method selected for benefit determination must also relate to "prevailing market

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[503] *Memorandum to the File, RE: Final Determination Calculations for West Fraser Mills, Ltd. and its cross-owned affiliates* (November 1, 2017) ("West Fraser Final Calculation Memorandum"), p. 4 (Exhibit CAN-382 (BCI)) (underline added).

conditions".

Response:

382. This question is directed to Canada.

267. To Canada: The panel in *US – Antidumping and Countervailing Duties (China)*, a case that Canada cites in claiming that USDOC should not have disregarded certain comparison results in this case, found at paragraph 11.66:

> **We consider that there could be certain situations in which some sort of grouping or averaging of transactions might be necessary in order to arrive at a determination of the amount of the benefit. Examples might include where a given set of transactions was made pursuant to a contract, or possibly where the actual prices paid to the government fluctuated slightly around the market benchmark(s) over the entire period of investigation.**

Were the license agreements pursuant to which Crown timber was provided to investigated producers in New Brunswick and British Columbia "contracts" of the kind that the panel in *US – Antidumping and Countervailing Duties (China)* refers to in the quote above?

Response:

383. This question is directed to Canada.

268. To Canada: At paragraph 940 of its first written submission, referring to the USDOC's benefit determination methodology for provision of Crown stumpage by British Columbia, Canada notes that "Commerce's approach distorted the calculation in favour of finding a benefit, for substantially the same reasons that its approach distorted the calculation in New Brunswick".

Please confirm whether the reasons based on which Canada claims that the application of the USDOC's methodology to the case of British Columbia was inconsistent with Article 14(d) of the SCM Agreement are identical to the reasons for which the application of that methodology to New Brunswick was inconsistent with Article 14(d) of the SCM Agreement.

Response:

384. This question is directed to Canada.

269. To Canada: At paragraph 320 of response to the Panel's question no. 116, Canada posited that its claim under Article 1.1(b) of the SCM Agreement was consequential to its claims of violation of other provisions of the SCM Agreement. Please explain how a violation of Articles 14(d), 19.3 and/or 19.4 would result in a consequential violation of Article 1.1(b) of the SCM Agreement in this case.

Response:

385. This question is directed to Canada.

270. To the United States: In its opening statement at the first substantive meeting, Canada argued that applying the USDOC's methodology to the case of British Columbia would have resulted in a subsidy determination even in a transaction where the amount paid for the stand by the investigated producer was significantly higher than the benchmark amount (please refer to slide 56 of Exhibit CAN-528(BCI)). Please comment.

Response:

386. Canada's example is beside the point. The USDOC did not determine the amount of benefit by comparing a stand purchased by the investigated producer to a hypothetical benchmark stand. Rather, in the preliminary decision memorandum, the USDOC explained that it "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 purchases to the most similar species represented in the benchmark data."[504]

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

> Although the GBC and West Fraser argue the Department must consider pricing on a "stand as a whole" basis as a prevailing market condition, we disagree. Under our tier-three benchmark methodology we find that 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 stumpage from a weighted-average combined species benchmark, considering how its value is evaluated according to market principles. Moreover, not calculating a weighted-average combined species benchmark is consistent with our practice. In utilizing a timbermark-based approach and further disaggregating by species, the Department is conducting the

[504] Lumber Preliminary Decision Memorandum, p. 54 (Exhibit CAN-008) (citations omitted).

> calculation on the basis that is as close to a transaction-specific analysis as possible; a transaction-specific analysis is the Department's long-standing preference. And by not offsetting its comparisons for negative benefits, the Department is acting consistently with the fact that a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked or otherwise offset by "negative benefits" from other transactions. Because a benefit is either conferred or not conferred, the manner in which the GBC prices its stumpage is irrelevant to our analysis. If a government chooses to set a price for a whole stand, rather than differentiating by species within a particular stand, that does not change the amount of the benefit conferred for purposes of our analysis.[505]

388. The USDOC further explained its efforts to make species-specific comparisons in the final calculation memoranda. For example, with respect to Canfor, the USDOC explained that:

> [W]e continue to aggregate, on an annual basis, Canfor's BC stumpage purchases by timbermark and species. We will continue to use annual-average species-specific delivered log prices from Washington state as the market-determined reference price in our stumpage calculation.
>
> To the extent possible, we matched the species in Canfor's Crown stumpage purchase file with the species in the benchmark data. In instances where the benchmark price data was a combination of two species, *e.g.*, "White Fir-Hem" we assigned that benchmark price to both species categories in the Crown stumpage purchase file, as applicable. Where there were no exact species matches, we sought to compare the stumpage purchases to the most similar species represented in the benchmark data. For this final determination, we used the same species matches that we used in the Preliminary Determination.[506]

The USDOC provided similar explanations in the final calculation memoranda for Tolko and West Fraser.[507]

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[505] Lumber Final I&D Memo, p. 68 (Exhibit CAN-010) (citations omitted; underline added).

[506] Canfor Final Calculation Memorandum, p. 3 (Exhibit CAN-380 (BCI)) (citations omitted).

[507] *See* Tolko Final Calculation Memorandum, pp. 5-6 (Exhibit CAN-381 (BCI)); West Fraser Final Calculation Memorandum, pp. 3-4 (Exhibit CAN-382 (BCI)).

389. In sum, the USDOC determined species-specific prices for the transactions under examination based on data and information supplied by respondents, and compared those species-specific prices to species-specific benchmarks constructed using available data and information. The USDOC explained its reasons for taking the approach it did in the memoranda that are before the Panel. That Canada can conceive of other ways of making the comparison that would be beneficial to Canadian interests says nothing about – and certainly does not detract from – the reasonableness and the logic of the approach that the USDOC took.

271. To the United States: In determining the benefit amount for provision of Crown timber in British Columbia, the USDOC compared prices of logs differentiated by species in Washington State to a price notionally assuming the price of a stand in British Columbia to be the price of each species in that stand. Given the variation in prices of different species in Washington logs, could an objective and unbiased investigating authority have assumed a common price for standing timber of all species in British Columbia?

Response:

390. As explained below in the U.S. response to question 273, subpart (a), the USDOC did not "notionally assum[e] the price of a stand in British Columbia to be the price of each species in that stand."[508] Rather, the USDOC determined the timbermark/species-specific stumpage price paid by an investigated producer based on information and evidence submitted by the investigated producer, which showed that the Government of British Columbia invoiced different species at the same price.

391. The United States does not take any position as to whether "an objective and unbiased investigating authority [could] have assumed a common price for standing timber of all species in British Columbia".[509] To do so would require speculation about a hypothetical scenario that is unrelated to the determination that the USDOC made in the underlying countervailing duty investigation.

272. In table 3 at paragraph 287 of its second written submission, Canada presented the following figures to illustrate how, in Canada's view, the USDOC's benefit determination methodology led to a flawed outcome:

Province A **(Crown Timber with Adjustment for**	**Province B**

[508] Panel Question 271 (underline added).

[509] Panel Question 271 (underline added).

Harvesting Costs)			**(Private Timber)**		
Stand 1	Stand is on flat ground	$22.5/m^3	**Stand 1**	Stand is on flat ground	$22.5/m^3
Stand 2	Stand is in swamp	$10/m^3	**Stand 2**	Stand is in swamp	$10/m^3
Stand 3	Stand is on steep hill	$5/m^3	**Stand 3**	Stand is on steep hill	$5/m^3

Based on this information, Canada asserts in paragraph 288 (table 4) of its second written submission that this leads to an incorrect benefit calculation as the USDOC would find a benefit whereas in Canada's opinion, there is none.

a. <u>To the United States</u>: Please comment.

<u>Response</u>:

392. Canada sums up its discussion of Table 3 and Table 4 in its second written submission by asserting that "[t]he <u>mismatch illustrated in our hypothetical</u> … can be avoided if the result of each transaction-to-average comparison is included in the overall benefit calculation."[510] On their face, Canada's arguments and its hypothetical examples are about the purported "mismatch" between transactions and benchmarks.

393. However, as the United States has demonstrated, the question of how to select and match transactions and benchmarks is entirely separate from the issue of the aggregation of multiple comparison results and the provision of offsets for negative comparison results in the overall subsidy benefit calculation.[511] If the transactions and benchmarks are mismatched, then the solution would be to match them correctly; not require that an investigating authority provide offsets in the aggregation process. If there truly were a mismatch problem, there would still be a mismatch problem if all the results of the mismatched comparisons were just aggregated and averaged. Any such aggregation and averaging and offsetting certainly would not result in the

[510] Canada's Second Written Submission, para. 290.

[511] *See, e.g.*, U.S. Second Written Submission, paras. 316-326; U.S. Second Opening Statement, paras. 39-49.

"careful matching" that Canada insists is required.[512]

394. And if the transactions and benchmarks were matched correctly, then certainly it would not be appropriate to provide offsets across different subsidies. Canada itself even appears to have agreed with this proposition in response to a question from the Panel.[513]

395. The hypothetical example in Table 3 and Table 4 in Canada's second written submission does nothing to overcome the deficiencies in Canada's legal argument, namely, Canada's utter failure to establish that anything in the text of the provisions of the covered agreements under which Canada has made its claims requires the kind of aggregation and offsetting across different subsidies for which Canada contends.

b. <u>To Canada</u>: During the United States' oral response to the above table, it illustrated a hypothetical situation in which the figures for province B were as follows: Stand 1 – $25/m^3; Stand 2 - $7.50/m^3; Stand 3 - $7.00/m^3. The United States argued that in this scenario, there would be no subsidy as regards Stand 1 and the overall subsidy amount would be $4.50 (Stand 2 - $2.50 and Stand 3 - $2.00). Please comment.

<u>Response</u>:

396. This subpart of the question is directed to Canada.

273. <u>To both parties</u>: In paragraphs 83-86 of its opening statement at the first substantive meeting of the Panel (day 3), Canada stated that:

> **[…]The single stumpage price for the entire stand means that the market values for individual species are simply not observed. […]. Commerce asked the companies to create artificial species-specific prices —in our example $30/m^3– for each species, and then compared them to its species-specific benchmarks. […]. The primary difference between Commerce´s benchmark prices and the B.C. companies' prices was this: The benchmark price reflected an average price for a single species. But the purchase price reflected an average price for several species.**

a. <u>To the United States</u>: Did the USDOC assume a common price per m^3 across species in a particular stand in determining the benefit amount for British

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[512] *See, e.g.,* Canada's Second Written Submission, paras. 284, 286, 291, 296.

[513] *See* Canada's Responses to the First Set of Panel Questions, para. 314.

Columbia? If so, where did the USDOC explain the basis for this assumption?

Response:

397. The USDOC did not assume a common price per m^3 across species in a particular stand in determining the benefit amount for British Columbia. Instead, the USDOC requested that the responding companies report what they paid for stumpage according to invoices issued by the Government of British Columbia.[514] The USDOC then compared what the companies paid for stumpage to the benchmark prices to calculate a benefit.

398. As Canada has previously explained with respect to British Columbia, "[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", and "[a]ny given invoice will … show the same stumpage rate for all species of sawlogs for scale-based stands, or all logs for cruise-based stands."[515]

399. Rather than making any assumption, the USDOC explained that, under the derived demand methodology it employed to determine a benchmark, "standing timber values are largely derived from the demand for logs produced from a given tree and '[t]he 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.'"[516] Accordingly, the USDOC constructed a stumpage benchmark using market-determined U.S. log prices, recognizing that the species of a tree is an integral part of the value of that tree. As the USDOC explained, "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 stumpage from a weighted-average combined species benchmark, considering how its value is evaluated according to market principles."[517] The USDOC explained that under this methodology it prefers to make the benefit comparison as close to transaction-specific as possible,[518] and the stumpage invoices issued by the GBC are issued on a timbermark-specific

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[514] *See, e.g.*, Tolko's Response to the Department's CVD Supplemental Questionnaire (May 30, 2017), p. 29 (Exhibit CAN-085 (BCI)). The USDOC requested Tolko to "[p]lease report your company's purchases of stumpage and logs in the appropriate tables. Please report your purchases on an invoice line-item basis as billed on the invoices issued during the POI, unless otherwise instructed."

[515] Canada's First Written Submission, para. 721.

[516] Lumber Final I&D Memo, pp. 67-68 (Exhibit CAN-010) (citations omitted).

[517] Lumber Final I&D Memo, p. 68 (Exhibit CAN-010).

[518] *See* Lumber Final I&D Memo, pp. 66, 68 ("In utilizing a timbermark-based approach and further disaggregating by species, the Department is conducting the calculation on the basis that is as close to a transaction-specific

basis with separate transaction lines for each species and grade combination.[519] To ensure the greatest possible accuracy in the comparison, the USDOC calculated the benefit at a timbermark- and species-specific level.[520]

400. The Government of British Columbia itself incorporates this derived demand analysis in the MPS through the "Real Stand Selling Price" ("RSP") variable[521] in its Estimated Winning Bid equation.[522] In the Interior, the Government of British Columbia uses species-specific monthly lumber sales data provided by Interior sawmills and published data as part of its calculation of per-cubic-meter selling prices of the various species on a particular timbermark as part of the RSP variable.[523] These calculated species-specific selling prices are then weight-averaged based on the volume of each species on the timbermark to generate a selling price for the stand.[524] After further adjustments are made as part of the MPS equations, the MPS generates a timbermark-specific stumpage rate.[525] The GBC issues timbermark-specific invoices to the license holders, which include invoice lines for each species and grade combination

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analysis as possible; a transaction-specific analysis is the Department's long-standing preference.") (Exhibit CAN-010).

[519] *See*, *e.g.*, Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-124 (Exhibit USA-084); Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-125 (Exhibit USA-085); Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-126 (Exhibit USA-086).

[520] *See* Lumber Final I&D Memo, pp. 66, 68 (Exhibit CAN-010).

[521] *See* Government of British Columbia Initial Questionnaire Response (March 14, 2017), pp. I-139-I-140, I-143-I-145 ((Exhibit CAN-018) (BCI)). *See also ibid*., Exhibit BC-S-132 (British Columbia, "Interior Appraisal Manual (2015)"), pp. 3-3 to 3-4 (pp. 42-43 of the PDF version of Exhibit CAN-047).

[522] *See* Government of British Columbia Initial Questionnaire Response (March 14, 2017), p. I-150 ((Exhibit CAN-018) (BCI)). *See also ibid*., Exhibit BC-S-132 (British Columbia, "Interior Appraisal Manual (2015)"), section 3 (pp. 40-59 of the PDF version of Exhibit CAN-047); Government of British Columbia Verification Exhibit VER-12, slide 11 (Exhibit USA-087 (BCI)).

[523] *See* Government of British Columbia Initial Questionnaire Response (March 14, 2017), p. I-150 ((Exhibit CAN-018) (BCI)). *See also ibid*., Exhibit BC-S-132 (British Columbia, "Interior Appraisal Manual (2015)"), pp. 3-3 to 3-4 (pp. 42-43 of the PDF version of Exhibit CAN-047); Government of British Columbia Verification Exhibit VER-12, slide 35 (Exhibit USA-087 (BCI)).

[524] *See* Government of British Columbia Initial Questionnaire Response (March 14, 2017), p. I-150 ((Exhibit CAN-018) (BCI)). *See also ibid*., Exhibit BC-S-132 (British Columbia, "Interior Appraisal Manual (2015)"), pp. 3-3 to 3-4 (pp. 42-43 of the PDF version of Exhibit CAN-047); Government of British Columbia Verification Exhibit VER-12, slide 35 ([[***]]") (Exhibit USA-087 (BCI)).

[525] *See* Government of British Columbia Initial Questionnaire Response (March 14, 2017), p. I-143-I-146 ((Exhibit CAN-018) (BCI)). *See also ibid*., Exhibit BC-S-132 (British Columbia, "Interior Appraisal Manual (2015)"), pp. 3-3 to 3-11 (pp. 42-50 of the PDF version of Exhibit CAN-047); Government of British Columbia Verification Exhibit VER-12, slide 36 ([[***]]) (Exhibit USA-087 (BCI)).

harvested on that timbermark.[526] These are the species and grade-specific volumes and prices that the respondent companies reported to the USDOC in their respective sales databases. On scale-based timbermarks, the MPS-generated stumpage rate is billed to all sawlog-grade timber, while all non-sawlog grade timber is billed at C$0.25/m^3.[527] For cruise-based timbermarks all timber is billed at the same stumpage rate.[528]

b. To both parties: If the USDOC did make this assumption, discuss the validity of the assumption in question given that the log prices from Washington State that the USDOC used as a benchmark for British Columbia varied significantly across species.

Response:

401. As explained in the U.S. response the previous subpart of this question, the USDOC did not make any such "assumption". Accordingly, it is not necessary for the United States to respond to this subpart of the question.

12 THE USDOC'S DETERMINATION OF BENEFIT WITH REGARD TO PROVINCIAL ELECTRICITY PROGRAMMES

274. To the United States: Please respond to Canada's argument in paragraph 354 of its second written submission that the United States' arguments presented in responses to the Panel's questions nos. 136 and 137 constitute an *ex post* rationalization.

Response:

402. As explained in the U.S. opening statement at the second substantive meeting of the panel,[529] and as demonstrated again below, the U.S. responses to Panel questions 136 and 137 do not constitute *ex post* rationalizations.

403. Canada argues, in effect, that the U.S. responses to Panel questions 136 and 137 constitute *ex post* rationalizations because, in Canada's view, Article 14(d) of the SCM

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[526] *See, e.g.*, Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-124 (Exhibit USA-084); Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-125 (Exhibit USA-085); Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-126 (Exhibit USA-086).

[527] *See* Government of British Columbia Initial Questionnaire Response (March 14, 2017), p. I-142 ((Exhibit CAN-018) (BCI)).

[528] *See* Government of British Columbia Initial Questionnaire Response (March 14, 2017), p. I-142 ((Exhibit CAN-018) (BCI)).

[529] *See* U.S. Second Opening Statement, paras. 69-75.

Agreement requires an investigating authority to examine every subsidy to determine whether government intervention created the market for the investigated good.[530] However, the USDOC was under no obligation to demonstrate, as part of its determination, that British Columbia and Quebec had not intervened in the marketplace to create new markets that otherwise would have not existed but for the subsidies at issue.

404. The guideline set out in Article 14(d) does not require an investigating authority to determine in every countervailing duty investigation whether the market for the investigated good, or inputs into that good, came into existence because of a government policy objective. The plain language of Article 14(d) cannot be understood as requiring an investigating authority to consider the policy objectives behind a government's decision to intervene in the marketplace.[531] As the Appellate Body noted in *US – Softwood Lumber IV*, the term "guidelines" in the chapeau of Article 14 suggests that the subparagraphs that follow "should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance.'"[532]

405. The Appellate Body's reasoning in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* also does not suggest that an investigating authority is required under the SCM Agreement to determine in every countervailing duty proceeding whether the market for a good came into existence because of government intervention.[533] Indeed, the Appellate Body specifically cautioned that "[t]o do so would mean to read an exception into Article 1.1(b) based on the rationale of the subsidy that has no textual basis in the [SCM] Agreement."[534] In addition, no other panel or Appellate Body report has ever mentioned this so-called "requirement" as a critical element that must guide the assessment of the adequacy of remuneration for a government-provided or government-purchased good.[535] The Appellate Body's reasoning in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* should not be understood, as Canada suggests, as altering the plain language of Articles 1.1(b) and 14(d) so as to require an investigating authority to examine the policy objectives that led a government to intervene in the

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[530] *See* Canada's Second Written Submission, paras. 354-355.

[531] *See* SCM Agreement, Art. 14(d) ("The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).").

[532] *US – Softwood Lumber IV (AB)*, para. 92.

[533] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, paras. 5.159-5.246.

[534] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.182. *See ibid*., 5.185 and U.S. Response to Question 281, *infra*.

[535] *See, e.g., US – Softwood Lumber IV (AB)*, paras. 84-85, 92; *EC – Large Civil Aircraft (AB)*, paras. 973, 975; *US – Carbon Steel (India) (AB)*, paras. 4.123-4.126, 4.128, 4.147-4.159; *US – Countervailing Measures (China) (AB)*, paras. 4.45-4.46; *US – Coated Paper (Indonesia) (Panel)*, paras. 7.32-7.35; *US – Carbon Steel (India) (Panel)*, paras. 7.30, 7.33; *US – Softwood Lumber III (Panel)*, para. 7.50.

marketplace in the form of a subsidy.

406. Finally, it is hypocritical for Canada to argue that the United States engaged in *ex post* rationalization, because the U.S. responses to questions, which were derived from Canada's arguments, demonstrated that Canada's arguments had misrepresented the evidence that was before the USDOC.

407. Panel question 136 asked the United States to "respond to Canada's argument at paragraph 1051 of its first written submission that the USDOC 'ignored the fact [sic] that British Columbia created a provincial market in which BC Hydro would acquire only new or incremental biomass electricity'."[536] The U.S. response demonstrated that Canada had misrepresented the evidence – *i.e.*, it was not a fact that British Columbia (or Quebec) created markets to acquire biomass electricity.[537]

408. Panel question 137 asked the United States to respond to Canada's argument at paragraph 1091 of its first written submission, where Canada erroneously argued that the "record shows that biomass prices include capital costs for biomass plants, as well as annual operation and maintenance expenses specific to the biomass electricity industry." The U.S. response demonstrated that Canada again had misrepresented the evidence – *i.e.*, the evidence cited by Canada did not support Canada's assertions, or otherwise show that biomass electricity was generally more expensive to produce than other energies.[538]

409. Panel question 136 also asked about, and question 137 referenced, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*.[539] The U.S. responses demonstrated that Canada had ignored critical elements of the Appellate Body's reasoning in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. The U.S. responses specifically showed that the Appellate

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[536] Panel Question 136 (underline added).

[537] *See* U.S. Responses to the First Set of Panel Questions, paras. 416-417. Paragraph 417, note 590, of the U.S. response to question 136 incorrectly references Exhibit CAN-395 as support for the statement that "the Government of Quebec mostly promoted the purchase of electricity from renewable energy facilities already in existence." The correct references are Exhibit CAN-424 (BCI), p. 4 (GOQ QR, Volume III-a) and Exhibit CAN-430, p. 14 (Hydro-Quebec Annual Report). The same correction applies to paragraph 433, footnote 1012, of the U.S. second written submission.

[538] *See* U.S. Responses to the First Set of Panel Questions, para. 419 and footnote 593.

[539] Panel question 136 directly asked the United States to comment on *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paragraphs 5.188-5.190, specifically "the Appellate Body's approach … 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." Panel Question 136 (underline added). Panel question 137 quoted from paragraph 1091 of Canada's first written submission where Canada had acknowledged that the Appellate Body's reasoning in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* was dependent on there being a comparison with conventional electricity generators. *See* Panel Question 137.

Body's reasoning in that dispute was built entirely upon Ontario's efforts to intervene in the energy marketplace to reduce reliance on fossil fuels.[540] The U.S. responses further showed that the Appellate Body's reasoning did not apply to "government interventions in support of certain players in markets that already exist, or to correct market distortions therein,"[541] as is the case in this dispute.[542]

410. In sum, Canada's contention that the United States is offering *ex post* rationalizations is baseless.[543] As demonstrated in the U.S. submissions,[544] the USDOC's findings and determinations regarding provincial electricity subsidies are firmly grounded in record evidence. The Panel should recognize that the U.S. responses to Panel questions 136 and 137 do not constitute *ex post* rationalizations and reject Canada's misrepresentations of the record evidence before the USDOC at the time of its determination.[545]

275. <u>To Canada</u>: In paragraph 678 of its first written submission, the United States points to the following statement of the USDOC:

> **[I]t 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.**

Has this part of the USDOC's determination been challenged by Canada? Please explain.

<u>Response</u>:

411. This question is addressed to Canada.

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[540] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.186.

[541] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.188. Indeed, even Canada's direct quote of the Appellate Body's finding at paragraph 1091 of its first written submission, which the Panel referred to in question 137, confirmed that *Canada – Renewable Energy / Canada – Feed-in Tariff Program* focused on "'a comparison between renewable energy electricity generators and conventional energy electricity generators' …." Panel Question 137.

[542] *See* U.S. Second Written Submission, paras. 431-436.

[543] *See* U.S. Second Opening Statement, paras. 69-75.

[544] *See, e.g.*, U.S. First Written Submission, paras. 668-736; U.S. Second Written Submission, paras. 426-455.

[545] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 174-179 (finding that, when assessing an investigating authority's determination, "[a] panel must … limit its examination to the facts that the agency should have discerned from the evidence on record" and "consider how the evidence should have fairly been understood at the time of the investigation").

276. <u>To both parties</u>: On page 164 of the final determination, the USDOC notes that "BC Hydro is required to purchase electricity from only sources within the province…". Please explain whether and how this statement is relevant for the Panel's analysis of Canada's claim under Articles 1.1(b) and 14(d) of the SCM Agreement?

<u>Response</u>:

412. The quoted statement from the USDOC's final issues and decision memorandum referenced in this question is relevant to the Panel's analysis of Canada's claim under Articles 1.1(b) and 14(d) of the SCM Agreement. The statement was responsive to arguments raised by Canadian interested parties that the USDOC did not need to conduct a benchmark analysis to determine whether Tolko and West Fraser received countervailable subsidies in the form of governmental purchases of electricity for more than adequate remuneration. The United States explains below the statement's relevance and the context in which it was made.

413. Tolko and West Fraser reported that they each sold electricity to BC Hydro[546] during the period of investigation pursuant to Electricity Purchase Agreements ("EPAs").[547] Accordingly, the USDOC evaluated whether BC Hydro's purchases of electricity conferred a benefit on Tolko and West Fraser (*i.e.*, whether BC Hydro's purchases were made for more than adequate remuneration). In its benefit analysis, the USDOC examined the evidence of record for a comparison source (*i.e.*, a benchmark) by which it could ascertain whether the remuneration that BC Hydro paid Tolko and West Fraser for the electricity it purchased from them pursuant to the EPAs was adequate.[548]

414. Canadian interested parties raised arguments in their administrative case briefs and rebuttals regarding the selection of a benchmark, which the USDOC summarized and addressed in the final issues and decision memorandum.[549] The Government of British Columbia and West Fraser argued, in part, that because the EPA prices are the result of competitive bids from BC

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[546] BC Hydro is a provincial Crown corporation and an agent of the Government of British Columbia. *See* Lumber Preliminary Decision Memorandum, pp. 65, 84 (Exhibit CAN-008); GBC QR, BC Volume II, p. BC II-30 (Exhibit CAN-395).

[547] *See* Lumber Preliminary Decision Memorandum, p. 84 (Exhibit CAN-008). Tolko had two EPAs during the period of investigation for which BC Hydro paid Tolko for electricity generated by the Kelowna sawmill (in excess of its agreed upon load requirements) and the Armstrong biomass generating station, as necessary. *See* Tolko QR, pp. 136-155 (Exhibit CAN-067 (BCI)). West Fraser also had two EPAs during the period of investigation for which BC Hydro paid West Fraser for electricity generated by the Fraser Lake and Chetwynd sawmills. *See* West Fraser QR, pp. 95-102 (Exhibit CAN-052 (BCI)).

[548] *See* Lumber Final I&D Memo, pp. 164-167 (Exhibit CAN-010).

[549] *See* Lumber Final I&D Memo, pp. 162-167 (Exhibit CAN-010).

Hydro's Bioenergy Power Call Phase I, the EPA prices were "adequate" and "market-based," as a matter of law, and no benchmark analysis was warranted.[550]

415. The USDOC disagreed that the EPA prices were "adequate" and "market-based" by virtue of the bidding process from BC Hydro's Bioenergy Power Call Phase I, because "for government policy reasons, BC Hydro is required to purchase electricity from only sources within the province, and increasingly from renewable sources of power."[551] The USDOC explained that the EPAs with BC Hydro fall within this government policy framework and, "[b]ecause this policy framework limits the sources from which BC Hydro can source electricity, the prices that result from the EPA process cannot be considered market-based."[552] As for British Columbia's and West Fraser's argument that no benchmark analysis was warranted, the USDOC stated:

> Furthermore, the fundamental premise underlying the [Government of British Columbia's] and West Fraser's argument [that no benchmark analysis is warranted] is erroneous. The adequacy of remuneration does not exist in a vacuum; to determine whether remuneration is "adequate," a comparison source is needed. We, thus, continue to find that it is necessary to select a benchmark to calculate the benefit under this program.[553]

416. Ultimately, the USDOC selected the price at which BC Hydro sold electricity as the benchmark to compare against the price at which BC Hydro purchased electricity from Tolko and West Fraser because "the best measure of the 'benefit to the recipient' is the difference between the price at which a government provided the good (*i.e.*, electricity) and the price at which the government purchased that same good."[554] On the basis of this comparison, the USDOC found that BC Hydro purchased electricity from Tolko and West Fraser for more than adequate remuneration.[555] 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.[556]

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[550] *See* Lumber Final I&D Memo, p. 163 (Exhibit CAN-010).

[551] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010). *See also* GBC QR, BC Volume II, p. BC II-32 (Exhibit CAN-395).

[552] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010).

[553] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010).

[554] Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[555] *See* Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[556] *See* U.S. First Written Submission, paras. 674-678.

417. Canada similarly argues before the Panel that there was no need for the USDOC to conduct a benchmark analysis because the EPA prices were "market-based." According to Canada, the USDOC instead should have relied on an analysis of the bidding processes conducted by BC Hydro for biomass-based electricity (*i.e.*, BC Hydro's Bioenergy Call Phase I prices) to determine whether BC Hydro purchased electricity from Tolko and West Fraser for more than adequate remuneration.[557]

418. As the United States has already demonstrated, Canada's arguments in this regard are without merit and are contrary to the benefit analysis contemplated under Articles 1.1(b) and 14(d) of the SCM Agreement.[558] Article 1.1(b) of the SCM Agreement provides that a subsidy shall exist if a financial contribution by a government confers a benefit.[559] Article 14(d) of the SCM Agreement provides that the purchase of goods by a government confers a benefit if the purchase is made for more than adequate remuneration, and the "adequacy of remuneration" is to be determined "in relation to prevailing market conditions … in the country of provision."[560] Aside from providing that the benchmark reflect prevailing market conditions in the country of provision, Article 14(d) does not specify the benchmark to be used when determining the adequacy of remuneration for governmental purchases of goods. Contrary to Canada's unsupported assertions,[561] every comparison under Article 14(d) requires a comparison source (*i.e.*, a benchmark) that is separate and independent from the financial contribution being examined to ascertain whether an artificial advantage results from that financial contribution.[562] As the USDOC observed, "[t]he adequacy of remuneration does not exist in a vacuum; to determine whether remuneration is 'adequate,' a comparison source is needed."[563]

277. <u>To the United States</u>: According to the United States, when investigating the purchase of electricity by BC Hydro, the USDOC "defined the relevant marketplace in this investigation as the market where BC Hydro both bought electricity from Tolko and West Fraser and sold electricity to Tolko and West Fraser" (paragraph 681 of the United States' first written submission). Was the sale of electricity by BC Hydro to Tolko and West Fraser under investigation as a potential subsidy?

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[557] *See* Canada's First Written Submission, paras. 1057-1062; Canada's Responses to the First Set of Panel Questions, paras. 400-406; Canada's Second Written Submission, paras. 374-377.

[558] *See* U.S. First Written Submission, paras. 680-684; U.S. Responses to the First Set of Panel Questions, paras. 414-418, 426-429; U.S. Second Written Submission, paras. 431-432, 434-442.

[559] *See* SCM Agreement, Art. 1.1(b).

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

[561] *See* Canada's Responses to the First Set of Panel Questions, paras. 400-406.

[562] *See* U.S. Second Written Submission, paras. 437-442.

[563] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010).

Response:

419. The USDOC did not investigate BC Hydro's sales of electricity to Tolko and West Fraser as a potential countervailable subsidy. No party alleged that BC Hydro's sales of electricity were made for less than adequate remuneration and the investigatory record did not otherwise indicate that an investigation into such sales was warranted.[564]

278. To the United States: The USDOC determined that there was a benefit by comparing the price at which the respondents purchased electricity from BC Hydro to the price at which they sold electricity to BC Hydro. Did the benefit arise in respect of the sale of electricity by BC Hydro, or the purchase of electricity by BC Hydro?

Response:

420. The USDOC examined whether BC Hydro's purchases of electricity conferred a benefit on Tolko and West Fraser.[565]

421. A benefit is conferred if the government's purchases of electricity were made for more than adequate remuneration. To determine whether BC Hydro's purchases of electricity conferred a benefit on Tolko and West Fraser, the USDOC examined the evidence of record for a comparison source (*i.e.*, benchmark) by which it could assess whether the remuneration that BC Hydro paid Tolko and West Fraser for the electricity it purchased from these companies pursuant to the EPAs was adequate.[566] The USDOC selected the price at which BC Hydro sold electricity as the benchmark to compare against the price at which BC Hydro purchased electricity from Tolko and West Fraser.[567] On the basis of this comparison, the USDOC concluded that BC Hydro's purchases of electricity from Tolko and West Fraser were for more than adequate

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[564] *See* Lumber Final I&D Memo, p. 166, footnote 995 (Exhibit CAN-010) ("We note that the petitioner has not alleged that the approved electricity tariff rates from BC Hydro are for [less than adequate remuneration]; therefore, the Department has not considered how the benefit to the recipient may be calculated in an investigation where there is a corresponding [less than adequate remuneration] allegation with respect to the same input allegedly provided for [more than adequate remuneration].").

[565] *See* Lumber Preliminary Decision Memorandum, pp. 84-85 (Exhibit CAN-008) (discussing whether BC Hydro's purchases of electricity generated by Tolko and West Fraser pursuant to EPAs constituted countervailable subsidies in the form of governmental purchases of goods for more than adequate remuneration); Lumber Final I&D Memo, pp. 18, 158-167 (Exhibit CAN-010) (same). The USDOC used the term "MTAR," which stands for "more than adequate remuneration," when discussing whether BC Hydro's electricity purchases conferred a benefit. *See* Lumber Final I&D Memo, pp. 162, 270 (Exhibit CAN-010).

[566] *See* Lumber Final I&D Memo, pp. 164-167 (Exhibit CAN-010).

[567] *See* Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

remuneration and thus conferred a benefit.[568]

279. <u>To the United States</u>: Please comment on Canada's statement, at paragraph 380 of its second written submission, that the turn down payments made to Tolko are "contractual provisions between BC Hydro and Tolko".

<u>Response</u>:

422. The turn down payments that BC Hydro granted to Tolko form part of the EPA entered into between BC Hydro and Tolko.[569] As the United States has demonstrated, the turn down rights associated with these payments afforded BC Hydro "control over the timing of energy deliveries. Turndown rights permit BC Hydro to decline energy deliveries that are surplus to its needs at any point in time, although BC Hydro still pays the supplier for having made its power generation capacity available."[570] The turn down payments thus do not relate to the purchase of a good but, "[a]s noted by Tolko, these payments are used to compensate Tolko for its investment in fixed generation assets that relate to its sales of electricity to BC Hydro."[571]

423. Canada has failed to point to any evidence of record that directly supports its assertion[572] that the turn down payments compensated Tolko for its agreement to sell exclusively to BC Hydro or represented a typical commercial practice for maintaining standby generation capacity. A grant exists for purposes of Article 1.1(a)(1)(i) of the SCM Agreement when the government confers something on a recipient without getting anything in return.[573] 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. Therefore, the USDOC correctly treated these turn down payments as grants.

280. <u>To Canada</u>: In the context of Canada's claim concerning the Net LIREPP Credit, please comment on the following statement made by the United States in paragraph 707 of its first written submission:

> **NB Power first determines the credit it wants to give the large industrial customers, such as JDIL; NB Power then <u>works</u>**

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[568] *See* Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[569] *See* Armstrong EPA, pp. 17-18 (Exhibit CAN-414 (BCI)).

[570] GBC QR, p. BC II-37 (Exhibit CAN-395).

[571] Lumber Final I&D Memo, p. 159 (Exhibit CAN-010). *See* Tolko CVD Affirmative Case Brief, p. 52 (Exhibit CAN-138 (BCI)) (Tolko stated, in part, that the turn down payments represented "compensation for Tolko's investment in fixed generation assets").

[572] *See* Canada's Second Written Submission, para. 380.

[573] *See* U.S. First Written Submission, paras. 670-671.

> **backwards to build up that credit through a series of renewable energy power purchases and sales and additional credits.**

In particular, does this working backwards mean that the amount of LIREPP credit is not linked to the NB Power's purchase of electricity from the Irving group?

Response:

424. This question is addressed to Canada.

281. To both parties: At page 167 of the final determination, the USDOC noted:

> **While electricity can be generated using various sources – hydro, coal, gas, oil, solar, nuclear, biomass – there is no information on the record to demonstrate that the method used to generate electricity changes the physical characteristics of electricity or the fungibility of electricity.**

Please explain the basis on which an investigating authority could consider electricity produced from biomass, from renewable sources, and non-renewable sources to be the same or different products.

Response:

425. As the USDOC noted in the excerpt quoted in the question, if there is information on the record to demonstrate that the method used to generate electricity changes the physical characteristics of electricity, or its fungibility, then an investigating authority could consider electricity generated from different sources to be different products. However, if no such information exists, it is difficult to conceive of a basis on which an investigating authority would be obligated under the SCM Agreement to distinguish electricity based on the method of its generation, given that electricity cannot otherwise be distinguished based on physical and technical characteristics, use, or fungibility. Reasonable minds may differ on this question, but when viewed pursuant to the applicable standard of review – *i.e.*, whether an unbiased and objective investigating authority could have reached the same conclusions based on the evidence and arguments before it – a panel should refrain from substituting its judgment for that of an investigating authority.