UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

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

Business Confidential Information (BCI) Redacted in Double Brackets ("[[ ]]")
on pages 28, 31, 32, 74, 76, 77, 79, 80, 81, 91, 101, 102, and 127, and in Exhibit USA-092

December 3, 2019

TABLE OF REPORTS

Short Form	Full Citation
Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
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
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
EC – Countervailing Measures on DRAM Chips (Panel)	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
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) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002

Short Form	Full Citation
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 – Cotton Yarn (AB)	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
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
US – Countervailing Measures (China) (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 – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005

Short Form	Full Citation
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 IV (Panel)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Supercalendered Paper (Panel)	Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add. 1, circulated 5 July 2018
US – Tyres (China) (AB)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

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

Exhibit No.	Description
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	Market Memorandum, New Brunswick attachment, Table 2.1
USA-089 (BCI)	Canfor 4th Supplemental Questionnaire 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))
U.S. Comments on Canada's Responses to the Panel's Second Set of Questions	
USA-092 (BCI)	Government of Quebec Verification Exhibit VE-QC-29 (BCI)
USA-093	Government of Nova Scotia Verification Exhibit NS-VE-1 ("Minor Corrections of the Government of Nova Scotia")

INTRODUCTION

1. Before addressing Canada's individual responses to questions,[1] the United States first offers some overarching comments on Canada's most recent set of responses, as well as Canada's general approach in this panel proceeding. Canada's responses to the second set of Panel questions are quite similar to Canada's earlier written submissions, responses to questions, and oral statements, and are therefore similarly disturbing.

2. To put it directly: Canada's arguments in this dispute are premised on gross misrepresentations of the evidence and gross mischaracterizations of the positions of the United States and the determinations of the U.S. Department of Commerce ("USDOC").

3. The United States does not make this observation lightly.

4. The United States recognizes that the Panel may be skeptical of such an observation, or may tend to view the observation as a litigation tactic. The United States is concerned that the perniciousness of Canada's bad behavior will not be taken seriously, or that the United States' calling it out will be lost as noise in the scrum of the dispute.

5. This is not a normal situation.

6. The degree to which Canada has attempted and continues to attempt to mislead the Panel is striking. For perspective, in this document alone, the United States comments on 65 of Canada's responses to the Panel's questions. In those 65 responses, there are more than 45 instances in which Canada has misrepresented, mischaracterized, or misstated a matter, or has made a factual assertion that is demonstrably untrue. The United States highlights these instances in this document using double underline.[2] The United States has attempted to catalogue Canada's falsehoods methodically, with specific citations to complete portions of the decision memoranda that the USDOC published – in their full and proper context – as well as with references to the voluminous record evidence on which the USDOC relied, which provides ample support for the USDOC's determinations.

7. Canada's approach to this dispute obligates the Panel to scrutinize the USDOC's decision memoranda and the record evidence. That, of course, is the task of every panel reviewing an investigating authority's determination for consistency with the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). But it is far more critical in this instance, given the deluge of misinformation with which Canada has flooded the Panel. Canada has made the

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[1] *See* Responses of Canada to Questions to the Parties from the Panel in Connection with the Second Substantive Meeting (November 12, 2019) ("Canada's Responses to the Second Set of Panel Questions").

[2] *See infra*, *e.g.*, U.S. Comments on Canada's Responses to Questions 157, 167(c), 172, 178(b), 180, 185, 188, 191, 196, 202, 204, 208(a), 208(b), 210(a), 211, 212, 215, 218, 219(a), 219(c), 221, 246, 248, 249, 259, 261(a), 275, 276, and 281.

Panel's work much more difficult.

8. Canada's lack of candor toward the Panel is especially problematic in this dispute because the case that Canada has brought is not a simple one, like, for example, an allegation under Article II of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") that a tariff is in excess of a Member's tariff binding. Resolving such an Article II claim would be a relatively far easier matter. Consulting the Member's schedule of concessions, the Panel would ask: Is the tariff imposed higher than the binding? If yes, there is a breach. If no, there is no breach. The case Canada has put before the Panel, though, cannot be resolved with such a relatively simple analysis.

9. Canada has not claimed that the United States has breached bright-line rules in the SCM Agreement or the GATT 1994 in a straightforward manner. Rather, Canada has, pointing to various provisions of those agreements, argued that the myriad decisions and findings that the USDOC made in the course of its determination in the underlying countervailing duty investigation – including with respect to specific, individual pieces of evidence – were not reasonable, or they were not those that could have been made by an objective and unbiased investigating authority. Resolving claims such as these would be challenging for a panel in any case, even if Canada had been forthright throughout the proceeding, which Canada plainly has not been.

10. To resolve Canada's claims, the Panel will need to carefully examine the decisions and findings that the USDOC made, and the evidence on the USDOC's record that underlies and supports the USDOC's determination. The Panel may consider it useful to apply analytical tools that have been developed in prior reports. For example, in *US – Tyres (China)*, the Appellate Body summarized as follows the role of a panel under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") when reviewing a determination made by a domestic authority based on an administrative record:

> It is well established that, in examining an investigating authority's determination, a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Rather, a panel should examine whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations. A panel's examination of an investigating authority's conclusions must be critical, and be based on the information contained in the record and the explanations given by the authority in its published report. As the Appellate Body has explained, what is "adequate" will depend on the facts and

circumstances of the particular case and the claims made.[3]

11. Similarly, in *US – Cotton Yarn*, the Appellate Body explained that:

> [P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.[4]

12. The Article 21.5 panel in *US – Countervailing Measures on Certain EC Products* observed that its role was to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner."[5] Numerous other WTO panels likewise have expressed this understanding that the role of the panel in a dispute involving claims under the SCM Agreement concerning a Member's application of countervailing duty measures is to examine whether the findings reached in the investigation are those that an unbiased and objective investigating authority could have reached.[6]

13. Canada has expressly stated its agreement with the reasoning in the prior reports referenced above concerning the correct standard of review.[7] And yet, at the same time, by seeking review of atomized findings by the USDOC on specific pieces of evidence – while misrepresenting and mischaracterizing that evidence – Canada has, in effect, urged the Panel to ignore the correct standard of review.

14. Again and again throughout this panel proceeding, Canada has wrongly invited the Panel to reweigh the evidence that was before the USDOC, to step into the shoes of the investigating authority, and to determine for itself whether there was or was not subsidization. That is not the Panel's role. As explained above, the Panel's role is to assess whether the USDOC properly

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[3] *US – Tyres (China) (AB)*, para. 123.

[4] *US – Cotton Yarn (AB)*, para. 74.

[5] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. *See also ibid.*, paras. 7.78-7.83.

[6] *See, e.g.*, *US – Supercalendered Paper (Panel)*, paras. 7.40, 7.150, 7.202; *US – Coated Paper (Indonesia) (Panel)*, paras. 7.61, 7.83; *US – Countervailing Measures (China) (Panel)*, para. 7.382; *China – GOES (Panel)*, paras. 7.51-7.52; *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.335, 7.373.

[7] *See, e.g.*, Canada's First Written Submission, paras. 22.i, 24.

established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's role is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the USDOC, could have – not would have – reached the same conclusions that the USDOC reached. Under the DSU, the Panel must not conduct *a de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as *"initial trier of fact*."[8] Indeed, it would be inconsistent with a panel's function under Article 11 of the DSU to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.[9] Yet, Canada has pushed and continues to push the Panel to undertake precisely the wrong kind of *de novo* review, which the Panel is prohibited from undertaking. In effect, Canada promotes an erroneous standard of review and seeks to have the Panel commit legal error.

15. The Panel has asked many specific questions about passages of the USDOC's decision memoranda and about particular pieces of evidence, or granular aspects of particular pieces of evidence. A correct use of the information that the parties have provided in response to the Panel's questions would be, as described above, to scrutinize what the USDOC did, and what the USDOC said about what it did, to assess whether the USDOC's determination comports with the requirements of the SCM Agreement and the GATT 1994. It would be legal error for the Panel to second-guess the USDOC's findings and decisions and find that the Panel would have, in its own judgment, come to a different conclusion than that of the USDOC.

16. Additionally, while the Panel may, of course, look at each individual piece of evidence as part of its review of the USDOC findings, it would be legal error to examine whether each piece of evidence, viewed in isolation, is sufficient by itself to establish the USDOC finding that Canada has challenged.[10] One particular piece of evidence, while not decisive, may take on greater meaning when viewed in the light of other corroborating evidence.[11] Canada has mounted wave after wave of assaults against a host of individual pieces of evidence, taken in isolation. Most of Canada's attacks are based on mischaracterization or misrepresentation. The thrust of Canada's argument is that particular pieces of evidence do not, on their own, support the ultimate conclusion that the USDOC reached, and thus the particular pieces of evidence are of no value at all. It is incumbent upon the Panel to resist Canada's call to ignore the standard of review, and reject Canada's proposal that the Panel view the evidence in a legally impermissible manner.

17. The United States offers the above comments to the Panel respectfully, and does so simply in light of the extreme degree to which Canada has tried throughout this proceeding to

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[8] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (italics in original; underline added).

[9] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.

[10] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 145-150. *See also* Closing Statement of the United States of America at the Second Substantive Meeting of the Panel (October 18, 2019) ("U.S. Second Closing Statement").

[11] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 148.

tempt the Panel to err by advancing a standard of review that is inconsistent with the DSU and the covered agreements.

18. To conclude these initial comments, the United States stands firmly behind the USDOC's determination in the underlying countervailing duty investigation of softwood lumber products from Canada. While resolving Canada's claims may require the Panel to examine carefully the USDOC's lengthy determinations and the massive volume of record evidence that was before the USDOC when it made its determinations, ultimately this dispute is not a close call. When the Panel examines the USDOC's determination and the record evidence underlying that determination under the correct standard of review, the United States considers that the Panel will conclude that: the USDOC's determination accords with the requirements of the SCM Agreement, properly interpreted pursuant to customary rules of interpretation; the USDOC provided a reasoned and adequate explanation for its determination; the USDOC's determination is based on ample evidence; and the USDOC's conclusion in the investigation is, indeed, one that an unbiased and objective investigating authority could have reached.

19. In the following sections, the United States comments on Canada's responses to individual questions. The absence of a U.S. comment on an aspect of Canada's response to any particular question should not be understood as agreement with Canada's response.

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

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. <u>To both parties</u>: 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.

<u>U.S. Comment</u>:

20. Canada's response to subpart (a) of question 155 is largely correct, to the extent that it

quotes the record of the investigation where the term "market" was used in various ways.[12] However, Canada draws the wrong conclusions from these references. Canada observes that "Commerce considered whether it was appropriate to use in-market benchmarks proposed by the provinces by examining whether the market within each province was distorted."[13] This is true. But it does not follow from this observation that Article 14(d) of the SCM Agreement obligates a Member to use benchmark prices from within each province where a subsidy is provided.[14] Rather, the USDOC examined "whether distortion is present in the stumpage market of each of the Canadian provinces" because the parties had proposed to use benchmark prices that, for each province, were limited to prices within that province.[15]

21. Thus, on this basis, for each province where it was alleged that the provincial government provided subsidies to producers in that province, the proposed benchmarks were comprised of prices within that province, and the USDOC found that the prices in that province could not be used as the basis for a meaningful comparison because prices within that province were distorted by the involvement of the provincial government in the provision of a particular good (*e.g.*, stumpage) in that province. It was the Canadian parties who proposed that the USDOC should only look to prices within the subsidizing province,[16] so the fact that the USDOC then examined whether prices in those provinces (*i.e.*, the proposed benchmark prices) were distorted by the government's predominance in each province (among other things) does not support Canada's legal argument that Article 14(d) obligates a Member to use benchmark prices from within each province where a subsidy is provided.

22. The U.S. response to question 155 addresses this issue.[17] As explained, it is possible to draw a line around any geographical area and then examine the market within that area.[18] It does not follow that an examination of the prevailing market conditions for the good in question in the country of provision must be limited to a particular geographical area within that country. The relevant "conditions" are the prevailing market conditions for the good in question. Here, the good was stumpage – not four different goods, as if each province were its own unique species

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[12] *See* Canada's Responses to the Second Set of Panel Questions, paras. 2-6.

[13] Canada's Responses to the Second Set of Panel Questions, para. 5.

[14] *See* Responses of the United States to the Panel's Second Set of Questions to the Parties (November 12, 2019) ("U.S. Responses to the Second Set of Panel Questions"), paras. 1-2.

[15] *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. 27 (Exhibit CAN-008). *See also, e.g.*, Canada's Responses to the Second Set of Panel Questions, paras. 7-8 *et seq.*

[16] *See* Canada's Responses to the Second Set of Panel Questions, paras. 7-8 *et seq.*

[17] *See* U.S. Responses to the Second Set of Panel Questions, paras. 15-29.

[18] *See* U.S. Responses to the Second Set of Panel Questions, paras. 3-5. *See also* First Written Submission of the United States of America (November 30, 2018) ("U.S. First Written Submission"), paras. 83-86.

(that is to say, as if there were Alberta stumpage, Ontario stumpage, Quebec stumpage, and New Brunswick stumpage).[19] Here, Alberta provided stumpage, Ontario provided stumpage, Quebec provided stumpage, and New Brunswick provided stumpage. The good in question is stumpage.[20] What Canada failed to do is to show that there was a different "good in question" between one province and the next or that "prevailing market conditions for the good in question" were distinct on one side of a provincial border and the other.[21]

23. Canada's response to subpart (a) of question 155 also fails to acknowledge why these issues (as quoted in the Panel's question) arose in particular in the New Brunswick context.[22] As explained in the U.S. response to question 155, the language that appears in the excerpt of the USDOC's questionnaire 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.[23] And, as noted in the U.S. responses to questions 154 and 155, New Brunswick did not argue that the USDOC should artificially define the provincial boundaries as constituting the boundaries of a regional market.[24]

24. New Brunswick, rather, took a different approach that was unlike 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

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[19] *See* U.S. Responses to the Second Set of Panel Questions, paras. 7 and 295-299. *See* Second Written Submission of the United States of America (May 6, 2019) ("U.S. Second Written Submission"), paras. 170-178. *See* Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008); *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. 110-112 (Exhibit CAN-010).

[20] *See* U.S. Responses to the Second Set of Panel Questions, paras. 2-8. Moreover, Canada has acknowledged that it accepts a range of tolerance in, among, and between variations in what comprises stumpage for SPF while still considering it to be SPF stumpage. *See, e.g.*, U.S. Responses to the Second Set of Panel Questions, para. 294. Even further, Canada has argued that the analysis need not be limited to "the good in question", but also may relate to "the same or similar good." *See, e.g.*, First Written Submission of Canada (October 5, 2018) ("Canada's First Written Submission"), para. 45. The United States notes this here only briefly, for reference, given that we have addressed these aspects of the issue at length elsewhere in prior U.S. submissions, statements, and responses to Panel questions. *See, e.g.*, U.S. Second Written Submission, paras. 170-178.

[21] *See* U.S. Responses to the Second Set of Panel Questions, paras. 2-8. *See also, e.g.*, U.S. Second Written Submission, paras. 170-178.

[22] *See* Canada's Responses to the Second Set of Panel Questions, para. 5 (noting only that "questionnaires for the other provinces do not ask a similar question to the one referenced in the Panel's question.").

[23] *See* U.S. Responses to the Second Set of Panel Questions, paras. 15-29.

[24] *See* U.S. Responses to the Second Set of Panel Questions, paras. 2 and 15-29.

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 (as quoted in the Panel's question) arose in the New Brunswick context for reasons that were particular to New Brunswick and reflected New Brunswick's own ready acknowledgment that the timber market can be described in many different ways at the same time.

156. To Canada:

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.

U.S. Comment:

25. Canada's response to subpart (a) of question 156 simply confirms that "Canadian parties repeatedly and consistently proposed that Commerce rely on prices from private standing timber, auction, or log markets in their respective provinces, or in the case of British Columbia, the B.C. Interior."[26] Canada's response to subpart (b) of question 156 simply confirms that "Canadian parties proposed regional benchmarks" based on Canada's assertion that benchmarks should be selected for each province from within each province (despite having failed to establish that the good in question was different in each province).[27]

26. Canada also repeats the assertion that the USDOC "recognized and addressed the fact that Canada was comprised of distinct standing timber markets."[28] As explained, however, there is no basis for Canada's assertion that, simply because one can speak of stumpage in terms of regional markets, Article 14(d) somehow required the USDOC to use prices from the province of provision.[29] Indeed, one can speak in terms of even broader markets, too. Canada has simply

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

[26] Canada's Responses to the Second Set of Panel Questions, para. 7. *See also generally ibid.*, paras. 7-26.

[27] Canada's Responses to the Second Set of Panel Questions, para. 27. *See also generally ibid.*, paras. 27-39.

[28] *See* Canada's Responses to the Second Set of Panel Questions, paras. 28, 29, and 39.

[29] *See* U.S. First Written Submission, paras. 83-86; U.S. Responses to the Second Set of Panel Questions, paras. 1-10.

failed to establish any factual or legal basis that would require the use of provincial boundaries as the dividing line between areas where SPF stumpage is sold and purchased, much less a requirement to make such a region-based assessment under Article 14(d).

27. The fact that the USDOC solicited certain province-specific information at the outset of the investigation is unremarkable and certainly what one would expect from an unbiased and objective investigating authority. Based upon information contained in the petition filed by the domestic industry and its own experience from prior countervailing duty investigations of softwood lumber from Canada, the USDOC understood that provincial governments controlled the overwhelming proportion of Crown timber in Canada and were responsible for providing the good to softwood lumber producers in their respective provinces. In light of that fact, the USDOC posed appropriate questions to facilitate an understanding of how the provision of stumpage operated within each province, including pricing information that could be considered for use as potential benchmarks. The mere fact of asking such questions in no way qualifies as an admission or implicit acknowledgement that the proper inquiry under Article 14(d) of the SCM Agreement obligates a region-based assessment, particularly when the language of that provision refers to "the country of provision" as discussed below in comments on Canada's response to questions 157 and 159.[30]

28. 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 – on the basis of the good in question and the prevailing market conditions for that good in Canada.[31]

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**

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

[31] *See* U.S. Second Written Submission, para. 165. *See also* U.S. Responses to the Second Set of Panel Questions, para. 3.

> **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.

U.S. Comment:

29. Canada's response to question 157 is misleading in several ways, and Canada repeats the same erroneous assertions it has relied on since its first written submission.[32] Canada has never contested the U.S. rebuttal of those erroneous assertions.

30. First, Canada denies that it argued for different conditions on a "tree-by-tree" basis.[33] But Canada has argued just as much in several instances, asserting, for instance, 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."[34] As noted in the Panel's question 9, "Canada referred to 187 tariffing zones each with its own constitution" within Quebec.

31. Second, Canada repeats the erroneous assertion that "market" should be interpreted as simply meaning "location."[35] The term "prevailing market conditions" in Article 14(d) of the SCM Agreement refers, in the first place, to market-determined prices, not simply the geographical location of the transactions at issue.[36] The language in Article 14(d) that speaks to the geographical scope of the provision is the phrase "in the country of provision," which is even further attenuated by the phrase "in relation to." What this means is that, even if the term

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[32] *See* Canada's Responses to the Second Set of Panel Questions, paras. 40-51.

[33] *See* Canada's Responses to the Second Set of Panel Questions, para. 40.

[34] Canada's First Written Submission, para. 616.

[35] *See* Canada's Responses to the Second Set of Panel Questions, para. 42.

[36] *See* U.S. First Written Submission, paras. 103-112.

"market" (within the phrase "prevailing market conditions") is interpreted as relating to a particular geographical location in Article 14(d), that location is the country of provision – not, as Canada suggests, the local jurisdiction of the authority providing the subsidy.

32. As the Appellate Body has explained, the key question for the investigating authority is "whether proposed benchmark prices are market determined such that they can be used to determine whether remuneration is less than adequate."[37] Canada's argument that "market" should be read to mean merely a geographical limit within the country of provision does not explain how an investigating authority still could answer this key question. Prior reports have recognized the importance of analyzing the primary question of the functioning of a market, not whether a specific area could designated as a market.[38] For example, in *US – Coated Paper (Indonesia)*, the panel found that, for the benchmark assessment to be "meaningful for determining the adequacy of that remuneration . . . requires a comparison of the government price, *i.e.* the level of remuneration in question, with a market-based price."[39] In *US – Softwood Lumber IV*, the Appellate Body found that where there is no functioning domestic market for the good in question, the guidelines cannot properly be applied to the country of provision.[40] Reading the term "market" as if it only indicated a geographical distinction would deprive that term of its ordinary meaning.

33. Third, Canada repeats its erroneous assertion that the findings in *Canada – Renewable Energy / Canada – Feed-In Tariff Program* have created an obligation to use local prices as benchmarks.[41] As explained in the U.S. first written submission,[42] the Appellate Body's finding in that dispute was couched in terms of "situations where government intervenes to create markets that would not otherwise exist" – a specific reference to the unique nature of the green energy policies at issue in that dispute.[43] The real issue being addressed in *Canada – Renewable*

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[37] *US – Carbon Steel (India) (AB)*, para. 4.152 (underline added).

[38] *See, e.g., EC – Large Civil Aircraft (AB)*, para. 975; *US – Countervailing Measures (China) (AB)*, para. 4.46; *US – Carbon Steel (India) (Panel)*, paras. 7.39-42; *US – Coated Paper (Indonesia) (Panel)*, para. 7.70 ("[A]ccepting Indonesia's position would lead to an assessment whether the price charged by the government – that is, the remuneration itself – was distorted. We do not see how that assessment could be meaningful for determining the adequacy of that remuneration, which requires a comparison of the government price, *i.e.* the level of remuneration in question, with a market-based price.").

[39] *US – Coated Paper (Indonesia) (Panel)*, para. 7.70.

[40] *See US – Softwood Lumber IV (AB)*, para. 94.

[41] *See* Canada's Responses to the Second Set of Panel Questions, para. 43.

[42] *See, e.g.*, U.S. First Written Submission, paras. 97-98.

[43] *Canada – Renewable Energy / Canada – Feed-in-Tariff (AB)*, para. 5.185. *See also ibid.*, para. 5.188 ("[A] distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had

Energy / Canada – Feed-in-Tariff Program arose from comparing different electricity inputs to the type of input used as a benchmark.[44] The discussion of the relevant "market" segment in that context cannot reasonably be separated from those particular facts, which were unique to the electricity market at issue. The facts there do not resemble the facts in this dispute, where a commodity input like timber is at issue, and Canada does not contest that the benchmark inputs are "the same or similar" goods.

34. Further, the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* was not facing the same question that the Panel faces here. In *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Appellate Body's finding related to the appropriate benchmark to measure Ontario's purchase from private companies selling a government-dictated supply mix.[45] That supply mix (wind and solar photovoltaic energy) and the "market" for it (through purchases by electricity distributors) was devised and promulgated by the provincial government in the first place.[46] Here, the various provincial governments provided stumpage to the Canadian respondents in an existing stumpage market, not a market of the provinces' own invention.

35. Fourth, Canada asserts again, without support, that there exist differences in "prevailing conditions" (notably absent is the word "market") that have "shaped" the regions that Canada asserts must be the only permissible source of benchmark prices.[47] However, as explained in the U.S. second written submission, Canada's argument for a categorical distinction between provinces remains unsubstantiated and is based on Canada's misunderstanding of the term "prevailing market conditions" in Article 14(d) of the SCM Agreement.[48]

159. To both parties: At paragraph 34 of its opening statement at the first substantive 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**

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not created it. While the creation of markets by a government does not *in and of itself* give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries." (italics in original)).

[44] *See Canada – Renewable Energy / Canada – Feed-in-Tariff (AB)*, para. 5.175. The "supply-mix" for electricity at issue in *Canada – Renewable Energy / Canada – Feed-in-Tariff* is like the product specifications that were addressed by the USDOC and not disputed by the parties in the underlying countervailing duty investigation.

[45] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.227.

[46] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.227.

[47] *See* Canada's Responses to the Second Set of Panel Questions, paras. 44-51.

[48] *See, e.g.*, U.S. Second Written Submission, paras. 161-178.

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.

U.S. Comment:

36. In its response to this question, Canada repeats the same erroneous assertions addressed above in the U.S. comment on Canada's response to question 157.[49] The United States respectfully refers the Panel to the discussion in that comment, as well as to the discussion in the U.S. response to this question.[50]

37. Canada asserts that the term "market" should be defined simply as "place", citing statements from prior reports in *US – Carbon Steel India* and *US – Upland Cotton* as examples.[51] As explained in the U.S. first written submission, Canada fails to demonstrate that there is any support for this assertion in the text of Article 14(d) of the SCM Agreement.[52] The text of Article 14(d) refers to prevailing market conditions for the good in question "in the country of provision." The Appellate Body has been clear that "in-country prices [that] are market determined . . . would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)."[53] The term "prevailing market conditions" in Article 14(d) refers, in the first place, to market-determined prices, not simply the geographical location of the transactions at issue. As the Appellate Body has explained, the key question for the investigating authority is "whether proposed benchmark prices are market determined such that they can be used to determine whether remuneration is less than adequate."[54] Canada's argument that "market" should be read to mean merely a geographical limit within the country of provision does not explain how an investigating authority still could answer this key question.

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[49] *See* Canada's Responses to the Second Set of Panel Questions, paras. 52-57.

[50] *See* U.S. Responses to the Second Set of Panel Questions, paras. 43-46.

[51] *See* Canada's Responses to the Second Set of Panel Questions, para. 56.

[52] *See* U.S. First Written Submission, paras. 103-112.

[53] *US – Countervailing Measures (China) (AB)*, para. 4.46 (footnotes omitted).

[54] *US – Carbon Steel (India) (AB)*, para. 4.152 (underline added).

38. While Canada refers to the Appellate Body report in *US – Carbon Steel (India)*,[55] that report does not support Canada's position. As that report emphasized:

> We consider it important to emphasize the market orientation of the inquiry under Article 14(d) of the SCM Agreement. As the Appellate Body stated in *EC and certain member States – Large Civil Aircraft*, the language found in the second sentence of Article 14(d) "highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, *under market conditions*, be exchanged". Because Article 14(d) requires that the assessment of the adequacy of remuneration for a government-provided good must be made in relation to *prevailing market conditions in the country of provision*, it follows that *any benchmark for conducting such an assessment must consist of market-determined prices* for the same or similar goods that relate or refer to, or are connected with, the prevailing market conditions for the good in question in the country of provision. Proper benchmark prices would normally emanate from the market for the good in question in the country of provision. To the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d).[56]

39. The common principle of the findings in prior reports is that the correct interpretation of Article 14(d) of the SCM Agreement accords with "economic logic"[57] – in other words, market-determined prices are the right basis for comparison.[58] Accordingly, to apply the appropriate approach, it is "important to emphasize the market orientation of the inquiry under Article 14(d)" because the language of the second sentence of that provision "highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods at issue would, *under market conditions*, be exchanged."[59] Absent market conditions, the adequacy of remuneration may not be discernible if the examination is limited to the local jurisdiction.

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[55] *See* Canada's Responses to the Second Set of Panel Questions, para. 56.

[56] *US – Carbon Steel (India) (AB)*, para. 4.151 (citing *EC – Large Civil Aircraft (AB)*, para. 975, and *US – Softwood Lumber IV (AB)*, para. 89; footnotes omitted; italics in the *US – Carbon Steel (India)* Appellate Body report; underline added).

[57] *US – Softwood Lumber IV (AB)*, para. 94, footnote 118 (citing *US – Softwood Lumber IV (Panel)*).

[58] *See US – Carbon Steel (India) (AB)*, para. 4.169.

[59] *See US – Carbon Steel (India) (AB)*, para. 4.151 (citing *EC – Large Civil Aircraft (AB)*, para. 975 (italics in the *US – Carbon Steel (India)* Appellate Body report).

40. Canada also repeats Canada's argument that the Spanish and French versions of Article 14(d) support its position that market must be interpreted to simply mean place.[60] But Canada's assertions regarding the Spanish and French versions of Article 14(d) fail for the same reasons given above.

161. <u>To both parties</u>: 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.

<u>U.S. Comment</u>:

41. Canada's response to question 161 repeats the same errors that characterize its other responses, namely attempting to equate the different political or geographical areas of Canada with a difference in the good in question for each province.[61] As explained above, in the U.S. comment on Canada's response to question 155, Canada conflates the fact that distinctions can be made between any two areas by drawing a line between them with the fact that the USDOC demonstrated that the good in question (stumpage for SPF) was not distinguished by provincial or geographical boundaries and that the prevailing market conditions for the good in question were not categorically different between provinces.[62] The U.S. response to question 161 also addresses this issue, explaining that the distinctions to which Canada refers are simply among the possible ways one can speak of any given area as a "market" (setting aside whether it is functioning, etc.).[63]

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

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[60] *See* Canada's Responses to the Second Set of Panel Questions, paras. 53-55.

[61] *See* Canada's Responses to the Second Set of Panel Questions, paras. 64-69.

[62] *See supra*, U.S. Comment on Canada's Response to Question 155. *See also, e.g.*, U.S. Responses to the Second Set of Panel Questions, paras. 2-8 and 294; U.S. Second Written Submission, paras. 170-178.

[63] U.S. Responses to the Second Set of Panel Questions, paras. 51-54.

STUMPAGE BENCHMARK

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 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>U.S. Comment</u>:

42. Canada's response to subpart (a) of question 167 acknowledges that the Marshall Report did not compare the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders.[64] But despite the implications of this shortcoming of the Marshall Report, Canada dismisses any analysis of losing bids of both TSG-holders and non-TSG holders as "economically uninformative."[65]

43. As the investigating authority tasked with determining whether auction prices in Quebec could be used to measure the adequacy remuneration for Crown stumpage prices paid by softwood lumber producers in Quebec, the USDOC explained why it considered such information relevant.[66] On this point, the United States refers to its response to the Panel's question 167, subpart (b).[67] In summary, the USDOC found that the provincial auction system gave "little incentive for the TSG-holding corporations [and non-TSG-holding corporations] to bid for Crown timber above the TSG administered price."[68] As a result, the USDOC considered that the structure of the provincial stumpage market resulted in downward pressure on auction prices, such that "the reference market (here, the auction) does not operate independently of the administered market."[69] Such incentives and pressures 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.[70] An analysis of the losing bids of TSG-

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[64] *See* Canada's Responses to the Second Set of Panel Questions, para. 70.

[65] Canada's Responses to the Second Set of Panel Questions, para. 70.

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

[67] *See* U.S. Responses to the Second Set of Panel Questions, paras. 73-74.

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

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

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

holding bidders and non-TSG-holding bidders would have captured a more fulsome range of bidding behavior, which would have enabled the USDOC to better assess the competitiveness of Quebec's auction system

44. Canada's attempt to salvage the Marshall Report by focusing attention on those limited instances where Dr. Marshall did analyze losing bids "when there was value" to doing so misses the mark.[71] As acknowledged by Canada, the Marshall Report did not compare the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders.[72] Instead, the Marshall Report examined losing bids in such limited contexts as possible collusion and the rationality of relatively small bids.[73] To the extent that the Marshall Report explored the concepts of possible bid suppression and adverse selection, that analysis was limited only to the second highest bids, not all losing bids, and made no distinction between TSG-holding bidders and non-TSG-holding bidders.[74] Thus, the narrow manner in which the Marshall Report analyzed losing bids sheds little light on the incentives and pressures on bidders – whether they held TSGs or not – arising from Quebec's auction system operating in tandem with the administered market for stumpage.

45. Lastly, Canada's response to subpart (a) of question 167 reveals a fundamental misconception displayed by Canada throughout this dispute. Canada treats its so-called "expert reports," such as the Marshall Report, as infallible truths rather than evidence to be considered and weighed by an investigating authority. The determination whether Quebec auction prices are distorted rests with the investigating authority acting in an objective and unbiased manner, not Dr. Marshall – no matter how strenuous his arguments are. For the reasons stated in the USDOC's final issues and decision memorandum[75] and documented numerous times previously in this dispute,[76] the USDOC had multiple sufficient bases to conclude that the Marshall Report failed to demonstrate that the auction system for Quebec stumpage operates on a competitive basis.

c. To Canada: 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

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[71] Canada's Responses to the Second Set of Panel Questions, para. 72.

[72] *See* Canada's Responses to the Second Set of Panel Questions, para. 70.

[73] *See* Marshall Report, pp. 52-58 (Exhibit CAN-171 (BCI)).

[74] *See* Marshall Report, pp. 62-69 (Exhibit CAN-171 (BCI)).

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

[76] *See* U.S. First Written Submission, paras. 269-273; 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. 162-167, 182-183; U.S. Second Written Submission, paras. 89-91; U.S. Responses to the Second Set of Panel Questions, paras. 68-70, 73-74, 94-102.

the USDOC.

U.S. Comment:

46. The two sets of raw data that Canada references in its response to this question are among 254 separate datasets upon which the Marshall Report relied.[77] 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 underlying countervailing duty investigation contains 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.[78] Canada's suggestion that the USDOC should have focused on these particular data, or *sua sponte* conducted its own analyses of these data, when even the interested parties did not do so, is unavailing.

47. The United States also respectfully refers the Panel to the U.S. response to question 58, which further addresses the issues raised by the Panel's question and Canada's response.[79]

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.**

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,**

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[77] *See* Canada's Responses to the Second Set of Panel Questions, para. 75. *See also* Marshall Report (pp. 101-105 of the PDF version of Exhibit CAN-171 (BCI)).

[78] *See* Public Record Index (Exhibit USA-034).

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

> **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.**
>
> **U.S. Comment:**

48. Canada's characterization of Decree 259-2015 is misleading.[80] An examination of 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 premised upon the recognition that "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."[81]

49. Importantly, 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 pine, 26,000 m^3 of hemlock, 86,000 m^3 of thuya (cedar), and 238,000 m^3 of hardwood."[82] Those harvesters are also subject to stringent scaling and reporting requirements.[83]

50. Therefore, Decree 259-2015 does not eliminate the log processing restriction, but "merely modifies it" for two regions of Quebec.[84] 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)."[85]

51. The United States also respectfully refers the Panel to the U.S. responses to questions 62

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[80] *See* Canada's Responses to the Second Set of Panel Questions, para. 78.

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

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

[83] *See* Decree 259-2015, p. 3 (Exhibit CAN-500).

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

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

and 172, which further address the issues raised by the Panel's question and Canada's response.[86]

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

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 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%.**

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>U.S. Comment</u>:

52. <u>Canada's response to subpart (b) of question 178 mischaracterizes the USDOC's position with respect to the supply "overhang" in New Brunswick</u>.

53. Although the United States and Canada both quote the same language from the USDOC's final issues and decision memorandum in their respective responses to subpart (b) of question 178,[87] it is important to emphasize what the USDOC actually found concerning the supply "overhang" in New Brunswick:

> 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

[86] *See* U.S. Responses to the First Set of Panel Questions, paras. 196-199; U.S. Responses to the Second Set of Panel Questions, paras. 90-93.

[87] *See* U.S. Responses to the Second Set of Panel Questions, para. 115; Canada's Responses to the Second Set of Panel Questions, para. 81.

> 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 tenure-holding 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.[88]

Thus, the USDOC concluded that 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.

54. Canada's argument that the USDOC's analysis relied upon the extent of the "overhang," not its existence, hinges on the USDOC's use of the word "significant" in describing the "overhang."[89] Canada's reliance on the use of that word is misplaced. The USDOC used the word "significant," or variations thereof, twice in discussing the "overhang" issue and its determination that, "on average, tenure holders harvested only approximately 47 percent [*sic*] of their Crown-origin standing timber allocation during calendar year 2014."[90] Notwithstanding that the United States has recognized the error in the USDOC's supply "overhang" calculation,[91] it does not fundamentally change the USDOC's analysis, which is quoted above.

55. Canada asserts, without any analysis or explanation, that "Commerce's premise is not supported by the amount of softwood Crown timber that was actually unharvested in New Brunswick (i.e. 13.8%)."[92] Canada then engages in baseless speculation that, "[i]f Commerce had not made errors in its calculation, its analysis would have found that the amount of unharvested Crown timber in New Brunswick would not have allowed mills to avoid the private market, even assuming all of the unharvested Crown timber was economic to harvest."[93] Those statements belie Canada's contention that any finding of "significance" on the part of the USDOC was tied to the "overhang" percentage calculated in the final determination, and that anything less would be somehow not "significant." That is a preposterous proposition. The consideration relevant to the USDOC's analysis was whether tenure-holding mills in New

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

[89] *See* Canada's Responses to the Second Set of Panel Questions, paras. 79-82.

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

[91] *See* U.S. Responses to the Second Set of Panel Questions, paras. 111-112.

[92] Canada's Responses to the Second Set of Panel Questions, para. 82.

[93] Canada's Responses to the Second Set of Panel Questions, para. 82.

Brunswick had the ability to source additional Crown-origin standing timber from their tenures.[94] An "overhang" percentage of 13.8 percent, as calculated by Canada, still would cause this to be true, in that there would be ample supply from Crown sources to provide a readily available alternative to private woodlot owners, thereby enabling tenure-holding mills in New Brunswick to exercise leverage to keep prices on private woodlots low.[95] Whether the "overhang" percentage is approximately 47 percent or precisely 13.8 percent does not change the crux of the USDOC's analysis.

180. <u>To Canada</u>: 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.**

Please respond to the United States' assertions above.

<u>U.S. Comment</u>:

56. Canada's response to question 180 fails to rebut the point made in paragraph 208 of the U.S. response to question 64. Canada does not dispute that neither the Government of New Brunswick nor JDIL relied upon the Kalt Report in their arguments to the USDOC.[96] Canada instead cites to a single page of a 147-page volume of a nine-volume case brief presented to the USDOC during the investigation to contend that it raised, with respect to New Brunswick, the argument 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".[97] <u>That discussion in Canada's case brief does no such thing</u>. Instead, the cited page of Canada's case brief provides a one-paragraph summary of the Kalt Report that makes no specific mention of New Brunswick and no specific contention that private market stumpage prices are

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

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

[96] *See* Canada's Responses to the Second Set of Panel Questions, paras. 84-85.

[97] *See* Canada's Responses to the Second Set of Panel Questions, para. 84, footnote 139.

determined not by competing stumpage prices, but by the variable cost of the delivered log.[98]

57. In fact, Canada's suggestion that the Kalt Report speaks to the competitiveness of the private stumpage prices in New Brunswick is undermined by the complete absence of any analysis of New Brunswick prices in the Kalt Report. Over the span of 60 pages, the Kalt Report makes only two mentions of New Brunswick: first, noting that New Brunswick is "dominated" by Acadian forest; and second, including New Brunswick in a table listing timber ownership and harvests by type of owner on a provincial basis.[99]

58. In contrast, the USDOC was presented with reports commissioned by New Brunswick in its ordinary course of business, and those official reports contradict the conclusions in the Kalt Report on which Canada relies.[100] Accordingly, it was appropriate for the USDOC to accord greater weight to the reports prepared in the ordinary course of business than to the Kalt Report, which was commissioned specifically for the purpose of the investigation, and to which the Government of New Brunswick and JDIL did not refer.[101] That evidence, along with evidence demonstrating the flexible supply of Crown timber and the market dominance of a few firms in New Brunswick, led the USDOC to the reasonable conclusion that private stumpage prices in New Brunswick are not market-determined.[102] That conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

183. To Canada: 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-

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[98] *See* Canadian Government Parties' Joint Case Brief (July 27, 2017), p. Vol. I-26 (Exhibit CAN-311).

[99] Joseph P. Kalt, Ph.D., Compass Lexecon, "Economic Analysis of Remuneration for Canadian Crown Timber: Are In-Jurisdiction Benchmarks Distorted by Crown Stumpage?", pp. 9, 10 (Exhibit CAN-014).

[100] *See* "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); "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); "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).

[101] *See, e.g.*, Lumber Final I&D Memo, p. 146 (Exhibit CAN-010). *See also* U.S. Second Written Submission, paras. 69-74 (explaining the manner in which the USDOC addressed the Kalt Report in the final determination).

[102] *See* Lumber Final I&D Memo, pp. 78-86 (Exhibit CAN-010).

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.S. Comment:

59. The United States does not dispute Canada's assertion in response to question 183 that the Government of New Brunswick does not provide operational adjustments for transportation costs.[103] The United States does dispute Canada's reliance upon that fact to support its argument that private stumpage prices in New Brunswick operate on a competitive basis.[104]

60. The USDOC extensively addressed prices available for standing timber from private woodlot owners in New Brunswick in the final issues and decision memorandum.[105] Specifically, the USDOC identified several factors – including that the government accounted 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.

61. Reports prepared by the Government of New Brunswick in the ordinary course of business lend further support to the USDOC's conclusion that the market for private stumpage in New Brunswick is distorted.[106] 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

[103] *See* Canada's Responses to the Second Set of Panel Questions, paras. 86-89.

[104] *See* Canada's First Written Submission, paras. 546-549; 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"), paras. 222-225.

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

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

> incentive for processing facilities to keep prices paid to private land owners low….[107]

The effect of transportation costs and the relative proximity of New Brunswick mills to private woodlots compared to Crown lands do not undermine the totality of the evidence upon which the USDOC based its determination.[108]

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 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.**

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 but not all types of standing timber.

<u>U.S. Comment</u>:

62. Canada's response to subpart (b) of question 184 correctly notes that the indexing performed in the New Brunswick market survey is product-specific.[109] However, the United States disagrees with other aspects of Canada's response.

63. First, Canada incorrectly asserts that the USDOC lacked evidentiary support for its statement in the final issues and decision memorandum concerning the New Brunswick market survey that "private stumpage prices for non-SPF species were frequently higher than the

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

[108] *See* Canada's First Written Submission, paras. 546-548; Canada's Responses to the First Set of Panel Questions, paras. 222-224.

[109] *See* Canada's Responses to the Second Set of Panel Questions, para. 90.

stumpage prices charged on Crown land."[110] The USDOC made that observation in response to a statement by the Government of New Brunswick in its case brief to the investigating authority that "Crown prices consistently exceed private stumpage prices."[111] The USDOC examined the price data provided by New Brunswick and found that statement not to be accurate. Aside from the example of cedar sawlogs cited by the USDOC,[112] record evidence reveals that private stumpage prices reflected in the survey exceeded Crown stumpage price for other non-SPF species, including hardwood and biomass.[113]

64. Second, and more importantly, Canada's response to subpart (b) of question 184 fails to address deficiencies with the New Brunswick market survey that the USDOC identified. The USDOC concluded as follows:

> [T]he Department has significant concerns about the accuracy of the New Brunswick private stumpage price survey itself. Specifically, the survey states that it does not include the volume of timber harvested from primary forest produced by woodlot owners/operators or the volume of stumpage sold through lump-sum transactions. The GNB estimates that these two types of transactions represent approximately 50 percent of the total (private) harvest in the province. The omission of these two significant types of transactions from the New Brunswick private stumpage price survey leads us to conclude that the survey is incomplete, and the results of the survey are skewed by the survey's exclusion of these transactions and the significant stumpage volume associated with them. In light of these deficiencies in the New Brunswick private stumpage price survey, we conclude that the survey is not an accurate source against which to compare the Crown stumpage prices—and, thus, we find the GNB's arguments on the basis of this comparison to be unpersuasive.[114]

For that reason alone, any comparison of the provincial stumpage rates to the private market rates from the New Brunswick market survey is of little value.

185. <u>To Canada</u>: At paragraph 223 of its first written submission, the United States

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[110] *See* Canada's Responses to the Second Set of Panel Questions, paras. 91-92.

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

[112] *See* Lumber Final I&D Memo, p. 84, footnote 499 (Exhibit CAN-010).

[113] *See* New Brunswick Forest Products Commission, "New Brunswick Private Woodlot Stumpage Values", pp. 7, 10 (Exhibit CAN-226); New Brunswick Timber Regulation 86-160, p. 17 (Exhibit CAN-254).

[114] Lumber Final I&D Memo, pp. 84-85 (Exhibit CAN-010) (footnotes omitted).

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.

U.S. Comment:

65. Canada's dismissive response to question 185 reflects Canada's fundamental misunderstanding of the USDOC's rationale for why the ability of private parties such as JDIL to import sawlogs contributes to the suppression of private stumpage prices in New Brunswick. Contrary to Canada's contention that the USDOC "does not draw a causal link" between the ability of a company like JDIL to import logs and price distortion caused by the government's presence in the market,[115] the USDOC quite clearly explained its reasoning in the final issues and decision memorandum:

> We agree that, typically, when faced with a high degree of imports, the Department finds that private prices in the market are not distorted by government involvement in that market. However, here, we find the opposite: that the ability of mills to import logs provides the mills with even more leverage over the New Brunswick private stumpage market. Specifically, we found that a significant volume of the imports was comprised of JDIL's imports from its own privately held land in Maine, *i.e.*, these imports did not represent arm's-length transactions. Further, in *SC Paper from Canada – Expedited Review*, the Department found that JDIL is the largest landowner in Maine. Given these investigation-specific facts, rather than demonstrating that imports are an indication of competition in the market, we find that these imports are another indication that the large mills can obtain timber from several sources other than private woodlot owners in New Brunswick (including, in JDIL's case, from its own private holdings in other jurisdictions) if private woodlot owners in New Brunswick do not price their timber at sufficiently low prices. As such, we disagree with the GNB's and JDIL's conclusion that trade between New Brunswick and other jurisdictions is indicative of an open timber

[115] *See* Canada's Responses to the Second Set of Panel Questions, para. 95.

> market in New Brunswick, and instead conclude that, in this instance, these non-arm's-length imports are among the factors that suppress private timber prices in New Brunswick.[116]

The alternative supply sources available to New Brunswick mills, including imports such as those of JDIL, are not "a prevailing market condition" as argued by Canada, but instead result in a market for private stumpage in New Brunswick where prices are suppressed and unusable as a benchmark.

66. Rather than confront the USDOC's rationale, Canada's response to question 185 primarily focuses on the specific identification of JDIL by the United States as an example of a softwood lumber producer in New Brunswick that imports sawlogs.[117] Canada appears to question how the experience of a single company can be representative of all softwood lumber producers in New Brunswick.[118] But JDIL is not just any company. In the preliminary decision memorandum, the USDOC emphasized its finding from the *SC Paper from Canada – Expedited Review* proceeding that the forest products market in New Brunswick consists of "a bilateral monopoly (a single dominant seller, the Crown; and a single dominant buyer, JDIL)" in which "[t]wo parties dominate the transactions, and prices for a large proportion of the total harvest are set administratively."[119] Additional evidence on the record of the investigation supports that characterization. Data provided by the GNB to the USDOC confirm that JDIL accounts for [[***]] of Crown-origin timber consumption as processed by sawmills and [[***]] of private-origin timber consumption as processed by sawmills.[120] Without question, JDIL is the dominant consumer of timber in New Brunswick, and its actions, aside from being reflective and representative of the industry, have a direct and outsized impact on the stumpage market in the province. Canada's suggestion that JDIL would not have the ability to "exercise market power in the light of the hundreds of private harvesters that also purchase stumpage from private woodlots" defies commercial reality.[121]

186. <u>To Canada</u>: 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**

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[116] Lumber Final I&D Memo, pp. 83-84 (Exhibit CAN-010) (footnotes omitted).

[117] *See* U.S. First Written Submission, para. 223.

[118] *See* Canada's Responses to the Second Set of Panel Questions, para. 94 (arguing that "Commerce's reasoning fails to explain why the ability of *one company* to import timber from its own holdings in the United States leads to the conclusion that *all large mills* in New Brunswick can obtain timber from several sources other than private woodlot owners in New Brunswick" (italics in original)).

[119] Lumber Preliminary Decision Memorandum, pp. 32-33 (Exhibit CAN-008) (footnotes omitted).

[120] *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)).

[121] *See* Canada's Responses to the Second Set of Panel Questions, para. 96.

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".

U.S. Comment:

67. Canada's response to question 186 constitutes yet another attempt to introduce an obligation into Article 14(d) of the SCM Agreement that simply is not there. Article 14(d) calls for the adequacy of remuneration to be determined using a benchmark that relates to the prevailing market conditions for the good in question in the country of provision. Canada contends, "[i]n order to determine whether New Brunswick's provision of Crown timber conferred a subsidy, the most accurate benchmark would be a market-determined price that would have been available to the alleged recipient of the subsidy (a benchmark arising out of the conditions of purchase and sale in New Brunswick)."[122]

68. As is evident from Canada's response, Canada would have the Panel impose an additional obligation on WTO Members to 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.

69. 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

[122] Canada's Responses to the Second Set of Panel Questions, para. 97.

support in the text of Article 14(d) or in logic.

70. The United States has extensively and repeatedly addressed such attempts by Canada to manipulate Article 14(d) of the SCM Agreement in a manner contrary to its express terms. The United States will not repeat those arguments again. Instead the United States respectfully refers the Panel to the U.S. response to question 154.[123]

71. Although the United States rejects the notion that the possible existence of regional markets must dictate the selection of a benchmark under Article 14(d), there is nonetheless ample record evidence establishing that the stumpage market in Nova Scotia reflects prevailing market conditions in New Brunswick.

72. Notwithstanding its emphasis on certain differences, Canada acknowledges "that there are similarities between Nova Scotia and New Brunswick."[124] For instance, the USDOC found that the SPF species group dominates standing timber in Nova Scotia and New Brunswick based on responses that the provincial governments provided to the USDOC's questionnaires.[125] Nova Scotia reported that SPF is "by far the predominant group of trees harvested in Nova Scotia."[126] Accordingly, the USDOC found that "SPF are the primary species that are harvested on private lands in Nova Scotia."[127]

73. The USDOC then evaluated the prevalence of SPF species in the other provinces, including New Brunswick. As discussed in the preliminary determination,[128] the USDOC found that SPF represents 94.8 percent of the softwood harvest in New Brunswick.[129] 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.[130]

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[123] *See, e.g.,* U.S. Responses to the Second Set of Panel Questions, paras. 1-14.

[124] Canada's Responses to the Second Set of Panel Questions, para. 99. *See also* Canada's First Written Submission, para. 600. The primary difference noted by Canada is that the Nova Scotia market for softwood stumpage is influenced by more processing of the softwood harvest as pulpwood and the increased competition provided by pulp and paper mills for wood fiber. *See* Canada's Responses to the Second Set of Panel Questions, para. 99. The USDOC found the failure of Canadian parties to quantify the extent of such purported differences did not render the "two sources incomparable on that basis." Lumber Final I&D Memo, p. 114 (Exhibit CAN-010).

[125] *See* U.S. Responses to the Panel's First Set of Questions, paras. 24-27.

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

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

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

[129] *See* Government of New Brunswick Initial Questionnaire Response (Exhibit CAN-240) at Exhibit NB-STUMP-1 at Table 4 (Exhibit USA-022).

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

74. In light of these similarities, it should come as no surprise that the Government of New Brunswick, in its initial questionnaire response to the USDOC, noted the many similarities in prevailing market conditions between New Brunswick and Nova Scotia, in fact referring on multiple occasions to a Maritime market.[131] Additionally, JDIL incorporates standing timber from both provinces into its sawmill operations.[132] For determining the adequacy of remuneration for stumpage in New Brunswick, a Nova Scotia benchmark more than satisfies the obligations for a benchmark under Article 14(d) of the SCM Agreement.

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.

U.S. Comment:

75. Canada's response to question 188 is a misleading and misguided attempt to diminish the role of sawmills in the New Brunswick stumpage market. Canada has previously 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.[133]

76. The "middleman" role played by independent harvesters in New Brunswick in no way undermines the USDOC's finding that private sawmills are the dominant consumers of standing timber in New Brunswick. Data provided by the Government of New Brunswick to the USDOC confirm that just three companies account for [[***]] of Crown-origin timber consumption as

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[131] *See* Government of New Brunswick Initial Questionnaire Response, pp. I-13-I-14, I-18 (Exhibit CAN-240).

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

[133] 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. 202 (underline added).

processed by sawmills and [[***]] of private-origin timber consumption as processed by sawmills.[134] Independent harvesters do not process timber in sawmills. Moreover, sawmills process wood fiber as logs, not as standing timber. It is therefore entirely appropriate that the USDOC assessed the volume of sawmills' private-origin stumpage consumption through the sawmills' consumption of logs.

77. Additionally, the United States respectfully refers the Panel to the U.S. response to question 188, which further discusses the issues raised by this question.[135]

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

191. To Canada: 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.S. Comment:

78. Canada's response to question 191 fundamentally misrepresents the USDOC's findings. Contrary to Canada's contention,[136] the USDOC never stated that salvage timber is without value. Rather, the USDOC found that these salvage transactions occur in non-commercial circumstances, which was one of four bases upon which the USDOC determined that log prices in Alberta were not usable as a benchmark.[137] Those conclusions are supported by the USDOC's verification report for the Government of Alberta.[138] As discussed in paragraph 339 of the U.S. first written submission,[139] Alberta explained during verification that the trees in Alberta may

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[134] *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)).

[135] *See* U.S. Responses to the Second Set of Panel Questions, para. 136.

[136] *See* Canada's Responses to the Second Set of Panel Questions, paras. 104, 107.

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

[138] *See* Lumber Final I&D Memo, p. 50, footnote 306 (Exhibit CAN-010).

[139] *See* U.S. First Written Submission, para. 339.

take from 90 to 120 years to reach full growth.[140] "A commercial rotation in Alberta takes 120 years," and "[l]arger trees are more valuable by volume because they contain a higher proportion of merchantable timber and therefore they have lower hauling, handling, and milling costs by volume."[141] The USDOC additionally verified that "Alberta provincial utilization standards define a merchantable tree as one that is 16 feet or more in length to a four inch top (with no more than a twelve inch stump)."[142] Salvage timber that is prematurely cut because of concessions granted to Alberta energy and utility companies cannot form the benchmark for standing timber cleared for commercial purposes.

79. In responding to subpart (a) of question 191, Canada acknowledges that salvage timber is not harvested in accordance with an approved forest management plan (*i.e.*, cutting plan).[143] With regard to subpart (b) of question 191, Canada acknowledges that Alberta requires companies to harvest all trees that meet a minimum utilization standard, as discussed in the USDOC's verification report.[144] Canada asserts that "undersized timber may, on occasion, also be harvested," but offers no evidentiary support for that proposition.[145] Even if that statement were correct and there are rare instances in which undersized timber is harvested in Alberta, it does not detract from the USDOC's finding that prematurely-cut salvage timber is not representative of commercial conditions in Alberta.

80. Lastly, the United States respectfully refers the Panel to the U.S. response to question 190, which addresses Canada's assertion that the USDOC lacked sufficient grounds to reject Alberta's proposed log benchmark.[146] 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. 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.

81. In this instance, the record conclusively demonstrates that the USDOC considered the proffered alternatives, including Alberta's log benchmark, but found they did not compel a different result, *i.e.*, the USDOC determined that the alternative did not outweigh the chosen benchmark. 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

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[140] *See* GOA Verification Report, p. 4 (Exhibit CAN-110 (BCI)).

[141] GOA Verification Report, p. 13 (Exhibit CAN-110 (BCI)).

[142] GOA Verification Report, p. 14 (Exhibit CAN-110 (BCI)).

[143] *See* Canada's Responses to the Second Set of Panel Questions, para. 105.

[144] *See* Canada's Responses to the Second Set of Panel Questions, para. 106.

[145] Canada's Responses to the Second Set of Panel Questions, para. 106.

[146] *See* U.S. Responses to the Second Set of Panel Questions, paras. 140-148.

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.[147] The USDOC determined that this evidence reflected "near complete Crown dominance of the market for standing timber in Alberta,"[148] 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."[149]

82. 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 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).[150] The USDOC determined that these stumpage prices were "relatively inconsequential as compared to the total volume of sales"[151] and, upon further examination, found these transactions not to be reflective of freely determined prices between buyers and sellers for a host of reasons, including those discussed above in the U.S. comment on Canada's response to question 191.[152]

83. The USDOC's determination could have stopped with the analysis of stumpage prices, but the Canadian parties requested that the USDOC further consider the possibility of using log 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).[153] 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.[154]

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[147] *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).

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

[149] 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).

[150] 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).

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

[152] *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).

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

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

196. To Canada: 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.S. Comment:

84. Canada's response to question 196 incorrectly asserts that the USDOC "fail[ed] to engage" with the reports authored by Dr. Kalt.[155] With respect to the first Kalt report discussed by Canada and the accompanying affidavit by Dan Wilkinson, Director of Markets for the Alberta Forest Products Association,[156] the United States explained in the U.S. second written submission how the USDOC addressed that report. For convenience, the United States reproduces below the relevant passage of the U.S. second written submission:

> **Document 7: Joseph P. Kalt, Ph.D., Compass Lexecon, "Economic Analysis of Remuneration for Canadian Crown Timber: Are In-Jurisdiction Benchmarks Distorted by Crown Stumpage?" (Exhibit CAN-014)**
>
> According to Canada, the relevance of this document is that it "focuses on whether the government's activity as a seller of stumpage distorts in-jurisdiction benchmark prices" and "concludes that stumpage markets are not distorted, finding that 'the evidence does not support the existence of the overharvesting and resulting excess supply of timber that Petitioner's claims of distorted and suppressed in-jurisdiction benchmark market prices require.'" The USDOC addressed this report in the final issues and decision memorandum at page 53. The USDOC also addressed the Wilkinson affidavit (submitted as part of the Kalt report) on page 53 of the final issues and decision memorandum. Canada argues

[155] Canada's Responses to the Second Set of Panel Questions, para. 115.

[156] *See* Canada's Responses to the Second Set of Panel Questions, paras. 108-113.

that "instead of addressing Professor Kalt's report, [the USDOC] focused on one of the report's attachments, the Wilkinson Affidavit." But the USDOC focused on the Wilkinson affidavit precisely because Alberta relied upon the Wilkinson affidavit – not the general Kalt report – to support its argument.

The USDOC explained that "the GOA cites to an affidavit from Dan Wilkinson, Director of Markets for the Alberta Forest Products Association, to argue that the supply overhang results from a variety of causes, such as the level of harvesting and transportation costs relative to the downstream price for lumber; decisions of mixed-wood lot holders, who run pulp and oriented strand board mills, to not harvest because it is impractical or uneconomic; First Nations and wildlife habitat considerations; and a fall in demand for oriented strand board and dimensional lumber in the market since the 2007 recession," and thus did not provide evidence of distortion in the provincial market.

The USDOC found that "Mr. Wilkinson's statements were generated specifically for purposes of this investigation and are not supported by any evidence or empirical data on the record of this investigation." Nonetheless, the USDOC went on to identify specific concerns about the affidavit. The USDOC explained that "Mr. Wilkinson does not quantify the extent to which the unused [annual allowable cut of timber on long-term tenures] is a result of these factors, and instead only uses general terms such as 'mostly' and 'partly.'" The USDOC also found that the "affidavit does not account for the fact that on the margin, the tenure holder has access to additional supply from Crown lands that it can harvest rather than going to the private market, not only because there is unused volume allocation during the period of investigation, but also because mills are awarded periodic allotments that span five years. Therefore, the available supply to a particular tenure holder may be even greater in a given year because, in any year of the five-year cut control period, the tenure holder can harvest beyond one-fifth of its five-year allocation, as long as they do not exceed the allocation for the five-year period."

Canada now argues that the Wilkinson Affidavit "was not intended to be quantitative," but rather "intended to confirm that the economics explained by Professor Kalt were supported by Mr. Wilkinson's experience." That Canada did not intend the Wilkinson affidavit to be quantitative does not undermine the USDOC's evaluation of the report, which addressed both

> quantitative and qualitative (e.g., its failure to address the 5-year supply guarantee system) deficiencies in the report.
>
> To the extent that Canadian interested parties relied upon the Kalt report itself (and not the Wilkinson affidavit) to support their arguments regarding Alberta, they did so to argue that any stumpage overhang in the province is "legally irrelevant because unused allocated Crown standing timber cannot 'distort' private party log prices." Because the USDOC found it appropriate to compare respondents' purchases of stumpage to stumpage prices, and not log prices, the USDOC did not need to address the Kalt report's conclusions regarding the relationship between Crown stumpage overhang and private log prices.[157]

85. With respect to the second Kalt report referenced by Canada in its response to question 196,[158] Canada conspicuously neglects to mention that the second Kalt report is limited to an analysis of stumpage and log markets in British Columbia, not Alberta. The report is titled, "An Analysis of Certain Economic Issues Relating to Petitioner's Claims About the Operation of Stumpage and Log Markets in British Columbia."[159] The United States explained how the USDOC addressed this particular report by Dr. Kalt in the U.S. second written submission with respect to its analysis of stumpage and log markets, as well as log export restraints in British Columbia.[160] Other than two passing references to Alberta in footnotes that do not factor into Dr. Kalt's analysis,[161] the second Kalt report is silent with respect to the operation of stumpage and log markets in Alberta. Dr. Kalt's pass-through analysis, which is specifically referenced by Canada in response to question 196, relies exclusively upon data from British Columbia, not Alberta.[162]

86. It is therefore not surprising that neither the Government of Alberta nor any of the company respondents with operations in Alberta relied upon or cited to this second Kalt report in

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[157] U.S. Second Written Submission, paras. 69-73 (footnotes omitted).

[158] *See* Canada's Responses to the Second Set of Panel Questions, para. 114.

[159] 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 (BCI)).

[160] *See* U.S. Second Written Submission, paras. 63-69.

[161] *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," pp. 41, 61, footnotes 56, 74 (Exhibit CAN-016 (BCI)).

[162] *See* Canada's Responses to the Second Set of Panel Questions, para. 114; 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," p. 90 (Exhibit CAN-016 (BCI)).

their written arguments to the USDOC.[163] Moreover, because the USDOC found it appropriate to compare respondents' purchases of stumpage to stumpage prices, and not log prices,[164] it was not necessary for the USDOC to address the second Kalt report's conclusions regarding the relationship between Crown stumpage rates and private log prices in the Alberta context. Canada's suggestion that the USDOC should have considered a report specific to British Columbia in its analysis of Alberta log markets is unavailing.

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>U.S. Comment</u>:

87. The premise of Canada's response to question 197 is flawed for the reasons discussed in the U.S. response to question 190. The United States respectfully refers the Panel to the discussion in that response.[165]

88. With respect to the specific characterizations of the Brattle Report in Canada's response to question 197, the United States recalls that it has explained previously, in the U.S. second written submission, how the USDOC addressed the Brattle Report in the final issues and decision memorandum. For convenience, the United States reproduces below the relevant passage of the U.S. second written submission:

> **Document 1: Mark Berkman et al., "Assessment of an Internal Benchmark for Alberta Crown Timber" (Brattle report) (Exhibit CAN-093)**

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[163] *See* Government of Alberta and the Alberta Softwood Lumber Trade Council Case Brief, Vol. IV (July 27, 2017) (Exhibit CAN-092); Canfor Case Brief (July 27, 2017) (Exhibit CAN-137 (BCI)); Tolko Case Brief (July 27, 2017) (Exhibit CAN-138 (BCI)); West Fraser Case Brief (July 27, 2017) (Exhibit CAN-139 (BCI)).

[164] *See* Lumber Final I&D Memo, pp. 48-49 (Exhibit CAN-010). *See also* U.S. Responses to the Second Set of Panel Questions, paras. 140-148.

[165] *See* U.S. Responses to the Second Set of Panel Questions, paras. 140-148.

> According to Canada, the relevance of this document is that it "concludes that log prices in Alberta are not depressed as a result of the Crown stumpage system and that TDA transaction data can be used to calculate an in-jurisdiction benchmark for stumpage dues." The USDOC addressed this report in the final issues and decision memorandum at pages 53-54. The USDOC found that "this report was commissioned by the [government of Alberta] for the purposes of this investigation and as such, carries only limited weight given its potential for bias, with data and conclusions that may be tailored to generate a desired result." However, the USDOC also went on to address whether the report supported the Canadian interested parties' argument that "the existence of supply overhang is consistent with Crown stumpage rates being too high, rather than too low." The USDOC found that "whether Crown stumpage prices are too 'high' or 'low' is not what the Department is attempting to measure in its distortion analysis. Rather, our concern, reflected above, is that private prices are 'effectively determined' by Crown stumpage prices, which renders any price comparison circular."
>
> Canada asserts that the USDOC "completely ignored the Brattle Report's most relevant evidence and analysis, which concluded that the observed log prices constitute an appropriate benchmark." However, as discussed in the final issues and decision memorandum at page 48, the USDOC found that the appropriate benchmark for respondents' purchases of stumpage was a stumpage benchmark, not a log benchmark. Therefore, the USDOC had no reason to address what Canada describes as "the Brattle Report's most relevant evidence and analysis."[166]

200. <u>To Canada</u>: 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

[166] U.S. Second Written Submission, paras. 39-40 (footnotes omitted).

dominance of the government in the market for stumpage" is relevant?

U.S. Comment:

89. The premise of Canada's response to question 200 is flawed, for the reasons discussed in the U.S. response to question 190.[167]

90. In short, the relevant question under Article 14(d) of the SCM Agreement, as the United States has demonstrated, is whether the benchmark that the USDOC selected reflects prevailing market conditions for the good in question in the country of provision. Canada states in response to question 200 that "Commerce was therefore required to find that private log prices in Alberta were distorted in order to reject the proposed benchmark."[168] Canada's position reflects a fundamental misunderstanding of the obligations under Article 14(d), and further illuminates the misguided 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.

91. In this instance, the record conclusively demonstrates that the USDOC considered the proffered alternatives, including Alberta's log benchmark, but found they did not compel a different result, *i.e.*, the USDOC determined that the alternative did not outweigh the chosen benchmark. 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.[169] The USDOC determined that this evidence reflected "near complete Crown dominance of the market for standing timber in Alberta,"[170] 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."[171]

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[167] *See* U.S. Responses to the Second Set of Panel Questions, paras. 140-148.

[168] Canada's Responses to the Second Set of Panel Questions, para. 120.

[169] *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).

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

[171] 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

92. 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 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).[172] The USDOC determined that these stumpage prices were "relatively inconsequential as compared to the total volume of sales"[173] and, upon further examination, found these transactions not to be reflective of freely determined prices between buyers and sellers, for a host of reasons.[174]

93. The USDOC's determination could have stopped with the analysis of stumpage prices, but the Canadian parties requested that the USDOC further consider the possibility of using log 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).[175] 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.[176] Contrary to Canada's baseless contention that the USDOC's findings with respect to private log prices in Alberta are "unsubstantiated,"[177] the USDOC's findings are supported by ample record evidence.[178]

94. The United States respectfully refers the Panel to the entirety of the discussion in the U.S. response to the Panel's question 190.[179]

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

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).

[172] 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).

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

[174] *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).

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

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

[177] Canada's Responses to the Second Set of Panel Questions, para. 121.

[178] *See* Lumber Final I&D Memo, pp. 49-50, footnotes 306-309 (Exhibit CAN-010).

[179] *See* U.S. Responses to the Second Set of Panel Questions, paras. 140-148.

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.

U.S. Comment:

95. Canada's response to question 202 largely parallels the U.S. response to this question in terms of explaining the calculation of the share of Crown timber harvest volumes sold through BCTS auctions.[180]

96. However, Canada's response suggests that the USDOC's distortion finding was based on the conclusion that the percentage of Crown timber harvest sold through the BCTS auction was too low.[181] Canada mischaracterizes the USDOC's distortion analysis, which did not require that the volume of Crown timber sold through the BCTS auction meet a certain minimum threshold to serve as a market-determined reference price. The USDOC explained why the Crown stumpage prices from the BCTS auctions were distorted and therefore not an appropriate tier-one benchmark:

> [W]e have not presumed that reference prices (such as the results of a government-run auction) must represent a specific percentage of a province's harvest before it could be used as a point of reference for setting prices on the administered portion of the harvest, but have examined whether the market used as a point of reference established fair market prices that would then apply to the administered portion of the standing timber sales system. Thus, when evaluating the reference market, we have examined whether the reference price actually functions as a market price, and functions independently of the government-set price.[182]

97. The USDOC further explained that BCTS prices, which were the only benchmark proposed by the Canadian respondent interested parties, would present a viable benchmark if the auction mechanism were open and competitive, and thus functioned as a market price

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[180] Canada's Responses to the Second Set of Panel Questions, paras. 122-124; U.S. Responses to the Second Set of Panel Questions, paras. 161-163.

[181] *See* Canada's Responses to the Second Set of Panel Questions, para. 124 (citing Lumber Preliminary Decision Memorandum, p. 37 (Exhibit CAN-008)).

[182] Lumber Preliminary Decision Memorandum, p. 36 (Exhibit CAN-008).

independent of the government-set price.[183] However, the USDOC determined that the BCTS auction prices, which set the MPS prices, are not valid, market-determined prices. The USDOC's finding was not based on the volume of harvest sold at auction, but on the features of the auction structure and market that distorted BCTS auction prices.[184]

98. Canada repeats its assertions regarding Dr. Athey's findings, but the United States has addressed these assertions numerous times previously.[185] The United States respectfully refers the Panel to the prior U.S. discussion of these issues.

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>U.S. Comment</u>:

99. Canada's response to question 204 asserts that the BCTS auction results in "robust competition," in part because bidders are unaware of the number of other bidders and the amount of the offer on a particular tract.[186] <u>The record evidence, however, does not support Canada's argument</u>.

100. As explained in the U.S. first written submission, the record evidence undermines Canada's characterization of "robust competition" in the BCTS auction.[187] The data show that for the 358 unrestricted TSLs awarded in the BC Interior, there were only 539 eligible, unsuccessful bids – *i.e.*, an average of 2.5 bids per auction.[188] In addition, 11 percent of TSLs failed to sell in their first listing.[189] The fact that excluding bidders impacts price is obvious and, indeed, undisputed. For instance, British Columbia stated in its Initial Questionnaire Response that "[g]enerally, there is a statistically positive correlation between the number of bidders and

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[183] Lumber Preliminary Decision Memorandum, p. 36 (Exhibit CAN-008).

[184] *See* U.S. Responses to the First Set of Panel Questions, para. 270 ("(1) BCTS prices were not independent of prices for timber on the administered portion of GBC-owned land, because the tenure-holding sawmills were also the predominant purchasers of BCTS-harvested timber; (2) BCTS prices were not set by competitive bid procedures because the three-TSL limit inhibits competition and suppresses prices; and (3) the GBC's and GOC's restraints on the exportation of BC-origin logs contribute to an overabundant supply of logs and suppresses standing timber prices.").

[185] *See* Canada's Responses to the Second Set of Panel Questions, para. 124. *See also* U.S. Responses to the First Set of Panel Questions, paras. 259-261 and 275 (citing, *inter alia*, Lumber Preliminary Decision Memorandum, p. 38 (Exhibit CAN-008)); U.S. Second Written Submission, paras. 107-108.

[186] *See* Canada's Responses to the Second Set of Panel Questions, paras. 126, 128.

[187] *See* U.S. First Written Submission, para. 384.

[188] GBC QR, p. I-174 (Exhibit CAN-018 (BCI)).

[189] GBC QR, p. I-179 (Exhibit CAN-018 (BCI)).

the winning bid. Data indicate, however, that the winning bid increases at a decreasing rate relative to the number of bidders."[190] Similarly, British Columbia explained that it uses the number of anticipated bidders in its equation to determine MPS prices "because it is known that number of bidders affects sale price."[191] And, when asked at verification regarding circumvention of the three-sale limit by large lumber companies, British Columbia officials stated that the issue was a topic of internal discussion and "there are some within the Ministry [of Forests, Lands & Natural Resource Operations] that do not think that enforcement of this a [*sic*] rule is in the Ministry's interest."[192] Thus, Canada's arguments ignore British Columbia's own statements on the record linking price to the number of auction bids.[193]

101. Furthermore, the United States has demonstrated that the three-sale limit imposed under the BCTS means that the auctions are inherently less competitive and open than they would be absent such a restriction.[194] As the USDOC explained in the final issues and decision memorandum, the three-sale limit inhibits competition because it:

> imposes an artificial barrier to participation in the BCTS auctions; while no companies are *per se* excluded from the auction system as a whole, the three-sale quota means that, to the extent some companies have already reached the quota, any given auction will find fewer bidders that could otherwise participate. In this manner, the BCTS auctions are not the type of "competitively run government auctions" envisioned under 19 CFR 351.511(a)(2)(i). For this reason alone, the auctions could not provide a tier-one benchmark under our regulations even if we were to find a non-distorted market overall such that the first tier in our methodology would apply.[195]

102. The reduced competition in the BCTS auctions is further compounded by the dominant firms' use of proxy bidders to get around the three-sale limit, which allows them to maintain their dominance in the auctions.[196] Record evidence demonstrates that large companies, including the mandatory respondents, were able to harvest more than three TSLs at a time by

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[190] GBC QR, p. I-178 (Exhibit CAN-018 (BCI)).

[191] GBC QR, p. I-143 (Exhibit CAN-018 (BCI)).

[192] GBC Verification Report, p. 12 (Exhibit CAN-088).

[193] *See* U.S. First Written Submission, para. 384.

[194] *See* U.S. First Written Submission, paras. 367-369.

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

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

purchasing additional licenses won by smaller independent loggers at the BCTS auctions.[197] Consequently, the USDOC determined that "the three-sale limit has failed to significantly diversify the entities harvesting from TSLs won on the auction in the manner intended."[198]

103. The use of proxy bids introduces an additional market distortion because the large firms pay cutting rights fees to access the right to harvest a TSL won by a third party at auction.[199] Because these cutting rights fees are not built into the third-party bids, "the price paid by the BCTS auction winner does not reflect the full value of the timber."[200] Furthermore, while most of the participants in 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.[201] 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."[202] Accordingly, the operation of the BCTS auction undercuts Canada's contention that because winning bids must exceed the upset rate, the number of bidders cannot drive down the sales price to an aberrantly low figure.[203] Specifically, "the 'expected winning bid' is set by the MPS equation, which itself is based upon prior BCTS auctions," which is circular.[204]

104. As explained in more detail below in the U.S. comment on Canada's response to question 211, Canada's assertion that the BCTS has a commercial mandate and functions like a small private landowner[205] is contradicted by record evidence demonstrating that the BCTS has public policy objectives that prevent the prices from being fully market-determined.

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

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

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

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

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

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

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

[203] *See* Canada's Responses to the Second Set of Panel Questions, para. 127.

[204] *See* U.S. Responses to the First Set of Panel Questions, para. 278; U.S. Second Written Submission, para. 113.

[205] Canada's Responses to the Second Set of Panel Questions, para. 127.

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.S. Comment:

105. Canada feigns ignorance of the "blocking process" that is operating in its own province of British Columbia,[206] suggesting that the USDOC "used the term 'blocking' in an imprecise manner", so, purportedly, it is unclear to Canada what the USDOC could have meant when it used the term "blocking" in the final issues and decision memorandum.[207] Canada attempts to obfuscate, but the USDOC's discussion of the blocking process in British Columbia is clear.

106. Because Canada has yet again misrepresented the contents of the USDOC's determination, the United States once again is obligated to show the Panel exactly what the USDOC actually said in its determination. The USDOC found, in the final issues and decision memorandum, that "a 'blocking' system operates in the province, discussed further below, which creates an environment in which log sellers are forced into informal agreements that lower export volumes and domestic prices."[208] Citing to record evidence, the USDOC explained that:

> Under the "blocking" system, processors in the province will block a harvester's export application in order to force the harvester to provide logs to the processor at low prices. To export their logs from the province, most exporters in British Columbia are required to first offer their logs to processors in the province. As such, most potential exports are subject to this blocking process. As explained in the Canada Institute at the Wilson Center's report "From Log Export Restrictions to a Market-Based Future: Towards an Enduring Canada-U.S. Softwood Agreement", the processors in the province will make a bid on the logs offered for sale, effectively blocking the harvester from exporting their logs, for the sole purpose of negotiating concessions from the exporter. Once

[206] *See* Lumber Final I&D Memo, pp. 139-141 (Exhibit CAN-010).

[207] Canada's Responses to the Second Set of Panel Questions, para. 130. *See also ibid*., para. 135.

[208] Lumber Final I&D Memo, p. 139 (Exhibit CAN-010).

> an informal agreement is reached, in which the processor receives logs at discounted prices, the processor will agree not to block the log exports. In other words, the domestic processor agrees to lift the block on certain exports of logs in return for favorable terms on the sales of other logs. Further, the report indicates that this practice is wide spread throughout the province. As a result of this blocking process, harvest operators are frequently forced to sell a portion of their logs to processors in British Columbia at or below the cost of production in order to be able to export their remaining logs.
>
> The existence of this "blocking process" is corroborated by record evidence that a log exporter in British Columbia has been subject to this process. Specifically, these documents detail how the company has been forced to negotiate agreements with domestic processors in which they sell logs below market rates to prevent their requests for exports from being blocked and that the GBC is aware of this process.[209]

107. The above excerpt is the only discussion of the blocking process in the final issues and decision memorandum, save for the footnotes omitted from the quotation above, and the USDOC did not address the blocking process in the preliminary decision memorandum. The Panel can judge for itself whether this discussion of the blocking process by the USDOC is "imprecise", as Canada alleges. The United States considers that Canada's argument in that regard simply lacks any credibility whatsoever.

108. Canada also falsely asserts that the USDOC "relied on speculation about the existence of purported 'blocking' by domestic consumers in the Coastal market."[210] The USDOC did not rely on "speculation", the USDOC relied on evidence. Additionally, as demonstrated in the U.S. response to question 210, subpart (b), Canada's assertion that the USDOC relied only on information concerning the Coastal market is belied by evidence on the USDOC's record, including a report prepared for the British Columbia Minister of Forests and Range, which expressly references information obtained from "interior log producers".[211]

109. Turning to the question that the Panel actually posed to the parties, Canada contends that

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[209] Lumber Final I&D Memo, pp. 140-141 (Exhibit CAN-010) (underline added; footnotes omitted).

[210] Canada's Responses to the Second Set of Panel Questions, para. 129 (underline added).

[211] "Generating More Wealth from British Columbia's Timber: A Review of British Columbia's Log Export Policies," A report for the British Columbia Minister of Forests and Range, by Bill Dumont and Don Wright (December 2006), p. 5, Petition, Exhibit 242 (p. 4 of the PDF version of Exhibit USA-010) (underline added). *See also* U.S. Responses to the Second Set of Panel Questions, paras. 207-213.

"assertions in legal pleadings in an adversarial process, drafted by litigation counsel, cannot be considered 'evidence' that established that Merrill & Ring entered into formal agreements of the sort referenced in the Panel's question."[212] Why not? Canada does not explain this contention at all. Instead, Canada attempts to score debating points by observing that "Commerce's reliance on these documents as 'evidence' stands in stark contrast to its treatment of expert reports prepared for the investigation, which it determined were '*at risk* of litigation inspired fabrication'."[213] Canada continues to fail to understand why the USDOC assigned the weight it did to the reports prepared by Canada's paid consultants, which is why Canada makes this flawed observation that is of no help to Canada.

110. As the United States has demonstrated, the USDOC not only explained that the reports prepared by Canada's paid consultants were "at risk" of bias, but they were also deficient for other reasons, or they were contradicted by other evidence on the record that was not similarly at risk of bias. In "stark contrast", to borrow Canada's term,[214] the "assertions in legal proceedings in an adversarial process"[215] made by Merrill & Ring were corroborated – not contradicted – by other evidence on the record, including a sworn affidavit by a company official at Merrill & Ring attesting to the company's own experience, which was made under penalty of perjury, as well as by reports published independently of any adversarial proceeding. The United States discussed that other corroborating evidence in the U.S. responses to question 208, subparts (a) and (b).[216]

111. With respect to the statement by TimberWest, Canada asserts that "[a]s an opinion piece, rather than a sworn statement of facts, its contents must be approached with caution."[217] Once again, Canada does not explain its assertion concerning how one should approach the contents of the TimberWest statement. And once again, the statement by TimberWest was corroborated – not contradicted – by other evidence on the USDOC's administrative record.[218]

112. Canada further asserts that "[a] close examination of the [TimberWest] opinion piece reveals that it does not, in fact, state anything about informal agreements–simply the author's views about the LEP process itself."[219] Since Canada has proposed it, the United States agrees that a "close examination" of the TimberWest piece is warranted. In the piece, TimberWest's President and CEO, Brian Frank, explains that, under BC's log export restraint policy:

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[212] Canada's Responses to the Second Set of Panel Questions, para. 132.

[213] Canada's Responses to the Second Set of Panel Questions, para. 132 (italics in original).

[214] Canada's Responses to the Second Set of Panel Questions, para. 132.

[215] Canada's Responses to the Second Set of Panel Questions, para. 132.

[216] *See* U.S. Responses to the Second Set of Panel Questions, paras. 180-193.

[217] Canada's Responses to the Second Set of Panel Questions, para. 134.

[218] *See* U.S. Responses to the Second Set of Panel Questions, paras. 180-193.

[219] Canada's Responses to the Second Set of Panel Questions, para. 134.

> [P]roposed exports and domestic log prices are reviewed by a non-transparent, government-appointed committee. There is no negotiation on price with the seller, the domestic buyer simply makes an offer on a proposed export and the committee considers whether that offer is "fair" without regard to international log or lumber prices.
>
> In some cases the domestic log price deemed "fair" by this committee is less than half of what the international market would pay for the same log in the same location.
>
> Perhaps even more troubling for my company, and others, is that the price for a log in the domestic market, in most cases, is below our cost to produce.
>
> So why would we harvest trees that take sixty years to grow, and sell them at a loss into the artificially depressed domestic market? Because, only after we satisfy domestic demand are we able to obtain an export permit and sell to international customers at a substantially higher price and profit. Only export sales generate a profit margin that supports investment and jobs.
>
> …
>
> At TimberWest, we sell over 50 per cent of our production into the domestic market at a loss, so without log exports we would have no cash flow, no operating profits, no business, no economic activity, and no jobs.[220]

113. Canada is being obtuse, or is just cynically misrepresenting the content of the TimberWest piece, when it suggests that the piece does not discuss informal agreements and the blocking process in BC. Plainly, TimberWest's description of selling "at a loss into the artificially depressed domestic market" to "satisfy domestic demand" prior to "obtain[ing] an export permit" to "sell to international customers at a substantially higher price and profit" is a description of TimberWest's own experience with the kind of informal agreements and the blocking process, which is described in more explicit terms by Merrill & Ring and in other reports on the USDOC's administrative record.[221] TimberWest's description of its own experience is corroborated by that other evidence, and is not contradicted by any other evidence on the USDOC's record.

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[220] "Unfair log restrictions in B.C.", by Brian Frank, published on www.woodbusiness.ca, Petition, Exhibit 252 (p. 153 of the PDF version of Exhibit USA-010).

[221] *See* U.S. Responses to the Second Set of Panel Questions, paras. 180-193.

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

U.S. Comment:

114. As explained in the U.S. response to subpart (b) of this question, 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 USDOC relied on that evidence together with other evidence on the USDOC's administrative record, including 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, and a report prepared for the British Columbia Minister of Forests and Range.[222]

115. Canada does not mention this other evidence in its response to the Panel's question.

116. Instead, Canada again obfuscates. Canada argues that "the fact that an offer is placed on advertised logs does not necessarily mean that those logs cannot be exported. If the offer is not fair, the logs will receive their authorization to export."[223] This is a strawman argument. The USDOC did not find and the United States has not argued that a mere offer for advertised logs means that the logs cannot be exported. As demonstrated above in the U.S. comment on Canada's response to subpart (a) of this question, the USDOC clearly explained the blocking process, relying on record evidence. Of course, whether an offer is "fair" is subjective. TimberWest explained that "[t]here is no negotiation on price with the seller, the domestic buyer simply makes an offer on a proposed export and the committee considers whether that offer is 'fair' without regard to international log or lumber prices. In some cases the domestic log price deemed 'fair' by this committee is less than half of what the international market would pay for the same log in the same location."[224] In that case, a potential export of logs can be blocked by a low-price offer that is nevertheless deemed by a government-appointed committee to be "fair".

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[222] *See* U.S. Responses to the Second Set of Panel Questions, paras. 188-193.

[223] Canada's Responses to the Second Set of Panel Questions, para. 136.

[224] "Unfair log restrictions in B.C.", by Brian Frank, published on www.woodbusiness.ca, Petition, Exhibit 252 (p. 153 of the PDF version of Exhibit USA-010).

117. Canada also notes that "less than 1% of the applications to advertise logs for export have valid offers", and Canada argues that "[t]he effective threat of 'blocking' cannot be significant when the number and share of logs that are precluded from export through the LEP process is so small."[225] An alternative explanation, of course, is that the number and share of logs that are precluded from export through the LEP process is so small because of the informal arrangements made between log suppliers and BC processers to avoid offers on advertised logs and "blocking", as the evidence established. As the USDOC reasoned, "[t]here is no way to know how many more logs would be exported in the absence of this process", and "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."[226]

118. Canada also contends that the information from Merrill & Ring and TimberWest, which operate on the BC Coast, is insufficient to establish that the blocking process operates in the BC Interior.[227] Canada argues that the USDOC "relied on contradictory evidence from a different market to conclude that the alleged practice of negotiating agreements is 'widespread' in both markets."[228] That is false. The USDOC, referring to the "Canada Institute at the Wilson Center's report 'From Log Export Restrictions to a Market-Based Future: Towards and Enduring Canada-U.S. Softwood Agreement'", explicitly stated that "the report indicates that this practice is wide spread throughout the province."[229] That report explains that:

> 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

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[225] Canada's Responses to the Second Set of Panel Questions, para. 136.

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

[227] *See* Canada's Responses to the Second Set of Panel Questions, para. 139.

[228] Canada's Responses to the Second Set of Panel Questions, para. 139.

[229] Lumber Final I&D Memo, p. 140 (Exhibit CAN-010) (citing Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 11, p. 9 (Exhibit USA-019); underline added).

> much less than 97%.[230]

Once again, Canada makes no mention of the Wilson Center report in its response to this question, nor to the report prepared for the British Columbia Minister of Forests and Range, which explains the blocking process and expressly references information obtained from "interior log producers".[231]

119. Finally, Canada contends that the information from Merrill & Ring and TimberWest is insufficient to establish that log prices are distorted throughout BC.[232] Again, Canada overstates the significance of the company statements to the USDOC's determination. The "blocking process" was only one part of the USDOC's determination that the LER system suppresses log and stumpage prices in British Columbia. 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:

> 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.[233]

120. Canada stresses that errors in an investigating authority's examination of individual pieces of evidence will affect an examination of the totality of the evidence.[234] However, as the United States has demonstrated, the USDOC did not err in its examination of the Merrill & Ring and TimberWest statements, neither on their own nor in conjunction with other evidence on the USDOC's record. The aspersions that Canada casts on the USDOC's analysis of individual pieces of evidence and the totality of the evidence lack any foundation in truth.

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

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

[231] Petition, Exhibit 242, p. 5 (Exhibit USA-010) (underline added).

[232] *See* Canada's Responses to the Second Set of Panel Questions, paras. 139-143.

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

[234] *See* Canada's Responses to the Second Set of Panel Questions, para. 142.

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.

U.S. Comment:

121. The United States respectfully refers the Panel to the U.S. response to question 210, subpart (b),[235] and to the U.S. comments above on Canada's response to question 208, wherein the United States discusses the evidence supporting the USDOC's finding that the blocking process operates in the BC Interior. As the United States has demonstrated, the USDOC, referring to the "Canada Institute at the Wilson Center's report 'From Log Export Restrictions to a Market-Based Future: Towards and Enduring Canada-U.S. Softwood Agreement'", explicitly stated that "the report indicates that this practice is wide spread throughout the province."[236] The USDOC also had before it a report prepared for the British Columbia Minister of Forests and Range, which explains the blocking process and expressly references information obtained from "interior log producers".[237]

122. In its response to this question, Canada notes "a Wilson Center commentary, which refers to 'ocean freight transport', the 'Coastal fee-in-lieu', and, generally, alleges price impacts on Coastal species."[238] Canada neglects, in its response to this question, to inform the Panel about the Wilson Center report's statement that "[a]lmost every timber harvester has negotiated side agreements to keep its exports from being blocked."[239] Canada also omits any mention whatsoever of the report prepared for the British Columbia Minister of Forests and Range.[240]

123. As the United States has shown, Canada once again has made assertions that not only lack support in the evidence, but that are directly contradicted by the evidence on the record.

211. To both parties: 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

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[235] *See* U.S. Responses to the Second Set of Panel Questions, paras. 207-213.

[236] Lumber Final I&D Memo, p. 140 (Exhibit CAN-010) (citing Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 11, p. 9 (Exhibit USA-019); underline added).

[237] Petition, Exhibit 242, p. 5 (Exhibit USA-010) (underline added).

[238] Canada's Responses to the Second Set of Panel Questions, para. 145.

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

[240] *See* Petition, Exhibit 242, p. 5 (Exhibit USA-010).

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.S. Comment:

124. In its response to question 211, Canada attempts to portray the primary goal of the BCTS as being business-oriented, while underplaying the additional public policy goals the BCTS is designed to achieve.[241] Record evidence demonstrates that, apart from revenue that may be generated, the objectives of the BCTS include job creation, the development of rural economies, and expanded participation of First Nations in the forest sector. Canada itself says as much in its response to the second set of panel questions, but attempts to minimize these public policy objectives as "typical corporate social responsibility objectives such as safe and sustainable forest management, supporting rural economies, and fostering a positive relationship with First Nations communities."[242] Canada's response only confirms the U.S. argument that the BCTS auctions are not like a private, profit-maximizing entity, but rather operate according to political mandates such as those described above.

125. Furthermore, the BCTS performance reports for the first three quarters of fiscal year 2015/2016, which encompassed the period of investigation, confirm that BCTS serves to ensure the "economic prosperity" of "[r]ural economies, jobs [and] families."[243] The second quarterly report further confirms that a goal of the BCTS is to "[s]trengthen the role of BCTS within the forest sector and rural economies" and "[p]rovide BCTS with the continuity of social licence to deliver superior and enduring performance."[244] Finally, the 2015-2016 BCTS Annual Performance Report summarized the achievements of the BCTS in job creation over the prior decade as follows:

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[241] *See* Canada's Responses to the Second Set of Panel Questions, paras. 147-153.

[242] Canada's Responses to the Second Set of Panel Questions, para. 148.

[243] BCTS first Quarterly Performance Report for the Fiscal Year 2015/2016, April 1-June 30, 2015, p. 1 (p. 5 of the PDF version of Exhibit CAN-022); BCTS second Quarterly Performance Report for the Fiscal Year 2015/2016, April 1-September 30, 2015, p. 1 (p. 19 of the PDF version of Exhibit CAN-022); BCTS third Quarterly Performance Report for the Fiscal Year 2015/2016, April 1-December 31, 2015, p. 1 (p. 33 of the PDF version of Exhibit CAN-022).

[244] BCTS second Quarterly Performance Report for the Fiscal Year 2015/2016, April 1-September 30, 2015, p. 7 (p. 25 of the PDF version of Exhibit CAN-022).

> Since 2003 BC Timber Sales has sold 150 million cubic metres of timber through competitive auctions supporting rural forest economies. The development, auction, harvesting and processing of this timber has helped create and sustain over 8,000 direct and 11,000 indirect jobs. These jobs have supported families and rural communities over the last 13 years and continue to do so.[245]

126. The BCTS 2015/2016 – 2017/2018 Business Plan similarly provides: "[BCTS] has an integral role in supporting the Forest Sector Strategy in the BC Jobs Plan. It also supports the Ministry's Four Key Pillars, its Goal of 'Productive, thriving natural resource sector and resilient communities.'"[246]

127. In its response to question 204, Canada asserts that the BCTS "is set up to operate like a small private landowner."[247] Canada's assertion is absurd, given that BC is the largest public landowner in Canada. Further, as explained in the U.S. response to question 211, the BCTS has a "pricing mandate which requires it to harvest the profile and continually test the market in all market conditions."[248] Thus, the BCTS does not operate "simply to maximize revenue in the manner of a private landowner."[249]

128. Notwithstanding Canada's assertion that the United States has made an *ex post facto* attempt to rationalize its price distortion finding by citing public policy objectives,[250] the U.S. response to question 211 explains how these issues were addressed in the USDOC's final determination itself.[251]

129. Moreover, the USDOC's determination that the BCTS does not yield market-determined prices is based on extensive record evidence. Canada's assertion that the USDOC preliminarily determined that "there is no evidence indicating that the auctions are not based solely on price" takes that statement out of its broader context.[252] In the passage of the preliminary decision

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[245] BCTS Annual Performance Report, April 1, 2015 – March 31, 2016, p. 5 (p. 47 of the PDF version of Exhibit CAN-022).

[246] BCTS Business Plan, 2015/2016 – 2017/2018, p. 2 (p. 72 of the PDF version of Exhibit CAN-022).

[247] Canada's Responses to the Second Set of Panel Questions, para. 127 (underline added).

[248] "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).

[249] Petitioner's Rebuttal Brief, pp. 20-21 (pp. 41-42 of the PDF version of Exhibit USA-071). The USDOC cited pages 15-21 of the petitioner's rebuttal brief in the final issues and decision memorandum as support for its conclusion. *See* Lumber Final I&D Memo, p. 55 (Exhibit CAN-010).

[250] Canada's Responses to the Second Set of Panel Questions, para. 150.

[251] U.S. Responses to the Second Set of Panel Questions, paras. 215-216.

[252] Canada's Responses to the Second Set of Panel Questions, para. 150.

memorandum to which Canada cites, the USDOC went on to explain that the prices from the BCTS auctions are distorted because a few large firms consume the majority of timber sold at auction, and because log export restraints suppress prices.[253] In the final determination, the USDOC continued to find that the BCTS prices were not market-determined because the tenure-holding sawmills were also the predominant purchasers of BCTS-harvested timber, the three-sale limit, and price suppression due to log export restraints.[254]

130. Canada's response to question 211 also mischaracterizes the legal nature of the USDOC's 2003 draft policy bulletin.[255] As a matter of law, the draft bulletin was never implemented and did not proceed beyond simply inviting public comment.[256] Moreover, the USDOC's statement that, "in certain circumstances, actual sales from competitively run government auctions" could be used does not amount to a requirement to use any auction prices in all circumstances, as Canada suggests.

131. The USDOC explained in the preliminary decision memorandum:

> [F]irst tier benchmark prices could include, in certain circumstances, actual sales from competitively run government auctions. The circumstances where such prices would be appropriate are where the government sells a significant portion of the good through competitive bid procedures that are open to everyone, that protect confidentiality, and that are based solely on price.[257]

It does not follow from this statement that a government-run auction necessarily results in market-determined prices. Here, record evidence demonstrated that the structure of the auction system in British Columbia did not generate prices that could serve as a tier-one benchmark against which to compare the prices for the allegedly subsidized stumpage in this investigation.

212. To both parties: 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.

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[253] Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008).

[254] U.S. Responses to the First Set of Panel Questions, para. 270.

[255] *See* Canada's Responses to the Second Set of Panel Questions, paras. 151-153.

[256] *See Proposed Policies Regarding the Conduct of Changed Circumstance Reviews of the Countervailing Duty Order on Softwood Lumber from Canada (C-122-839),* 68 Fed. Reg. 37,456 (Dept. of Commerce, Jun. 24, 2003) (Exhibit CAN-041).

[257] Lumber Preliminary Decision Memorandum, p. 37 (Exhibit CAN-008).

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

U.S. Comment:

132. Canada's response to question 212 attempts to retreat from the assertion Canada made that predominance is irrelevant.[258] To recall, Canada previously asserted 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."[259] Based on this erroneous premise, Canada has also argued that "market concentration . . . is likewise irrelevant" because "government predominance is irrelevant."[260] The U.S. response to question 212 addresses these erroneous assertions.[261]

133. In contrast to its earlier unqualified assertions, Canada's response to question 212 reflects a recognition that predominance is, indeed, relevant and, in fact, central to the question of selecting an appropriate benchmark.[262] However, Canada's response at paragraph 156 misstates the relevant legal approach to this question by referring in isolation to the terms "pricing strategy" and "market power" without their necessary context.[263] The reasoning set out in the prior reports from which Canada draws these references does not support the position Canada has sought to take.

134. As explained in the U.S. response to question 212, the Appellate Body in *US – Softwood Lumber IV* explained why Canada's 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.[264] 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.

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[258] *See* Canada's Responses to the Second Set of Panel Questions, paras. 154 and 164.

[259] *See* Second Written Submission of Canada (May 6, 2019) ("Canada's Second Written Submission"), para. 53.

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

[261] *See* U.S. Responses to the Second Set of Panel Questions, paras. 218-223. As noted in the U.S. response to question 212, 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.

[262] *See* Canada's Responses to the Second Set of Panel Questions, paras. 154-155.

[263] *See* Canada's Responses to the Second Set of Panel Questions, para. 156.

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

> 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 circumvented when the government is a predominant provider of certain goods.[265]

135. Here, 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.[266] Canada's attempt to revive such an approach should be rejected in this lumber dispute as well.

136. It is also inaccurate for Canada to imply that British Columbia had no ability to influence prices, whether through pricing strategy, market power, or other mechanisms.[267] The record demonstrates, and Canada does not contest, that in addition to being the overwhelmingly predominant supplier (and very nearly the sole supplier), the provincial government designed the BCTS auction system to generate prices for the remainder of the government-held stumpage supply.[268] As explained previously:

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

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

[267] *See* Canada's Responses to the Second Set of Panel Questions, paras. 156-158.

[268] *See* Canada's Responses to the Second Set of Panel Questions, para. 158. *See also* U.S. First Written Submission, paras. 353-354.

> In terms of government market share, the provincial government in British Columbia 'owns over 94 percent of the land,' and more than '90 percent of the total standing timber harvest in the province during the [period of investigation] was harvested from provincial Crown land.' In addition, '[a]ll Crown-origin standing timber harvested in British Columbia is subject to stumpage fees,' which the province 'determines . . . based on either the results of [BCTS] government-run auctions or through the MPS' administrative price-setting process.
>
> In conducting the BCTS auctions, the provincial government determines what stands to offer for auction, and when to hold the auctions, based on its regulatory mandate to offer a diverse range of sales that reflect the policies of the provincial administration. By doing so, the government is able to generate a reference price for each species of timber and region of the province. In turn, the government uses the BCTS-generated prices to guide its price-setting decisions for the remaining 80 percent of sales.[269]

137. Canada may fail to see it, but Canada's defense that "these auction prices establish the price for the remaining provincial Crown timber, and not the other way around" does not support Canada's argument that the "potential for circular price comparisons" does not arise.[270] On the contrary, Canada itself has demonstrated the very circularity that it denies.

138. Finally, in paragraphs 157-163 of Canada's responses to the second set of Panel questions, Canada attempts to argue that the facts supporting a finding of circularity are not present here in any of the other provinces.[271] These arguments suffer from the same flaws identified above, and these issues have been addressed exhaustively during this Panel proceeding. The United States respectfully refers the Panel to the prior U.S. discussion of these issues.

214. <u>To Canada</u>: 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

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[269] U.S. First Written Submission, paras. 353-354 (footnotes omitted).

[270] *See* Canada's Responses to the Second Set of Panel Questions, paras. 157-158.

[271] *See* Canada's Responses to the Second Set of Panel Questions, paras. 157-163.

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"?

U.S. Comment:

139. Canada's response to question 214 confirms that Canada "does not believe that Commerce necessarily needed to quantify the effect of the LEP process on BCTS auction prices."[272] This is true. There is no basis in the record of this proceeding or the applicable legal provisions to suggest that the USDOC "ought to have quantified" the explanation that it provided regarding the relevance of federal and provincial export restraints.

140. The remainder of Canada's response, at paragraphs 165-176 of its responses to the second set of Panel questions, is not responsive to the Panel's question, and instead highlights Canada's conflation of the applicable legal provisions.[273] There is no requirement in the SCM Agreement that an investigating authority carry out a particular type of analysis, nor does the passage referenced in the Panel's question suggest that there is. The USDOC provided a fulsome explanation regarding the relevance of export restraints and, although Canada has disagreed with that explanation, Canada has not argued for a quantitative analysis except to the extent prompted by question 214. The USDOC's analysis of export restraints speaks for itself.

141. As explained, the USDOC concluded that log export restraints further distorted prices in addition to the other aspects of the BCTS that the USDOC examined:

> In addition to the distortive effects of the three-sale rule, the log export restrictions in place in British Columbia also inhibit log exports from the province. This prevents log sellers from seeking the highest prices in all markets, and thus creates additional downward pressure on the log prices in the province. The demand and value of logs in the BC market is linked with demand and value of stumpage in BC, as the supply and value of the logs available in the market are derived from the stumpage market in the province. Thus, distortion in the log market also impacts the stumpage market. For these reasons, we continue to find that the prices of Crown-origin standing timber auctioned under BCTS are not market-determined prices resulting from competitively-run

[272] Canada's Responses to the Second Set of Panel Questions, para. 166.

[273] *See* Canada's Responses to the Second Set of Panel Questions, paras. 165-176.

> government auctions …, and therefore are not suitable for use as a tier-one benchmark ….[274]

142. Ultimately, the USDOC "found that these prices were not market-determined and, thus, were not appropriate to use as a tier-one benchmark."[275] On the basis of the foregoing, the USDOC determined that prices generated by the provincial price-setting mechanisms in British Columbia could not serve as a meaningful basis of comparison for measuring the adequacy of remuneration.

143. As a result, the USDOC concluded in the final determination that "information on this record indicates that the British Columbia stumpage market is distorted because the majority of the market is controlled by the government" and "log export restraints . . . restrict the exportation of logs from the province, which influences the overall supply of logs available to domestic users, and, in turn, suppresses log prices in British Columbia."[276] Accordingly, the USDOC determined that "prices within British Columbia, including prices from the BCTS auctions, cannot serve as a benchmark under" the appropriate standard.[277]

144. As noted in the U.S. response to question 207, Canada's attempt, in response to a Panel question, to re-frame the factual considerations in this investigation as analogous to the facts at issue in the USDOC's analysis of government influence in the People's Republic of China concerning state-owned steel producers is inapposite and utterly without merit.[278] 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 in the underlying countervailing duty investigation that is the subject 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 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

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

[275] Lumber Final I&D Memo, p. 54 (Exhibit CAN-010).

[276] Lumber Final I&D Memo, p. 54 (Exhibit CAN-010).

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

[278] Just as noted in the U.S. response to question 207, this Panel question also refers to recent "observations of the Appellate Body". The U.S. comments on Canada's response to question 214 address statements made by the "majority" in the recent appellate report in *US – Countervailing Measures (China) (Article 21.5 – China)*. For purpose of comments on 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.

province.[279] 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.[280] The suggestion that the USDOC's consideration of log export restraints somehow was deficient is utterly without merit.

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.

U.S. Comment:

145. In its response to this subpart of the question, Canada failed to point to any written criteria used to determine the fairness of offers made for logs advertised in the log export permitting process.

146. Rather, Canada points to the narrative discussion of the Government of Canada and the Government of British Columbia in their questionnaire response to the USDOC, which explained that Federal Timber Export Advisory Committee and Timber Export Advisory Committee ("FTEAC/TEAC") "members apply their knowledge of log markets in evaluating whether offers from domestic log buyers represent fair market value."[281]

147. On the same page of that narrative discussion, the Governments of Canada and British Columbia explained that "BC law does not prescribe particular tests or methodologies for FTEAC/TEAC members to apply in evaluating whether offers are for fair market value", and "[t]here are no applicable regulations".[282] Canada neglected to direct the Panel's attention to those statements, which would appear to be directly responsive to the question that the Panel posed.

148. The United States again recalls the statement of TimberWest, which explained that, under

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

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

[281] Canada's Responses to the Second Set of Panel Questions, para. 177 (quoting Canada/British Columbia, LEP QR Narrative, p. LEP-47 (Exhibit CAN-049 (BCI))).

[282] Canada/British Columbia, LEP QR Narrative, p. LEP-47 (Exhibit CAN-049 (BCI)).

BC's log export restraint policy:

> [P]roposed exports and domestic log prices are reviewed by a non-transparent, government-appointed committee. There is no negotiation on price with the seller, the domestic buyer simply makes an offer on a proposed export and the committee considers whether that offer is "fair" without regard to international log or lumber prices.
>
> In some cases the domestic log price deemed "fair" by this committee is less than half of what the international market would pay for the same log in the same location.
>
> Perhaps even more troubling for my company, and others, is that the price for a log in the domestic market, in most cases, is below our cost to produce.[283]

149. Thus, it appears, based on the record evidence that was before the USDOC, that the members of the FTEAC/TEAC "apply their knowledge"[284] to make subjective judgments in a non-transparent process that is not subject to "particular tests or methodologies" or "regulations"[285] to establish whether offers for logs are "fair", and the result is that offers are deemed to be "fair" even when they are "less than half of what the international market would pay for the same log in the same location", or when they are, "in most cases", below the log supplier's cost of production.[286]

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

U.S. Comment:

150. In its response to this subpart of the question, Canada briefly acknowledges that there could be other buyers in BC that would be interested in a proposed export besides the offeror in the LEP process. Canada explains that, for standing timber, "[t]he advertiser that has received an offer could choose to sell [to] another domestic purchaser, could choose not to harvest at all, or

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[283] "Unfair log restrictions in B.C.", by Brian Frank, published on www.woodbusiness.ca, Petition, Exhibit 252 (p. 153 of the PDF version of Exhibit USA-010) (underline added).

[284] Canada/British Columbia, LEP QR Narrative, p. LEP-47 (Exhibit CAN-049 (BCI)).

[285] Canada/British Columbia, LEP QR Narrative, p. LEP-47 (Exhibit CAN-049 (BCI)).

[286] "Unfair log restrictions in B.C.", by Brian Frank, published on www.woodbusiness.ca, Petition, Exhibit 252 (p. 153 of the PDF version of Exhibit USA-010).

could wait to harvest and re-advertise the logs once harvested."[287] And, for logs that have already been harvested, "the other buyers could be any other domestic purchaser of logs."[288]

151. Canada's explanation is consistent with the statement of TimberWest, which the United States discusses above in the U.S. comments on Canada's response to question 208 and Canada's response to subpart (a) of this question. As TimberWest explained, offers are deemed to be "fair" even when they are "less than half of what the international market would pay for the same log in the same location", or when they are, "in most cases", below the log supplier's cost of production.[289] Additionally, in the log export permitting process, "[t]here is no negotiation on price with the seller, the domestic buyer simply makes an offer on a proposed export and the committee considers whether that offer is 'fair' without regard to international log or lumber prices."[290] It is not difficult to imagine that a log supplier might choose to wait and seek a better offer from another buyer in BC, with whom the log supplier might actually be able negotiate a better/higher price.

152. Canada also takes the opportunity to reiterate arguments that it has made repeatedly in prior submissions. The United States likewise reiterates that the United States and the USDOC have both already responded to Canada's arguments and demonstrated that they lack merit.[291] Addressing the arguments that Canada repeats in its response to this subpart of the question, the USDOC explained that:

> [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

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[287] Canada's Responses to the Second Set of Panel Questions, para. 180.

[288] Canada's Responses to the Second Set of Panel Questions, para. 180.

[289] "Unfair log restrictions in B.C.", by Brian Frank, published on www.woodbusiness.ca, Petition, Exhibit 252 (p. 153 of the PDF version of Exhibit USA-010).

[290] *See* "Unfair log restrictions in B.C.", by Brian Frank, published on www.woodbusiness.ca, Petition, Exhibit 252 (p. 153 of the PDF version of Exhibit USA-010).

[291] *See, e.g.,* U.S. Responses to the Second Set of Panel Questions, paras. 194-205.

> most export requests are approved is not a reliable indication of how the market is impacted by the existence of the log export restraints.[292]

153. Additionally, the United States recalls the observation in the Wilson Center report that:

> 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%.[293]

154. Further, the fact that the holders of a portion of the volume that was authorized for export did not proceed to the permitting stage does not necessarily suggest, as Canada asserts, that "the log sellers were apparently satisfied with prices that they received from domestic purchasers."[294] Rather, another logical conclusion that reasonably could be drawn 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,[295] so the log suppliers were left to look for sales opportunities in BC, with which they may not have been fully "satisfied".[296] This would be a reasonable (if speculative) conclusion to draw, and it 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."[297]

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

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

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

[294] Canada's Responses to the Second Set of Panel Questions, para. 182.

[295] *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).

[296] Canada's Responses to the Second Set of Panel Questions, para. 182.

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

> **[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 <u>which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments</u>. (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?

<u>U.S. Comment</u>:

155. In the U.S. response to this question,[298] the United States noted that, per the 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.[299] Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") has been recognized as reflecting such customary rules.[300] 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, in the U.S. response to this question, the United States discussed considerations relevant to the Panel's application of customary rules of interpretation to the portion of the provision underlined in the Panel's question.

156. Canada took a different approach.

157. Rather than discussing the ordinary meaning of the terms of the provision in their context, Canada begins its response by asserting that, "[a]s a general proposition", the purpose of Article 1.1(a)(1)(iv) of the SCM Agreement "is to ensure that 'governments 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'."[301] This observation is unobjectionable, as far as it goes. However, as the United States noted in the U.S.

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[298] *See* U.S. Responses to the Second Set of Panel Questions, paras. 228-241.

[299] *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.").

[300] *US – Gasoline (AB)*, p. 17.

[301] Canada's Responses to the Panel's Second Set of Questions, para. 183 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 113, and *US – Softwood Lumber IV (AB)*, para. 52).

response to this question,[302] Article 31 of the Vienna Convention refers to the object and purpose of the treaty, *i.e.*, the SCM Agreement, and 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 their context and in light of the object and purpose of the treaty. Reasoning from the purported purpose of a provision to discern the interpretation of the provision could lead to an erroneous interpretation. That being said, the United States agrees with the general statement of the purpose of Article 1.1(a)(1)(iv), as set forth in the above quote from Canada's response to this question.[303]

158. Canada, though, goes on from the above statement of the purpose of Article 1.1(a)(1)(iv) to reason, incorrectly, that "Article 1.1(a)(1)(iv) is intended to capture private body action that essentially 'replaces' the government by carrying out a function that would typically be carried out by the government in the first place. Thus, if the function at issue is not already one with which the government would normally be vested, the action will not fall under the ambit of Article 1.1(a)(1)(iv)".[304] Canada's proposed interpretation would change the term "which would normally be" – in the phrase "one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government" – to "which are normally", such that the phrase would read "one or more of the type of functions illustrated in (i) to (iii) above which are normally vested in the government".

159. The United States has demonstrated that Canada's proposed interpretation does not accord with the ordinary meaning of the term "would normally be".[305] 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[306] in the present unreal conditional form.[307] 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."[308] 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

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[302] *See* U.S. Responses to the Panel's Second Set of Questions, para. 238.

[303] *See* U.S. Responses to the Panel's Second Set of Questions, paras. 239-241.

[304] Canada's Responses to the Panel's Second Set of Questions, para. 183.

[305] *See, e.g.*, U.S. First Written Submission, paras. 561, 603-604; U.S. Second Written Submission, paras. 384-385; U.S. Responses to the Second Set of Panel Questions, para. 232.

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

[307] *See* Explanation of Present Conditionals from englishpage.com (Exhibit USA-009).

[308] Explanation of Present Conditionals from englishpage.com (Exhibit USA-009).

followed by governments."[309] The United States provided this textual analysis in the U.S. first written submission. Canada has never responded to it, or even acknowledged it.

160. Instead, Canada argues in its response to this question that the U.S. argument that "the relevant 'function' is the 'provision of goods' generally" "would render the highlighted part of the provision redundant and *inutile*."[310] That is preposterous. And it is ironic coming from Canada, given its response to this question. Canada, focusing exclusively on "the meaning of the 'normally vested' language",[311] totally omits any mention of the latter part of Article 1.1(a)(1)(iv), which also is underlined in the question, and which provides: "and the practice, in no real sense, differs from practices normally followed by governments." Canada's response to this question literally reads that latter part of the provision out of the SCM Agreement, thus actually giving it no meaning and rendering it *inutile*.

161. In contrast, the United States discussed the meaning of the terms of the latter part of Article 1.1(a)(1)(iv) in the U.S. response to this question.[312] As the United States has demonstrated, the latter part of Article 1.1(a)(1)(iv) refers to "the practice", which implies that entrustment or direction is not limited to any particular official or formal program, but also includes broader "practices" in which governments engage. And "the practice" is one that does not differ, in any real sense, from "practices" normally followed by governments. The phrase "in no real sense" 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. 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 earlier in this panel proceeding, the term "governments" "must refer to governments more generally."[313]

162. In sum, as fully discussed in the U.S. response to this question,[314] a proper application of customary rules of interpretation leads to the conclusion that the terms of the second element of the provision, which are underlined in the question, indicate that what is called for is an

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[309] SCM Agreement, Art. 1.1(a)(1)(iv).

[310] Canada's Responses to the Second Set of Panel Questions, para. 184.

[311] Canada's Responses to the Second Set of Panel Questions, para. 184.

[312] *See* U.S. Responses to the Second Set of Panel Questions, paras. 234-235.

[313] Canada's Responses to the First Set of Panel Questions, para. 357.

[314] *See* U.S. Responses to the Second Set of Panel Questions, paras. 228-241.

examination of whether the "kind … sort … [or] class"[315] of "activity or operation"[316] entrusted or directed to a private body to "perform"[317] is that which "ordinarily"[318] – though not always – would be "assigned"[319] 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.

163. The United States has argued previously that 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."[320] In its response to this question, Canada dispenses with any need to rely on implication. Canada openly argues in its response that "Article 1.1(a)(1)(iv) is intended to capture private body action that essentially 'replaces' the government by carrying out a function that would typically be carried out by the government in the first place. Thus, if the function at issue is not already one with which the government would normally be vested, the action will not fall under the ambit of Article 1.1(a)(1)(iv), even if entrustment or direction were factually established."[321] Canada's proposed interpretation explicitly contemplates that Members could 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. But that transfer of value would not be subject to the disciplines to which Members agreed, in Canada's view.

164. 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 generally. 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

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[315] 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).

[316] 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).

[317] 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).

[318] 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).

[319] 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).

[320] *See* U.S. Second Written Submission, paras. 384-385.

[321] Canada's Responses to the Panel's Second Set of Questions, para. 183 (underline added).

might exercise its leverage over private bodies to accomplish tasks that normally the government would undertake.[322]

165. Finally, Canada asserts that "the U.S. interpretation now is inconsistent with Commerce's interpretation of that provision."[323] Canada's assertion is baseless. As an initial matter, the USDOC simply did not set forth an interpretation of Article 1.1(a)(1)(iv) of the SCM Agreement, neither in the preliminary decision memorandum nor in the final issues and decision memorandum.[324] The USDOC applies U.S. law; it does not apply the WTO agreements directly. Furthermore, rather than interpret provisions of the SCM Agreement, the USDOC made findings of fact. Namely, the USDOC found that the provision of logs "would normally be vested in the government" and "does not differ substantively from the normal practices of the government," citing the government's right to manage the forest in British Columbia since 1867, British Columbia's management of forest land for over 100 years, and the presence of log export restrictions at the provincial level since 1891 and the federal level since 1940.[325] Responding to arguments from Canadian parties, the USDOC explained in the final issues and decision memorandum that, even though the government does not have a history of providing logs directly to processors, logs are harvested from standing timber, and British Columbia owns and has long administered over 94 percent of forest lands in British Columbia.[326] These factual findings were sufficient to establish that the provision of goods (specifically logs) is a type of function that would normally be vested in the Government of British Columbia and the practice, in no real sense, differs from practices followed by governments.

218. To Canada: 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.S. Comment:

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[322] The final paragraph of Canada's response is hardly worth mentioning, as it merely misrepresents once again what the USDOC found. The USDOC's preliminary and final determinations speak for themselves, and the United States has previously addressed Canada's meritless contentions. *See, e.g.*, U.S. First Written Submission, paras. 599-606.

[323] Canada's Responses to the Second Set of Panel Questions, para. 185.

[324] *See* Lumber Preliminary Decision Memorandum, pp. 57-63 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 139-56 (Exhibit CAN-010).

[325] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, pp. 154-156 (Exhibit CAN-010).

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

166. There is nothing new in Canada's response to this question. The United States has already addressed the arguments that Canada presents in its response, and the United States has already demonstrated that the USDOC did not take an effects-based approach when analyzing whether British Columbia's and Canada's log export restraints result in a financial contribution by means of entrustment or direction. The United States did this most directly in the U.S. second written submission, at paragraphs 334-347.[327] The United States respectfully refers the Panel to that discussion.

167. Additionally, the United States again respectfully refers the Panel to the full explanation and analysis set forth by the USDOC in the USDOC's preliminary decision memorandum and final issues and decision memorandum.[328] Those documents speak for themselves, so the Panel does not need to rely on characterizations of them made by Canada, or even those made by the United States. As the Panel will see for itself when it reviews the USDOC's preliminary decision memorandum and final issues and decision memorandum, Canada's assertion that the USDOC took an effect-based approach to the analysis of entrustment or direction simply is untrue.

168. That being said, the United States offers the following brief reactions to Canada's response to this question.

169. First, Canada contends that "[t]he United States now claims that the parts of Commerce's determination in which it relies on the alleged effects of the LEP process do not form part of Commerce's reasoning".[329] This is a deeply unserious argument, and simply is not true. Plainly, the United States has made no such "claim". The prior U.S. written submissions, statements, and responses to the Panel's questions speak for themselves, and they need no assistance from Canada in doing so. Additionally, the USDOC's preliminary decision memorandum and final issues and decision memorandum speak for themselves, and the United States has urged and continues to urge the Panel to read those documents for itself to understand the USDOC's reasoning and the explanations for the USDOC's determination.

170. Second, Canada acknowledges that "Canadian parties raised arguments with respect to alleged effects of the LEP process",[330] as the United States has demonstrated.[331] The USDOC was responding to those arguments when it discussed the effects of BC's log export restraints. Canada asserts that Canadian parties raised effects-based arguments "because Commerce has

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[327] *See also* U.S. First Written Submission, paras. 533-545.

[328] *See* Lumber Preliminary Decision Memorandum, pp. 57-63 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 139-56 (Exhibit CAN-010).

[329] Canada's Responses to the Second Set of Panel Questions, para. 186.

[330] Canada's Responses to the Second Set of Panel Questions, para. 186.

[331] *See* U.S. Second Written Submission, paras. 337-347.

relied on an effects test to find entrustment or direction for over 30 years."[332] It is plain on the face of the USDOC's determinations that the USDOC did not rely on an effects test again in this countervailing duty investigation. Canadian parties made an incorrect assumption about the analysis that the USDOC would undertake. Given Canada's strong views about the illegitimacy of such an effects-based approach, it is surprising that Canada is not pleased that the USDOC took a different approach to the financial contribution analysis in this investigation.

171. Third, the United States does not recall the interaction during the second substantive meeting to which Canada refers in paragraph 187 of its responses, nor does the United States understand the relevance of Canada's reference to the alleged interaction. Regrettably, the parties are not provided with transcripts from the substantive meetings, so there is no way for the United States to confirm Canada's characterization of the alleged interaction or get fuller context to understand the point that Canada is attempting to make. That being said, Canada suggests that the statement was made in the context of questions and responses concerning why BCTS auction prices are distorted.[333] It was, of course, appropriate for the USDOC to consider the distortive effects of LERs on auction prices. As explained in the U.S. first written submission, that was one of the USDOC's three stated bases for finding that the BCTS auction prices were not a viable tier-one benchmark.[334] However, when the USDOC examined LERs in isolation, as its own program, to establish whether there was a financial contribution by means of entrustment or direction, the USDOC's analysis did not rely on any effects test, as is plain on the face of the USDOC's decision memoranda.

172. Fourth, it is unclear why Canada believes it is relevant to discuss the so-called "'direct and discernible benefit' test"[335] that Canada asserts was applied in countervailing duty investigations that pre-dated the existence of the World Trade Organization. The USDOC did not apply any such test in the countervailing duty investigation at issue in this dispute settlement proceeding. And, as the Panel will see for itself, the USDOC discussed the U.S. *Statement of Administrative Action* ("SAA") because, as the USDOC explained, "[t]he SAA … establishes that the circumstances by which the government acts through a private party can vary widely, and … Commerce must examine these circumstances, and the relevant evidence, on a case-by-case basis."[336] That proposition is entirely uncontroversial. The USDOC's discussion of the SAA is not evidence that the USDOC applied an effects-based approach to the financial contribution analysis of BC's and Canada's log export restraints.

173. Fifth, it is also unclear why Canada believes it is relevant to discuss the USDOC's

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[332] Canada's Responses to the Second Set of Panel Questions, para. 186.

[333] *See* Canada's Responses to the Second Set of Panel Questions, para. 187.

[334] *See* U.S. First Written Submission, para. 375.

[335] Canada's Responses to the Second Set of Panel Questions, para. 188.

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

determination in another countervailing duty investigation, *CFS from Indonesia*.[337] Canada grossly overstates the significance of a brief reference to that investigation that the USDOC made in the final issues and decision memorandum. As the Panel can see for itself, the USDOC, in the softwood lumber final issues and decision memorandum, did not discuss the details of the *CFS from Indonesia* investigation that Canada discusses in its response to this question.[338] The USDOC's brief reference to the *CFS from Indonesia* investigation is not evidence that the USDOC applied an effects-based approach to the financial contribution analysis of BC's and Canada's log export restraints.

174. Finally, in contrast to the United States, which urges the Panel to read for itself the full discussion in the USDOC's explanatory memoranda, Canada simply summarizes 18 pages of discussion in those memoranda in just five short bullet points.[339] And once again, Canada misrepresents the USDOC's findings and argues that the USDOC took an approach that has been found to be inconsistent with the SCM Agreement in prior reports. The United States has already demonstrated that there is no merit and no truth to Canada's claim.

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. To Canada: Please comment on this finding of the USDOC.

U.S. Comment:

175. Canada's response to subpart (a) of question 219 introduces several misleading lines of argument.[340] Canada first suggests that the Government of Nova Scotia, the Nova Scotia Department of Natural Resources, and Deloitte accidently or inadvertently surveyed log prices

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[337] *See* Canada's Responses to the Second Set of Panel Questions, para. 189.

[338] *See* Lumber Final I&D Memo, p. 153 (Exhibit CAN-010).

[339] *See* Canada's Responses to the Second Set of Panel Questions, para. 191.

[340] *See* Canada's Responses to the Second Set of Panel Questions, paras. 193-200.

instead of stumpage prices.[341] Canada's suggestion is absurd. The record is clear that the benchmark prices from the Deloitte survey consist of stumpage prices.[342] The Deloitte survey also collected data relating to logs, but the Nova Scotia Verification Report explains that the survey distinguished between datasets for "all fiber (*e.g.,* logs and stumpage)" and datasets for "pure stumpage . . . limited to standing timber purchases."[343] Source documents for the transactions examined by the USDOC at verification further establish that reported prices were for stumpage, not harvested logs.[344] Canada ignores other aspects of the Nova Scotia Verification Report, ignores the USDOC's explanation of the data, ignores the Government of Nova Scotia's explanation of the data (and supporting exhibits), and ignores Deloitte's own explanation of the data (and supporting exhibits).[345] Canada ignores all of the foregoing and instead argues that the USDOC (and by implication, the Panel) may not have understood that a standing tree is not a log.[346] For further elaboration, the United States refers to its response to question 236.[347]

176. The absurdity of Canada's argument is highlighted by Figure 3, at paragraph 197 of Canada's response, in which Canada provides a side-by-side comparison of a photograph of trees and a photograph of logs, purporting to assist the Panel in its task.[348] Canada's narrative argument is no less absurd. Canada argues, for example, that "[a] tree in the ground is not . . . a 'sawlog'"[349] and, conversely, that "a tree . . . that has been harvested is no longer standing

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[341] *See* Canada's Responses to the Second Set of Panel Questions, paras. 195-198.

[342] *See* Lumber Final I&D Memo, pp. 116-117 (Exhibit CAN-010) (citing Government of 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-8-A, Exhibit NS-VE-8-B, Exhibit NS-VE-8-C, Exhibit NS-VE-8-D, Exhibit NS-VE-8-E, Exhibit NS-VE-8-F, Exhibit NS-VE-9-A, Exhibit NS-VE-9-B, Exhibit NS-VE-9-C, and Exhibit NS-VE-10)).

[343] Government of Nova Scotia Verification Report, pp. 6-7 (Exhibit CAN-511 (BCI)).

[344] *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)) ([[***]]).

[345] *See* Lumber Final I&D Memo, pp. 111-119 (Exhibit CAN-010); Government of 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-8-A, Exhibit NS-VE-8-B, Exhibit NS-VE-8-C, Exhibit NS-VE-8-D, Exhibit NS-VE-8-E, Exhibit NS-VE-8-F, Exhibit NS-VE-9-A, Exhibit NS-VE-9-B, Exhibit NS-VE-9-C, and Exhibit NS-VE-10)). *See also* Nova Scotia Verification Exhibit NS-VE-6 ("Deloitte Survey Engagement Summary") (Exhibit CAN-512 (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") (Exhibit USA-032 (BCI)).

[346] *See* Canada's Responses to the Second Set of Panel Questions, paras. 195-198.

[347] *See* U.S. Responses to the Second Set of Panel Questions, paras. 308-311.

[348] Canada's Responses to the Second Set of Panel Questions, Figure 3 at para. 197.

[349] Canada's Responses to the Second Set of Panel Questions, para. 198.

timber"[350] or that "[s]tanding timber cannot be 'brought through the mill gate.'"[351] Canada argues that the USDOC "may have failed to grasp fundamental concepts" such as these and therefore erred in relying on the Deloitte survey.[352] Aside from its condescension, the argument that Canada presents along these lines is misleading because the record is clear that the USDOC, the Government of Nova Scotia, the Nova Scotia Department of Natural Resources, Deloitte, and the survey respondents distinguished between logs and stumpage.[353] As noted, the Deloitte survey was the subject of extensive scrutiny and the Nova Scotia Verification Report explicitly states how the survey distinguished between datasets for "all fiber (*e.g.*, logs and stumpage)" and datasets for "pure stumpage . . . limited to standing timber purchases."[354] Canada's misleading argument is meritless and is disproved by the record evidence that is before the Panel.

177. Canada alternatively suggests that Deloitte should have, in addition to collecting stumpage prices, collected prices for all logs (and / or other products) produced from the tree, once harvested, because, in Canada's view, a real stumpage price should be constructed by adding together the log prices for each of the logs harvested from a given tree – specifically, sawlogs plus pulpwood.[355] Canada's argument is premised on accepting a falsehood, namely that stumpage prices for sawlogs are just log prices that reflect only "prices allocated to logs extracted from those parts of the trees."[356] Based on this false premise, Canada argues that "the prices paid for a subset of the harvested logs" (referring to pulpwood) should have been added to the stumpage price to get the real stumpage price.[357] In making this flawed argument, Canada is assuming without any evidentiary support that stumpage prices collected in the survey are not real stumpage prices, but rather, prices "for a subset of logs".[358] There is no evidence on the record to support Canada's baseless and misleading assertions.

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[350] Canada's Responses to the Second Set of Panel Questions, para. 197.

[351] Canada's Responses to the Second Set of Panel Questions, para. 197.

[352] Canada's Responses to the Second Set of Panel Questions, para. 194.

[353] *See* Lumber Final I&D Memo, pp. 111-119 (Exhibit CAN-010); Government of 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-8-A, Exhibit NS-VE-8-B, Exhibit NS-VE-8-C, Exhibit NS-VE-8-D, Exhibit NS-VE-8-E, Exhibit NS-VE-8-F, Exhibit NS-VE-9-A, Exhibit NS-VE-9-B, Exhibit NS-VE-9-C, and Exhibit NS-VE-10)). *See also* Nova Scotia Verification Exhibit NS-VE-6 ("Deloitte Survey Engagement Summary") (Exhibit CAN-512 (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") (Exhibit USA-032 (BCI)).

[354] Government of Nova Scotia Verification Report, pp. 6-7 (Exhibit CAN-511 (BCI)).

[355] *See* Canada's Responses to the Second Set of Panel Questions, paras. 199-200.

[356] *See* Canada's Responses to the Second Set of Panel Questions, para. 199.

[357] *See* Canada's Responses to the Second Set of Panel Questions, para. 200.

[358] *See* Canada's Responses to the Second Set of Panel Questions, para. 200.

178. Canada's attempt to discredit the entire Deloitte survey is largely based on the fact that a certain Registered Buyer who responded to the survey was a pulp and paper manufacturer, whereas the majority of surveyed purchases were purchases by sawmills.[359] But there is no evidence that the purchases by that firm, which were reported in the survey, were anything other than purchases of sawable timber for sawlogs.[360] The USDOC was aware of this specific concern, which was raised by certain Canadian parties, and the USDOC accordingly verified this specific question during the Nova Scotia verification process.[361] The USDOC confirmed that the prices reported by that firm were for stumpage for sawlogs and not for other products.[362]

179. As explained in the USDOC's verification report for Nova Scotia, sawlogs are generally larger than pulplogs.[363] Purchasers of standing timber make purchases based on the potential sawlog or potential pulplog to be harvested and that purchasers pay for stumpage accordingly.[364] The USDOC considered that it was also reasonable to conclude that a pulp mill might well buy and harvest larger sawable standing timber, cut to length the "pulpable" parts and pulp it, and re-sell the larger "sawable" parts to a sawmill.[365] This conclusion is reflected in the Nova Scotia verification report.[366]

180. Further, Canada's arguments are contradicted by examples from other Canadian provinces. For instance, Quebec's auction system lists auction prices for standing timber in terms of "pulplogs" and "sawlogs."[367] Thus, while Canada appears to argue that the use of "sawlogs" and "pulplogs" in regard to standing timber is irrational, it also appears that Quebec runs its auction using those same terms to describe standing timber for sale in its auction blocks.

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[359] *See* Canada's Responses to the Second Set of Panel Questions, paras. 193-200.

[360] *See* Lumber Final I&D Memo, p. 117 and pp. 115-120 (Exhibit CAN-010); Government of Nova Scotia Verification Report, pp. 6-8 (Exhibit CAN-511 (BCI)) (citing Nova Scotia Verification Exhibit NS-VE-6 (Deloitte Survey) (Exhibit CAN-512 (BCI)) and Nova Scotia Verification Exhibit NS-VE-7 (Survey Response of Single Largest Purchase) (Exhibit CAN-551 (BCI)).

[361] *See* Lumber Final I&D Memo, pp. 115-120 (Exhibit CAN-010); Government of Nova Scotia Verification Report, pp. 4-8 (Exhibit CAN-511 (BCI)). *See also* Government of Nova Scotia Verification Exhibit NS-VE-6 (Deloitte Survey), pp. 27 and 45-47 (Exhibit CAN-512 (BCI)); and Government of Nova Scotia Verification Exhibit NS-VE-7 (Survey Response of Single Largest Purchase) (Exhibit CAN-551 (BCI)).

[362] *See* Lumber Final I&D Memo, pp. 112 and 115-119 (Exhibit CAN-010).

[363] Government of Nova Scotia Verification Report, p. 4 (Exhibit CAN-511 (BCI)).

[364] Government of Nova Scotia Verification Report, p. 4 (Exhibit CAN-511 (BCI)).

[365] *See* U.S. Second Written Submission, paras. 179-181 (quoting Lumber Final I&D Memo, p. 117 (Exhibit CAN-010)).

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

[367] *See* Government of Quebec Verification Exhibit VE-QC-29, p. 4 (p. 6 of the PDF version of Exhibit USA-092 (BCI)) ([[***]]).

181. Finally, during the Nova Scotia verification, the USDOC collected the sales documentation for the surveyed firms' purchases of standing timber.[368] Those invoices do not indicate that they are buying "a subset" of the standing tree, as Canada asserts.[369] Rather, the sales documentation for those sales indicates the "stumpage fee" paid to cut the entire tree down.[370] Thus, the record evidence does not support the concluding argument that Canada attempts to make in its response to subpart (a) of question 219.[371]

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?

U.S. Comment:

182. Canada's response to subpart (c) of question 219 continues to rely on speculation that ignores record evidence and the explanations given by the USDOC.[372] At the outset, Canada repeats its meritless accusation that the USDOC "never obtained the data and documentation underlying all of the transactions on which the Nova Scotia benchmark was based", and Canada repeats its meritless accusations about "lack of transparency" in this regard.[373] The USDOC explained that the Deloitte survey was conducted on the basis of protecting the confidentiality of the survey recipients, and the United States has addressed Canada's argument numerous times previously.[374] The U.S. responses to questions 219, subparts (b) and (c), and 228 address this

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[368] *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-8-A, Exhibit NS-VE-8-B, Exhibit NS-VE-8-C, Exhibit NS-VE-8-D, Exhibit NS-VE-8-E, Exhibit NS-VE-8-F, Exhibit NS-VE-9-A, Exhibit NS-VE-9-B, Exhibit NS-VE-9-C, and Exhibit NS-VE-10)).

[369] *See* Canada's Responses to the Second Set of Panel Questions, para. 200.

[370] *See* U.S. Responses to the Second Set of Panel Questions, para. 254 (citing Lumber Final I&D Memo, p. 117 (Exhibit CAN-010)). *See also, 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)) ([[***]]).

[371] *See* Canada's Responses to the Second Set of Panel Questions, para. 200.

[372] *See* Canada's Responses to the Second Set of Panel Questions, paras. 201-227.

[373] *See* Canada's Responses to the Second Set of Panel Questions, para. 201.

[374] *See* Lumber Final I&D Memo, p. 120 (Exhibit CAN-010) ("Due to confidentiality agreements, the GNS and Deloitte were unable to divulge the identities of the respondents to the NS Survey. Thus, other than the names of parties that were identified at verification during our examination of source documents for individual transactions listed in the NS Survey, the list of parties that responded to the NS Survey is not on the record."). *See also, e.g.*,

point in even further detail.[375]

183. It is all the more concerning that Canada's multi-part response to subpart (c) of question 219 misleads the Panel by presenting a series of unattributed quotations, as if quoting from the record,[376] when really these quotations are excerpts of Canada's own argument from several paragraphs earlier.[377] It is also concerning that, after presenting these misleading quotations in a effort to re-frame the Panel's question, Canada's response then proceeds to venture into a newly constructed line of argument based on dubious factual representations, borrowed out of context from a number of reports, in an attempt to re-litigate its entire case at the very end of the panel proceeding instead of having done so before the investigating authority. Canada's response should be approached with caution for this reason, and also because ultimately Canada's new line of argument is unsubstantiated and unpersuasive.

184. In the first subpart of Canada's multi-part response, for example, under the heading "Evidence of the Transactions Surveyed by Deloitte", Canada presents evidence that is actually from "the report of Earle Miller" about the "apparent" or "intended" nature of the Deloitte survey,[378] and Canada argues that there are "important implications" because the survey "collected information from purchasers . . . rather than from sellers."[379]

185. From there, Canada then proceeds to re-argue all of the points it has raised already:

- At paragraphs 209-213, Canada argues that stumpage classification in Nova Scotia differs from other provinces.[380] The record shows, however, that the USDOC addressed this argument and explained why, on the basis of record evidence, Canada's arguments are without merit.[381] The United States has addressed this argument numerous times previously.[382]

- At paragraph 214, Canada begins the next subpart of its response by repeating the

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U.S. Responses to the First Set of Panel Questions, paras. 106-116; U.S. Second Written Submission, paras. 194-199.

[375] *See* U.S. Responses to the Second Set of Panel Questions, paras. 252-253 and 271.

[376] *See* Canada's Responses to the Second Set of Panel Questions, paras. 205, 206, and 207.

[377] *Compare* Canada's Responses to the Second Set of Panel Questions, paras. 202-203, with *ibid.*, paras. 205, 206, and 207.

[378] *See, e.g.*, Canada's Responses to the Second Set of Panel Questions, para. 206.

[379] *See, e.g.*, Canada's Responses to the Second Set of Panel Questions, para. 205.

[380] *See* Canada's Responses to the Second Set of Panel Questions, paras. 209-213.

[381] *See* Lumber Final I&D Memo, p. 116 (Exhibit CAN-010) (citing, *e.g.*, GOO QR, p. 4). *See also* GOA Mar. 13, 2017 QR Pt. 1, p. ABIV-3 (Exhibit CAN-097).

[382] *See, e.g.*, U.S. First Written Submission, para. 126; U.S. Second Written Submission, paras. 200-203 and 207.

incorrect statement that the Deloitte survey "excluded the prices paid for lower value logs", repeating the incorrect assertion that market conditions in Nova Scotia are different, and then setting out to provide a whole series of hypothetical "examples of harvesting scenarios in Nova Scotia and Quebec, based on different conditions of purchase and sale that prevail in those provinces", with new graphics and figures depicting newly imagined trees.[383] At paragraphs 215-220, Canada presents these hypothetical scenarios that purport to be constructed from bits of record information, but which do not appear to be something that Canada either asked the USDOC to consider or even mentioned prior to this late stage of the panel proceeding.[384] More importantly, none of these hypotheticals is responsive to the reasons that the USDOC provided for finding the Canadian arguments to be flawed.[385]

- At paragraphs 221-227, Canada repeats the incorrect assertion that "Deloitte failed to properly define the term 'transaction'" based on the unsupported (and frankly preposterous) accusation that Deloitte, the Government of Nova Scotia, and the USDOC mistakenly considered logs to be "standing timber" because standing timber [[***]], and that this gives way to speculation and "doubts . . . reinforced by limited documentation".[386] The "doubts" and "limited documentation" to which Canada refers are nothing more than the spurious arguments that Canada has already raised, and which the USDOC rejected, regarding [[***]].[387]

186. The United States previously has addressed all of the arguments that Canada has raised. As explained in the U.S. response to subpart (c) of question 219 and the U.S. response to question 236, further evidence on the record demonstrates how [[***]] in the benchmark were structured and supports the USDOC's conclusion that the results were reliable as an evidentiary basis for a benchmark.[388] As noted, the exhibits collected during verification specifically support the USDOC's conclusions. Such examples include:

- **Nova Scotia Verification Exhibit VE-7 (Exhibit CAN-551 (BCI))** contains [[***]].

- **Nova Scotia Verification Exhibit VE-8-C, Exhibit VE-8-D, & Exhibit VE-8-E (Exhibit USA-051) (BCI)** illustrate where the [[***]].

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[383] *See* Canada's Responses to the Second Set of Panel Questions, para. 214.

[384] *See* Canada's Responses to the Second Set of Panel Questions, paras. 215-220.

[385] *See* Lumber Final I&D Memo, p. 117 (Exhibit CAN-010). *See also* U.S. Second Written Submission, paras. 179-181.

[386] *See* Canada's Responses to the Second Set of Panel Questions, paras. 221-227.

[387] *See* Canada's Responses to the Second Set of Panel Questions, paras. 226-227.

[388] *See* U.S. Responses to the Second Set of Panel Questions, paras. 252-253, 308-311.

- **Nova Scotia Verification Exhibit VE-8-F (Exhibit USA-051) (BCI)** indicates [[***]].
- **Nova Scotia Verification Exhibit VE-9-C (Exhibit USA-051) (BCI)** indicates [[***]]).

187. These verification exhibits demonstrate that the Deloitte survey reflects the prices paid for standing timber.

188. Canada argues that "there is evidence that the prices captured by the survey included payments, such as brokerage fees or costs associated with roadside purchases, that were not part of the remuneration received by the private landowners selling stumpage."[389] This is not true. As noted above, the evidence collected at verification demonstrates that the survey information reflects "stumpage" rates. The United States has addressed this argument numerous times previously.[390]

189. Canada also appears to argue that Deloitte should have solicited information on lump-sum transactions. According to Canada, only lump-sum transactions reflect payments for the "right to harvest all economically harvestable timber on the woodlot".[391] Thus, Canada asserts, the information collected by Deloitte necessarily reflects a "piece-rate" transaction in which "the purchaser acquires the right to harvest the standing timber on a woodlot in exchange for payment of agreed-upon per-unit prices for each of the specific types of products that are actually harvested from the woodlot."[392] However, the information collected at verification demonstrates that Canada's characterization of the Deloitte survey is not accurate.[393] For example, **Nova Scotia Verification Exhibit VE-8-F (Exhibit USA-051) (BCI)** presents sales documents for a purchase of standing timber in a [[***]].[394] The documents indicate a total price to be paid for harvesting standing timber from that [[***]].[395] However, the documents also indicate a stumpage rate charged for standing timber that falls under specific species/product categories.[396] Thus, the information in **Nova Scotia Verification Exhibit VE-8-F (Exhibit USA-051) (BCI)**

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[389] Canada's Responses to the Second Set of Panel Questions, para. 225.

[390] *See, e.g.*, U.S. Responses to the First Set of Panel Questions, paras. 45-46 and 112-114; U.S. Second Written Submission, paras. 303-304 and 307; U.S. Responses to the Second Set of Panel Questions, paras. 252-253, 308-311.

[391] Canada's Responses to the Second Set of Panel Questions, para. 206.

[392] Canada's Responses to the Second Set of Panel Questions, para. 206.

[393] *Cf.* U.S. Second Written Submission, paras. 200-210.

[394] Government of Nova Scotia Verification Report (Exhibit CAN-511 (BCI)) and accompanying Nova Scotia Verification Exhibit NS-VE-8-F (Exhibit USA-051 (BCI)).

[395] Government of Nova Scotia Verification Report (Exhibit CAN-511 (BCI)) and accompanying Nova Scotia Verification Exhibit NS-VE-8-F (Exhibit USA-051 (BCI)).

[396] Government of Nova Scotia Verification Report (Exhibit CAN-511 (BCI)) and accompanying Nova Scotia Verification Exhibit NS-VE-8-F (Exhibit USA-051 (BCI)).

demonstrates that stumpage rates in the Deloitte survey reflect the prices for standing timber that are, in turn, based on the species/product categories to which the standing trees belong, and that the survey prices do not, as Canada asserts, merely reflect the prices for log segments of a harvested tree.[397]

190. Canada's arguments about comparability in terms of harvested log type are likewise unfounded.[398] The focus of the subsidy benefit analysis was concerned with trees purchased by the respondents that went to sawmills.[399] Thus, by definition, the respondents reported the stumpage prices they paid for Crown-origin, sawable, standing timber that was able to be produced into lumber.[400] The Deloitte survey is similarly limited to stumpage prices paid for standing timber belonging to the sawable, standing timber category.[401]

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>U.S. Comment</u>:

191. <u>Canada's response to question 221 continues to rely on speculation that is contradicted by record evidence.[402] Canada's response is based on an unsupported assertion by Canada that "[t]he allocation of per-unit prices to different types of logs harvested from the same stands and trees is largely an arbitrary accounting exercise."[403] As explained above, Canada's assertion is not borne out by the documents that the USDOC collected at verification</u>. The remainder of

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[397] Government of Nova Scotia Verification Report (Exhibit CAN-511 (BCI)) and accompanying Nova Scotia Verification Exhibit NS-VE-8-F (Exhibit USA-051 (BCI)).

[398] *See* Canada's Responses to the Second Set of Panel Questions, para. 214.

[399] *See* Lumber Final I&D Memo, p. 112 (Exhibit CAN-010). *See also* U.S. Second Written Submission, paras. 209-210 and 212-214.

[400] *See* U.S. Second Written Submission, paras. 209-210 and 212-214.

[401] *See* U.S. Second Written Submission, paras. 209-210 and 212-214.

[402] *See* Canada's Responses to the Second Set of Panel Questions, paras. 228-240.

[403] *See* Canada's Responses to the Second Set of Panel Questions, para. 229.

Canada's flawed argument flows from Canada's incorrect understanding of the facts. Thus, for the same reasons given above in the U.S. comment on Canada's response to question 219, Canada's assertions utterly lack merit.

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.**

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?

<u>U.S. Comment</u>:

192. Canada's response to question 222 repeats again the same assertions that Canada has made throughout this panel proceeding, but which Canada has failed to substantiate.[404] The USDOC squarely addressed arguments raised by Canadian parties about the number and distribution of pulp mills in Nova Scotia and their potential effect on stumpage prices in the province. When faced by the same theoretical arguments about potential "influences" on stumpage prices in Nova Scotia that Canada articulates in its response to question 222, the USDOC concluded that the Canadian parties "fail[ed] to quantify the extent of the purported difference or even to demonstrate that such a difference exists."[405] Notably, Canada's response to question 222 cites no evidence of actual instances in which a sawmill adjusted the amount it was willing to pay for stumpage to account for the residual value of chips or used the additional income obtained through sale of residual chips to pay more for stumpage rights.[406] It would seem more logical for a rational economic actor to minimize as much as possible its costs for stumpage and to treat any additional revenue from the sale of residual chips as profit, as funds to reinvest into the operations of its company, or for some other use. Canada's continued attempts

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[404] *See* Canada's Responses to the Second Set of Panel Questions, paras. 241-249.

[405] Lumber Final I&D Memo, p. 114 (Exhibit CAN-010). *See also* U.S. First Written Submission, para. 131.

[406] *See* Canada's Responses to the Second Set of Panel Questions, paras. 241-249.

to second-guess Nova Scotia stumpage prices on that speculative basis does not undermine their validity as benchmark prices under Article 14(d) of the SCM Agreement.

223. <u>To Canada</u>: 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.

<u>U.S. Comment</u>:

193. Canada's response to question 223[407] ignores the more salient point that the USDOC made, namely that the provinces treat SPF stumpage as interchangeable, and they accept a range of tolerances in their own approaches to establishing the value of stumpage.[408]

224. <u>To Canada</u>: 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.

<u>U.S. Comment</u>:

194. Canada's response to question 224 engages in a lengthy explication of speculative considerations that are neither substantiated nor relevant to the question before the Panel.[409] Canada's response takes neutral statements about timber and attempts to then demonstrate that somehow stumpage transactions in Nova Scotia are aberrational or unrepresentative of genuine private stumpage transactions. But the record before the USDOC contradicts Canada's assertions, and instead supports the conclusion that Nova Scotia transactions were not

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[407] *See* Canada's Responses to the Second Set of Panel Questions, paras. 250-257.

[408] *See* Lumber Final I&D Memo, pp. 110-111, 113 (Exhibit CAN-010) (citing GOA QR at ABIV-73 and Exhibit AB-S-15 at 73; GNB QR at NBII-6 to NBII-9; GOO QR at Exhibit ON-TEN-34; GOQ QR Vol. 1 at 53). *See also* U.S. First Written Submission, paras. 115-120; U.S. Responses to the First Set of Panel Questions, paras. 12-17, 31, 37, and 39; U.S. Second Written Submission, paras. 154-160.

[409] *See* Canada's Responses to the Second Set of Panel Questions, paras. 258-264.

aberrational, in spite of Canada's speculation. The United States respectfully refers the Panel to the U.S. comments on Canada's responses to questions 219 and 221, above.

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>U.S. Comment</u>:

195. In commenting on Canada's response to subpart (a) of question 225, the United States respectfully refers to its response to subpart (b) of question 225, which explains why, in the context of a tier-one benchmark, downstream transportation costs are not relevant to determining the adequacy of remuneration for the good in question (i.e., stumpage) under Article 14(d) of the SCM Agreement.

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>U.S. Comment</u>:

196. Canada's response to question 226 repeats the same errors that Canada has repeated throughout this panel proceeding, but which Canada has failed to substantiate.[410] The U.S. second written submission explains that the USDOC took into account Canada's arguments on this point and concluded that none of the alleged differences in growing conditions were substantiated or resulted in differences that were not captured by the species and DBH

[410] *See* Canada's Responses to the Second Set of Panel Questions, paras. 271-277.

characteristics.[411]

227. To both parties: 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.S. Comment:

197. Canada's response to question 227 repeats general assertions about the concept of burden of proof, but ignores the reality of the investigation that took place here.[412] As explained in great detail in the U.S. second written submission, the USDOC more than satisfied any burden it had in this regard.[413] The U.S. response to question 227 also addresses this issue and explains why Canada's position in this regard is utterly without merit.[414] The United States respectfully refers the Panel to the prior U.S. discussion of these issues.

229. To Canada: 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.S. Comment:

198. Canada's response to question 229 repeats the sort of general and benign observations about whether certain landscapes are "harsh" or "gentle", but Canada fails to demonstrate that these adjectival differences reflect distinct prevailing market conditions for the good in question that would compel a different result in this case.[415] The U.S. second written submission explains that the USDOC took into account Canada's arguments on this point and concluded that none of the alleged differences identified in the excerpt quoted in question 229 were substantiated or

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[411] *See* U.S. Second Written Submission, paras. 113 and 170-178.

[412] *See* Canada's Responses to the Second Set of Panel Questions, paras. 278-281.

[413] *See* U.S. Second Written Submission, paras. 18-152 (Section II.A: "Canada Has Failed to Demonstrate that the USDOC's Investigation Was Deficient"; detailing the investigative process that took place and rebutting Canada's gross mischaracterization of the facts as set out in its Annex A Chart of Reports).

[414] *See* U.S. Responses to the Second Set of Panel Questions, paras. 43-46.

[415] *See* Canada's Responses to the Second Set of Panel Questions, paras. 282-288.

resulted in differences that were not captured by the species and DBH characteristics.[416]

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>U.S. Comment</u>:

199. Canada's response to subpart (a) of question 230 again repeats general and neutral observations about "precision" and "appropriateness", but Canada fails to demonstrate any error in the USDOC's analysis.[417] The U.S. response to subpart (b) of question 230 explains why Canada's position is without merit.[418] The United States respectfully refers the Panel to the discussion in that response.

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>U.S. Comment</u>:

200. Canada's response to question 231 goes on at length, making irrelevant assertions that are not responsive to the Panel's question, but ultimately confirms that Canada has not challenged this aspect of the USDOC's determination.[419] With respect to the issue of "in-kind" costs

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[416] *See* U.S. Second Written Submission, paras. 113 and 170-178.

[417] *See* Canada's Responses to the Second Set of Panel Questions, paras. 289-290.

[418] *See* U.S. Responses to the Second Set of Panel Questions, paras. 285-288.

[419] *See* Canada's Responses to the Second Set of Panel Questions, paras. 291-296.

referenced in Canada's response to question 231,[420] the United States has addressed Canada's argument numerous times previously and respectfully refers the Panel to those discussions.[421]

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>U.S. Comment</u>:

201. Canada's response to question 233 provides unsubstantiated speculation about considerations that might be made by hypothetical mills faced with hypothetical circumstances that are not borne out by the record in this investigation.[422] The USDOC addressed Canada's arguments on these points in the final issues and decision memorandum.[423] Canada's attempt at this late stage of the panel proceeding to introduce new lines of argument, or raise new details for consideration in the hypotheticals it proposes, in no way serves to assist the Panel in its task, which is to review the determination that the USDOC made.

234. At paragraph 54 of its response to the Panel's question no. 15, the United States argues that:

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[420] *See* Canada's Responses to the Second Set of Panel Questions, paras. 291-296.

[421] *See* Lumber Final I&D Memo, p. 137 (Exhibit CAN-010); U.S. First Written Submission, paras. 143, 145, 147-148; U.S. Responses to the First Set of Panel Questions, paras. 90-93.

[422] *See* Canada's Responses to the Second Set of Panel Questions, paras. 297-303.

[423] *See* Lumber Final I&D Memo, pp. 116-118 (Exhibit CAN-010).

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).

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

<u>U.S. Comment</u>:

202. Canada's response to subpart (a) of question 234 fails to take into account the numbers on which the USDOC actually relied.[424] The 17.8 cm figure to which Canada refers comes from a Nova Scotia Natural Resources publication, which is based on forest inventories of sample plots measured between 1999 and 2003.[425]

203. Canada cites to the Nova Scotia Natural Resources report to argue that sawlogs in Nova Scotia can only be produced from trees with a DBH that is no smaller than 17.8 cm. Canada therefore concludes that Nova Scotia's sawable, standing timber are too large to be compared to the sawable, standing timber that grows on Crown lands in the Canadian provinces at issue. However, the DBH information that the USDOC referenced in the investigation in support of the observation that Nova Scotia's trees were comparable to the Crown-origin trees in other Canadian provinces reflects the DBH for SPF species that grew on private land in Nova Scotia (as opposed to SPF trees that grew in all of Nova Scotia).[426] Moreover, the information on which the USDOC relied in the investigation reflects Nova Scotia Natural Resource sample plot data from a five-year period covering 2011-2015.

204. Thus, notwithstanding that a softwood tree in Nova Scotia's private forest with a 17.8 cm DBH would be comparable to the softwood standing timber that grows on Crown lands in the Canadian provinces at issue, the actual figure on which the USDOC relied in its investigation to establish that Nova Scotia's private-origin, softwood standing timber is comparable timber is the 15.9 cm DBH figure derived from Nova Scotia Natural Resource sample plot data observations

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[424] *See* Canada's Responses to the Second Set of Panel Questions, paras. 304-314.

[425] *See* Government of Canada Initial Questionnaire Response (March 14, 2017), Exhibit GOC-STUMP-7, Attachment 15 (Nova Scotia Natural Resources, "Nova Scotia Forest Inventory Based on Permanent Sample Plots Measured between 1999 and 2003"), p. 12 (Exhibit CAN-305).

[426] *See* Government of Nova Scotia Initial Questionnaire Response (March 17, 2017), p. 8 (Exhibit CAN-313); Government of Nova Scotia Verification Report, p. 2 (Exhibit CAN-511 (BCI)); Government of Nova Scotia Verification Exhibit NS-VE-1 ("Minor Corrections of the Government of Nova Scotia"), p. 1 (Exhibit USA-093).

covering the 2011 to 2015 period. This sample plot data used to derive the 15.9 cm DBH figure encompasses the period of investigation and is more contemporaneous than the 1999 through 2003 sample plot data used to derive the 17.8 cm DBH figure cited by the Canadian parties.

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 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).

<u>U.S. Comment</u>:

205. Aside from engaging in rank speculation, Canada's response to subparts (a)[427] and (b)[428] of question 238 ignores the explanation and evidence the USDOC set out in the final issues and decision memorandum as the basis for its treatment of Nova Scotia's conversion factor. As provided at page 119 of the final issues and decision memorandum:

> We also disagree with the Canadian Parties that the conversion factors used in the NS Survey to convert the data into a common unit of measure improperly skewed the data. The Canadian Parties claim that the NS Survey relied on an outdated, unreliable conversion factor. On this point, the Canadian Parties fail to mention that the conversion factor utilized in the NS Survey is the

[427] *See* Canada's Responses to the Second Set of Panel Questions, paras. 315-319.

[428] *See* Canada's Responses to the Second Set of Panel Questions, paras. 320-324.

> same conversion factor used by the GNS in its ordinary course of business. In fact, at verification, Deloitte stated that the use of the conversion factor by the GNS was the very reason it relied upon the factor for purposes of the NS Survey. The fact that the GNS relies upon the conversion factor in question as part of its ordinary course of business leads us to conclude that the factor is reliable. Moreover, although the Canadian Parties express concern with the conversion factor's age, particularly in light of intervening changes to the Nova Scotia scaling manual, their concern is unfounded. The GNS confirmed between 2001 and 2009 that the conversion factor continues to be accurate for use in government business, with any "minor difference" being "statistically insignificant."[429]

Additionally, the United States has previously responded to many of the same arguments by Canada concerning the conversion factor used in the Nova Scotia survey and respectfully refers the Panel to that discussion.[430]

206. To the extent Canada's argument goes beyond the record and into speculation about the "incentive to accurately measure and price crown timber",[431] Canada would be inviting the Panel to step into the role of the investigating authority, which would be contrary to the standard of review under the DSU.[432]

241. To both parties: 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.S. Comment:

207. Canada's response to question 241 further repeats the same unsubstantiated and hyperbolic allegations that Canada has repeated in other written submissions and during the substantive meetings, without ever refuting the U.S. rebuttal of Canada's baseless allegations.[433] The U.S. response to question 241 addresses this issue and demonstrates why Canada's

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[429] Lumber Final I&D Memo, p. 119 (Exhibit CAN-010) (footnotes omitted). *See generally ibid.*, pp. 115-120.

[430] *See* U.S. First Written Submission, paras. 171-173.

[431] Canada's First Written Submission, para. 861.

[432] *See, e.g., US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188. In the context of a WTO challenge to a trade remedies determination, it is well established that a WTO panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*." *Ibid.* (italics in original).

[433] *See* Canada's Responses to the Second Set of Panel Questions, para. 325.

allegations are unfounded, erroneous, irrelevant, and immaterial.[434] The United States respectfully refers the Panel to the discussion in that response.

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.

U.S. Comment:

208. Instead of answering the Panel's straightforward factual question, Canada's response to question 243 attempts to re-argue points that the United States has refuted previously on multiple occasions and that the USDOC itself addressed in the final issues and decision memorandum.[435] Canada's arguments continue to lack merit and should be rejected accordingly.

9 THE USDOC'S THE USDOC'S USE OF THE WASHINGTON STATE LOG PRICE BENCHMARK FOR BRITISH COLUMBIA

246. To Canada: Does the Dual Scale Study (Exhibit CAN-020(BCI)) explain the criteria used to select the sample sites? Please explain.

U.S. Comment:

209. The Dual Scale Study does not, as Canada contends, explain the methodology used to select the sample sites.[436] Although Canada's response emphasizes the importance of selecting a representative sample that accounts for variations in species, for "green" versus "dead" condition at harvest, and for log grade (in the BC interior), the study fails to explain how the sample sites were selected.[437] Canada's arguments do not cure that deficiency.

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[434] U.S. Responses to the Second Set of Panel Questions, paras. 321-323.

[435] *See* Canada's Responses to the Second Set of Panel Questions, para. 326. *See, e.g.*, U.S. Responses to the First Set of Panel Questions, paras. 25-27; U.S. Responses to the Second Set of Panel Questions, paras. 297-299; Lumber Final I&D Memo, pp. 112-113 (Exhibit CAN-010).

[436] *See* Canada's Responses to the Second Set of Panel Questions, paras. 327-331.

[437] *See* Canada's Responses to the Second Set of Panel Questions, para. 327.

210. In its response to question 246, Canada first asserts that the study selected sampling sites from 2014 and 2015 scale data derived from the BC Interior Harvest Billing System ("HBS").[438] However, as explained in the U.S. first written submission, left unaddressed is what criteria the authors employed in reviewing the 2014 and 2015 HBS scale data, how the range of scaling sites stacked up when applying those criteria, and the basis for the authors' conclusion that the selected scale sites provide a complete and representative sample.[439]

211. The Dual Scale Study does not contain any additional explanation of its sampling methodology. It is not clear why the study selected only 12 out of a possible 200 scaling sites in British Columbia for measurement.[440] The study's assertion that the 12 sites were selected on the basis of personal "historical knowledge" of the trees at those sites does not sufficiently demonstrate that the selected sites are representative or based on any statistically valid sampling methodology.[441] As the USDOC explained in the final issues and decision memorandum, "[t]he structure of a sampling methodology is a key decision point of any sound sampling methodology because how a sample is conducted can minimize bias, maximize the representativeness of the sample result, and inform the statistical relevance to the population."[442] As explained previously, the lack of explanation of the sampling methodology used in the Dual Scale Study therefore renders the study unreliable.

212. The United States also underscores that Canada has repeatedly changed its characterization of the study's purported methodology. In its first written submission, Canada asserted for the first time that the Dual Scale Study utilized "stratified random sampling."[443] This explanation is absent from the study and was not provided to the USDOC during the investigation. Then, in its responses to the first set of panel questions, when confronted with a direct question regarding the study's use of stratified random sampling, Canada changed its response and claimed that the study was based on "purposive sampling of scaling sites."[444] If the study did, indeed, clearly identify the sampling methodology, Canada would not need to resort to the type of shifting *post hoc* characterizations of the sampling methodology Canada has presented to the Panel.

213. Canada's reference to the summary description of Jendro and Hart's presentation on the Dual Scale Study in the British Columbia Verification Report does not cure the deficiencies in

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[438] *See* Canada's Responses to the Second Set of Panel Questions, para. 328.

[439] U.S. First Written Submission, para. 434.

[440] *See* U.S. First Written Submission, para. 431.

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

[442] Lumber Final I&D Memo, pp. 59-60 (Exhibit CAN-010).

[443] Canada's First Written Submission, para. 681.

[444] Canada's Responses to the First Set of Panel Questions, para. 278.

the study.[445] As explained in the verification report, the report "does *not* draw conclusions about whether the reported information was successfully verified, and further, does *not* make findings or conclusions regarding how the facts obtained at verification will ultimately be treated in the [USDOC's] analysis."[446] Rather, the verification report merely summarized the presentation by Mr. Jendro and Mr. Hart.[447] Furthermore, although the presentation included statements that the study was representative, it did not describe the underlying sampling methodology that would support that assertion.[448]

214. Finally, in stating that the USDOC did not request additional information at verification regarding the Dual Scale Study, Canada misapprehends the purpose of verification.[449] As explained in more detail in the U.S. responses to the second set of Panel questions, the purpose of verification is to confirm information contained in a respondent's questionnaire responses and is "not intended to be an opportunity for submission of new factual information."[450] As Canada acknowledges, Mr. Jendro and Mr. Hart made a presentation during verification on the Dual Scale Study and its methodology,[451] which had been submitted with a questionnaire response.[452] The purpose of verification was not to pass judgment on the merits of the study methodology, but rather to confirm and clarify the factual evidence submitted by the parties in their questionnaire responses.[453]

247. <u>To Canada</u>: 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.

<u>U.S. Comment</u>:

215. As explained above in the U.S. comment on Canada's response to question 246, the Dual Scale Study did not contain any explanation of its sampling methodology – whether it be purposive sampling, stratified random sampling, or another technique. Canada's *post hoc* explanation of the methodology underlying the study fails to retroactively rehabilitate the study's

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[445] *See* Canada's Responses to the Second Set of Panel Questions, para. 330.

[446] Verification Report of British Columbia, p. 1 (July 14, 2017) (Exhibit CAN-088) (italics in original).

[447] *See* Verification Report of British Columbia, pp. 15-16 (July 14, 2017) (Exhibit CAN-088).

[448] *See* U.S. First Written Submission, para. 435.

[449] *See* Canada's Responses to the Second Set of Panel Questions, para. 331.

[450] U.S. Responses to the Second Set of Panel Questions, para. 337.

[451] *See* Canada's Responses to the Second Set of Panel Questions, para. 330.

[452] *See* U.S. Responses to the Second Set of Panel Questions, para. 338.

[453] *See* U.S. Responses to the Second Set of Panel Questions, para. 338.

reliability.[454]

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.

U.S. Comment:

216. Canada's assertion in its response to question 248 that the scaling sites selected for the Dual Scale Study were representative of BC interior species mischaracterizes the USDOC's concern with the Dual Scale study.[455] The USDOC's primary concern was not the representativeness of the mix of species in the scaling sites, but whether the sites themselves were selected using a statistically valid sampling methodology that was not tailored to obtain a particular result.[456] This is why the USDOC concluded in the final issues and decision memorandum that, "[w]hile the data in the BC Dual Scale Study may be 'valid' in the sense that they are based upon the actual measurement of trees in BC, our concern arises when this data is subsequently characterized to be representative of all interior BC trees."[457] The study's assertion that the 12 sites were selected on the basis of Mr. Jendro and Mr. Hart's "historical knowledge" of the trees at those sites does not sufficiently demonstrate, in this context, that the selected sites are representative of the trees throughout British Columbia.[458]

217. Canada further demonstrates its misunderstanding of the USDOC's analysis of the Dual Scale Study by suggesting that the concern the United States expressed with the sampling methodology at the second panel meeting conflicts with the USDOC's concern in the final determination about the representativeness of the sampling sites.[459] Canada errs by suggesting that the sampling methodology and representativeness of the Dual Scale Study are two mutually exclusive concerns, when in fact they are inextricably linked. Without an explanation of the sampling methodology used to select the scaling sites, the USDOC was unable to determine whether the selected scaling sites were representative, or were specifically chosen to generate

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[454] *See* U.S. Second Written Submission, paras. 283-284.

[455] *See* Canada's Responses to the Second Set of Panel Questions, paras. 337-339.

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

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

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

[459] *See* Canada's Responses to the Second Set of Panel Questions, para. 340.

results favorable to the respondents. Consequently, the USDOC was unable to consider whether the underlying scaling data provided the basis for a reliable conversion factor. The USDOC clearly explained the intertwined relationship between sampling methodology and representativeness in the final issues and decision memorandum:

> While we do not question the qualifications of Mr. Jendro and Mr. Hart, or the scaling professionals used by Jendro & Hart LLC, we have serious concerns about the methodology used to identify the selected scaling sites. Given the volume of lumber products being produced by the BC respondents, it is unclear why only 13 scaling sites were selected by Mr. Jendro and Mr. Hart for purposes of the BC Dual Scale Study. Further, although these sites were purportedly selected based upon the historic knowledge of the trees that are harvested and scaled at these 13 sites, there is no evidence that either the GBC or Mr. Jendro and Mr. Hart selected these sites using any statistically valid sampling methodology. While the data in the BC Dual Scale Study may be "valid" in the sense that they are based upon the actual measurement of trees in BC, our concern arises when this data is subsequently characterized to be representative of all interior BC trees. We find that this concern may be alleviated if the BC Dual Scale Study was conducted using a statistically valid sampling methodology, which could then better represent the large area of BC interior trees or possibly all trees in BC. The BC Dual Scale Study does not explain how and whether different types of sampling were considered, or even selected: random, stratified, or composite, etc. The structure of a sampling methodology is a key decision point of any sound sampling methodology because how a sample is conducted can minimize bias, maximize the representativeness of the sample result, and inform the statistical relevance to the population. Instead, the researchers of the BC Dual Scale Study note that in order to have study results relatable to the BC Interior harvest, "the study team distributed study samples among the forest types represented by the BC interior harvest." Therefore, <u>because there is no evidence that the study used statistically valid sampling methodologies in selecting these 13 sites, the Department cannot determine that the information in the study provides a representative sample</u>.[460]

218. As a final matter, Canada's additional contention that the USDOC failed to consider the data contained in the Dual Scale Study and solicit further information about the study is the same

[460] Lumber Final I&D Memo, pp. 59-60 (Exhibit CAN-010) (footnotes omitted; underline added).

argument that Canada has repeated throughout this panel proceeding, and the United States has refuted Canada's argument numerous times.[461] The U.S. comment below on Canada's response to question 249 and the U.S. response to question 250[462] further address these points as well.

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.

U.S. Comment:

219. Canada's response to question 249 misconstrues the manner in which the USDOC assessed evidence during the course of the investigation.[463] After initiating an investigation based upon a sufficient petition, the USDOC identified respondents and provided opportunities for all interested parties to submit factual information. The USDOC then issued a preliminary determination for comment from the interested parties through case and rebuttal briefs, as well as a hearing, upon request. Under the USDOC's regulations, "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the [USDOC's] final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results."[464] In making the final determination, the USDOC responded to the parties' comments, and also made any appropriate adjustments.[465]

220. The record demonstrates that the parties commented extensively on the Dual Scale Study. As Canada's response to question 249 indicates, the petitioner raised concerns about the representativeness of the scaling sites in the Dual Scale Study (subsequent to the preliminary determination and prior to the on-site verification) and the Government of British Columbia and the B.C. Lumber Trade Council responded to these concerns in their joint administrative case brief.[466] One out of every ten pages in that case brief addresses and advocates for the Dual Scale

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[461] *See* Canada's Responses to the Second Set of Panel Questions, paras. 340-343. *See also* U.S. Responses to the Second Set of Panel Questions, paras. 337-340.

[462] *See* U.S. Responses to the Second Set of Panel Questions, paras. 337-340.

[463] *See* Canada's Responses to the Second Set of Panel Questions, paras. 344-347.

[464] 19 C.F.R. § 351.309(c)(2) (Exhibit USA-056).

[465] *See* U.S. Responses to the First Set of Panel Questions, para. 273.

[466] *See* Canada's Responses to the Second Set of Panel Questions, para. 346 (citing Case Brief of the GBC and B.C. Lumber Trade Council (Volume V), pp. V-68-69 (July 28, 2017) (Exhibit CAN-295)).

Study.[467] The respondent companies Canfor, Tolko, and West Fraser also addressed the Dual Scale Study in their case briefs.[468] The petitioner's rebuttal case brief again raised concerns about the representativeness of the scaling sites.[469] Following the submission of those case and rebuttal briefs, the parties also spent a significant amount of time in the USDOC's public hearing addressing the Dual Scale Study.[470] The submissions and arguments of the interested parties contained extensive debate regarding the reliability of the Dual Scale Study, and the USDOC took all of this into account in reaching its final determination.[471]

221. Canada's suggestion that the Canadian parties were deprived of the opportunity to address methodological concerns regarding the Dual Scale Study simply is not supported by the record. Canada's assertion that the USDOC failed to consider the record before it likewise is unsupported.

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.

U.S. Comment:

222. Canada's response to question 256 expresses Canada's disagreement with the U.S. position referenced in the question, but Canada fails to rebut the U.S. argument on this point.[472] As explained, the Spelter Study provided the only usable information on the record for completing a volumetric conversion.[473] The United States respectfully refers the Panel to the prior U.S. discussion of these issues.

259. To Canada: Please comment on the U.S. assertion at paragraph 327 of its response

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[467] *See* Case Brief of the GBC and B.C. Lumber Trade Council (Volume V), pp. V-57-V-71 (July 28, 2017) (Exhibit CAN-295).

[468] *See* Case Brief of Canfor Corporation, pp. 28-29 (July 27, 2017) (Exhibit CAN-137 (BCI)); Case Brief of Tolko Marketing and Sales Ltd. and Tolko Industries Ltd., pp. 11-14 (July 27, 2017) (Exhibit CAN-138 (BCI)); Case Brief of West Fraser Mills Ltd., pp. 40-42 (July 27, 2017) (Exhibit CAN-139 (BCI)).

[469] *See* Petitioner Rebuttal Brief, pp. 36-40 (August 7, 2017) (Exhibit USA-071).

[470] *See* USDOC Memorandum, "Hearing Transcript on CVD Issues," dated August 24, 2017, pp. 53-81 (Exhibit USA-072).

[471] *See* Lumber Final I&D Memo, pp. 58-59 (Exhibit CAN-010) (summarizing and citing the comments of Canadian parties advocating use of the Dual Scale Study, as well as petitioner's concerns regarding the representativeness of the study).

[472] *See* Canada's Responses to the Second Set of Panel Questions, paras. 348-350.

[473] *See* U.S. Responses to the First set of Panel Questions, paras. 297 and 334. *See also* Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

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?

U.S. Comment:

223. Canada's response to question 259 largely repeats Canada's arguments about the USDOC's determination not to make an adjustment to the benchmark for beetle-killed logs.[474] The United States has rebutted Canada's arguments previously.[475] The relevant issue in dispute is not whether beetle-killed logs represent a higher proportion of the harvest in British Columbia than in Washington state, or whether "green" logs sell at higher prices than beetle-killed logs.[476] The relevant issue is that record evidence establishes that the beetle infestation also exists in the United States in the Pacific Northwest ("PNW") among the same species as in British Columbia.[477] However, none of this demonstrates that the WDNR prices do not account for beetle-killed logs, a point which Canada challenges.[478]

224. Canada also asserts that the United States misunderstands the log grading systems in British Columbia and Washington state.[479] As the United States has explained, however, beetle-killed condition, like other quality issues, relates to log grade, and the WDNR benchmark did distinguish between three Washington State grades.[480] Because the WDNR data are species-specific, the data capture log quality issues that are unique to a given species.[481]

225. Canada's response to question 259 continues to rely on Jendro and Hart's Pacific Northwest sawmill timber price quotes for beetle-killed timber, as included in the Dual Scale Study.[482] As the United States has explained, 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.[483] Nor was it possible

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[474] *See* Canada's Responses to the Second Set of Panel Questions, paras. 351-358.

[475] *See* U.S. First Written Submission, paras. 454-455; U.S. Responses to the First Set of Panel Questions, paras. 321-322.

[476] *See* Canada's Responses to the Second Set of Panel Questions, para. 352.

[477] *See* U.S. Responses to the First Set of Panel Questions, para. 321.

[478] *See* Canada's Responses to the Second Set of Panel Questions, para. 353.

[479] *See* Canada's Responses to the Second Set of Panel Questions, paras. 351, 355.

[480] U.S. Responses to the Second Set of Panel Questions, para. 345.

[481] U.S. Responses to the Second Set of Panel Questions, para. 345.

[482] *See* Canada's Responses to the Second Set of Panel Questions, para. 358.

[483] *See* U.S. First Written Submission, para. 448. *See also* Lumber Final I&D Memo, p. 76 (Exhibit CAN-010).

for the USDOC to determine, for example, whether the authors had included all of the prices reported to them.[484] As Canada acknowledges, these are the only prices on the record for beetle-killed logs.[485] Because the USDOC found these prices to be unreliable, there was no usable record evidence on the price of blue-stain logs in the U.S. PNW with which the USDOC could make a benchmark adjustment.

226. The USDOC also took into account additional record evidence that called into question the reliability of the beetle-killed price quotes contained in the Dual Scale Study.[486] As explained in the U.S. response to question 104, the petitioner submitted rebuttal evidence in the form of an affidavit from a representative of Idaho Forest Group, which accounted for five of the eight price quotes that Jendro and Hart reported, in which the affiant stated that the lower prices for beetle-killed logs relate to those mills specializing in appearance-grade products and thus discouraging delivery of beetle-killed logs.[487] With respect to another mill, Jendro and Hart themselves state that the mill reported it pays less for lodgepole pine and spruce, the two species affected by beetle infestation, because it prefers to process certain other species.[488] This evidence is consistent with the USDOC's concern regarding whether Jendro and Hart's collection of price quotes was representative and reliable.[489]

227. As a final matter, Canada mischaracterizes the context in which the U.S. first written submission observed that beetle-killed logs are typically of a higher quality and price than utility grade non-saw logs.[490] The U.S. first written submission specifically explains that:

> Canada's assertion, based upon the price quotes collected by its consultants, that beetle-killed timber are lower quality than Utility grade logs, is contradicted by other evidence in Jendro and Hart's report. For instance, as indicated in Table 14 of Canada's first written submission, the BC Dual Scale Study found that 72.6 percent of beetle-killed lodgepole pine were grade 2 under the BC

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[484] *See* U.S. First Written Submission, para. 456. *See also* Lumber Final I&D Memo, p. 76 (Exhibit CAN-010).

[485] *See* Canada's Responses to the Second Set of Panel Questions, para. 358.

[486] *See* Lumber Final I&D Memo, p. 76 (Exhibit CAN-010). *See also* Petitioner Comments on Primary Questionnaire Responses, Exhibit 26, paras. 7-8 (Exhibit USA-052); GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 **(**BCI)).

[487] *See* Petitioner Comments on Primary Questionnaire Responses, Exhibit 26, paras. 7-8 (Exhibit USA-052); GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 **(**BCI)).

[488] *See* GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 **(**BCI)).

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

[490] *See* Canada's Responses to the Second Set of Panel Questions, para. 354.

> quality guidelines, *i.e.*, sawlogs. Thus, according to Canada's proffered evidence, beetle-killed logs are typically of higher quality and price than utility-grade, non-sawlogs.[491]

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.

U.S. Comment:

228. Canada's response to question 260 fails to rebut the U.S. argument presented in paragraphs 335-338 of the U.S. response to question 111.[492] As explained, the Panel should disregard the data in Figure 66 because it is irrelevant. Article 14(d) of the SCM Agreement unambiguously refers to prevailing market conditions for the good in question, not a downstream product that is later produced from that good. For purposes of Article 14(d), the "good or service in question" in the underlying investigation was standing timber provided by British Columbia, and not the numerous downstream products that may be created after British Columbia has provided the standing timber.[493]

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 of the U.S. response to Panel's question no. 103.)

a. To Canada: Please comment on the U.S. argument, above.

U.S. Comment:

229. Canada's response to question 261 mischaracterizes the U.S. observation about the small proportion of utility grade logs in the interior and ignores the more salient fact that the source of the volumetric utility grade log data in question was the Dual Scale Study – a source which the USDOC found to be unreliable.[494] Although the unreliability of that data, in and of itself, provided a sufficient reason not to make an adjustment for utility grade logs, the United States addressed additional arguments raised by Canada on this point during the course of this panel proceeding.[495] Such statements by the United States do not constitute *post hoc* rationalization for

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[491] U.S. First Written Submission, para. 457.

[492] *See* Canada's Responses to the Second Set of Panel Questions, paras. 359-361.

[493] *See* U.S. Responses to the First Set of Panel Questions, paras. 337-338.

[494] *See* Canada's Responses to the Second Set of Panel Questions, paras. 362-366.

[495] *See, e.g.*, U.S. First Written Submission, para. 451; U.S. Responses to the First Set of Panel Questions, paras. 315-316.

the USDOC's determination, but simply are a response to arguments and questions raised during the course of this proceeding.

230. For example, the U.S. first written submission explained that:

> Canada states that, applying the BC Dual Scale Study's ratios, [[***]] of Canfor's lodgepole pine harvest during the period of investigation would have been graded utility under U.S. rules. However, that statistic is an outlier. Across the three respondents with operations in British Columbia and the full array of various species, only Canfor's lodgepole pine harvest was estimated to be [[***]] utility-grade, applying the BC Dual Scale Study ratios. Across the majority of species, each company's harvest was estimated to include [[***]] utility-grade logs. Thus, even if Canada's data were reliable, those data do not necessarily establish a basis for the USDOC to recalculate the WDNR benchmark, which already reflects Washington timber of all grades.[496]

231. The U.S. response to the first set of panel questions similarly provides that:

> As summarized in the U.S. response to question 101, the USDOC determined there was no record evidence that would allow it to make a grade adjustment to the WDNR benchmark, because the record did not provide a reliable means of converting between Washington State and British Columbia grades.
>
> In addition to explaining this USDOC finding, the U.S. first written submission addresses Canada's assertion about portions of the B.C. Interior harvest that would have been graded as "utility." In support of its assertion, Canada cited a single statistic – that, using Jendro & Hart's estimate, Canfor Corporation's lodgepole pine harvest would have been [[***]] utility applying the Washington State grading system. The United States indicated that, even accepting for the sake of argument the Dual Scale Study's ratios, this statistic was misleading. A simple average of the proportion of the three BC-based respondents' harvest, among eight different species, indicates that [[***]] would have been graded utility. Notwithstanding the paucity of utility data in the WDNR benchmark, the relatively small share of the B.C. harvest that would have been utility grade supports the USDOC's finding that its chosen benchmark reasonably reflected the BC mandatory

[496] U.S. First Written Submission, para. 451 (footnotes omitted).

> respondents' timber inputs. More fundamentally, Canada's analysis is premised upon acceptance of the Dual Scale Study, which the USDOC reasonably concluded was flawed and unusable for reasons the USDOC gave in the final issues and decision memorandum.[497]

232. Canada mischaracterizes the U.S. arguments and, at the same time, Canada's own argument misses the fundamental point that the data derived from the Dual Scale Study is unreliable and was not used by the USDOC in the final determination. Consequently, Canada makes irrelevant assertions regarding the purported impact an adjustment for utility grade logs would have had on the subsidy benefit calculation.[498] Canada's arguments have no bearing on the relevant question in this dispute. The United States respectfully refers the Panel to the prior U.S. discussion of these issues, which responds fully to Canada's meritless arguments.

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 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)**

<u>Comment</u>:

233. The United States has already explained the proper legal framework for understanding the obligations set out in Article 2.1 of the SCM Agreement[499] and demonstrated that Canada has failed to show that the USDOC acted inconsistently with those obligations.[500] Nonetheless,

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[497] U.S. Responses to the First Set of Panel Questions, paras. 315-316 (footnotes omitted).

[498] *See* Canada's Responses to the Second Set of Panel Questions, para. 366.

[499] *See* U.S. First Written Submission, paras. 740-745; U.S. Responses to the First Set of Panel Questions, paras. 437-438; U.S. Second Written Submission, paras. 458-459.

[500] *See* U.S. First Written Submission, paras. 749-761; U.S. Second Written Submission, paras. 456-464.

Canada continues to take the view that the ACCA Class 29 assets program cannot be *de jure* specific because "eligibility for Class 29 is based not on the industries or enterprises claiming the deduction, but on the activities for which machinery or equipment is primarily used."[501] As the United States explains again below, Canada's view is without merit and not supported by the text of Article 2.1(a).[502]

234. First, a subsidy can be *de jure* specific without explicitly identifying eligible industries and enterprises by name. According to Article 2.1(a), a subsidy is *de jure* specific "[w]here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises."[503] The *de jure* specificity analysis "focuses … on whether *access* to [a] subsidy has been explicitly limited" and "situates the analysis for assessing any limitations on *eligibility* in the particular legal instrument or government conduct effecting such limitations."[504] The Appellate Body has explained that "a limitation on access to a subsidy may be established in many different ways …."[505] Activity-based exclusions are one way in which access to and eligibility for a subsidy may be explicitly limited to certain enterprises, thereby satisfying the *de jure* specificity criteria under Article 2.1(a).

235. Second, the record before the USDOC showed that the ACCA Class 29 assets program is explicitly limited to "manufacturing and processing" activities and that the *Income Tax Act* and *Income Tax Regulations* exclude numerous activities from the definition of "manufacturing and processing."[506] As the USDOC explained, the *Income Tax Act* and *Income Tax Regulations* explicitly limit access to tax benefits under the program to enterprises and industries that engage in the activities enumerated in the definition of "manufacturing and processing."[507] In other words, by excluding certain activities from the definition of "manufacturing and processing," enterprises and industries engaged exclusively in the activities excluded from the definition of "manufacturing and processing" are ineligible to receive the tax benefits as a matter of law. A *de jure* specificity finding based on this activity-based exclusion thus is not inconsistent with

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[501] Canada's Responses to the Second Set of Panel Questions, para. 367. *See also* Canada's First Written Submission, paras. 1162-1164, 1168; Canada's Responses to the First Set of Panel Questions, para. 417.

[502] *See* U.S. First Written Submission, paras. 750-754; U.S. Second Written Submission, paras. 456-460.

[503] SCM Agreement, Art. 2.1(a).

[504] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368 (italics in original).

[505] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413. *See also US – Washing Machines (AB)*, para. 5.223 ("[T]he inquiry under Article 2 hinges on limitations on '*eligibility* for a subsidy' in respect of certain recipients [and therefore] [e]ligibility may be limited in 'many different ways', e.g., by virtue of the type of activities conducted by the recipients or the region where the recipients run those activities.") (footnotes omitted; italics in original; underline added).

[506] *See* Lumber Final I&D Memo, pp. 197-199 (Exhibit CAN-010). *See also* U.S. First Written Submission, paras. 746-748; U.S. Responses to the First Set of Panel Questions, para. 439.

[507] *See* Lumber Final I&D Memo, pp. 197-199 (Exhibit CAN-010).

Article 2.1(a).

236. Finally, the existence of other tax deductions and exemptions under Canada's *Income Tax Act* does not render the Class 29 assets program non-specific. The other tax provisions that Canada identified provide for different financial contributions, different benefit amounts, and different criteria for eligibility.[508] None of these other tax provisions provide the same subsidy to those enterprises and industries precluded from access to the deductions from taxable income for the capital cost of property that is provided under the ACCA Class 29 assets program.

237. The USDOC's determination to treat the ACCA Class 29 assets program as *de jure* specific is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it. Therefore, the Panel should find that Canada has failed to establish that the United States acted inconsistently with Articles 2.1(a) and 2.1(b) of the SCM Agreement.

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?

U.S. Comment:

238. As an initial matter, the United States objects to the proposed "shorthand" description of Canada's claim – "transaction discounting" – that Canada has introduced at this late stage in the panel proceeding.[509] Canada has never used the term "transaction discounting" in any of its prior

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[508] Canada identifies other tax provisions under the *Income Tax Act* that provide: (1) a tax credit for "flow-through mining expenditure" and "pre-production mining expenditure" (citing section 127(5) of the *Income Tax Act*); (2) a tax deduction for exploration expenses included within the definition of "Canadian exploration expense" (citing sections 66.1(2) and (6) of the *Income Tax Act*); and (3) a tax deduction for development expenses (citing sections 66.2(2) and (5) of the *Income Tax Act*). *See* Canada's Response to the Second Set of Panel Questions, para. 369, footnote 641. *See also* Canada's First Written Submission, para. 1161, footnote 1958, and para. 1170, footnote 1968. The United States notes that it was unable to locate the tax deduction provisions in the exhibit cited by Canada that contains sections from the *Income Tax Act*. *See* SR&ED Tax Credit Legislation (Exhibit CAN-467). In any event, even according to Canada's descriptions of these tax deductions, they cannot be considered the same subsidy as the deductions from taxable income for the capital cost of property provided under the ACCA Class 29 assets program.

[509] Canada's Responses to the Second Set of Panel Questions, para. 370.

written submissions, statements, or responses to the Panel's questions. Nor has Canada, in its response to this question, explained what it even means by the term "transaction discounting".

239. Canada states that it "objects to the characterization of its claim as one of 'offsets'".[510] However, as the United States has demonstrated, in *US – Anti-Dumping and Countervailing Duties (China)*, China advanced a claim under Article 14(d) of the SCM Agreement that is nearly identical to the claim that Canada advances in this dispute.[511] The panel in *US – Anti-Dumping and Countervailing Duties (China)* described China's – and now Canada's – claim as "pertaining to 'credit' or 'offset' for unsubsidized transactions".[512] That panel explained that "China's argument is that if some purchases during the period of investigation are made for a higher-than-benchmark, or above-market, price, the full amount of these 'negative' benefit amounts, as measured against the benchmark price, must, as a matter of law, be offset against the 'positive' benefit amounts, over the full period of investigation."[513] Canada has made the same argument here. Specifically, Canada claimed in its panel request that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[514] In Canada's first written submission, Canada argued that the USDOC's benefit determination was not accurate because it "set negative comparison results to zero instead of simply aggregating them with the positive comparison results",[515] and "[o]nly by aggregating the results of its comparisons, without first zeroing negative comparison results, could this inaccuracy have been overcome."[516] The term "offsets" is a correct and succinct description of the claim that Canada has actually made in this dispute. The United States encourages the Panel to continue using that shorthand description to refer to Canada's claim.

240. Canada's proposal to describe its claim as "transaction discounting" actually is revealing, as is Canada's discussion in its response to this question of the "number of variables that will affect whether a benefit calculation methodology is consistent with Article 14(d)".[517] Discussing those variables, Canada suggests that "the frequency of sales of the good, the unit in which it is sold, the degree of variation in market conditions for the good, the contractual arrangement or arrangements under which the good is sold, and the manner in which the financial contribution is

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[510] Canada's Responses to the Second Set of Panel Questions, para. 370.

[511] *See, e.g.*, U.S. First Written Submission, paras. 476-483.

[512] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, heading XI preceding para. 11.1 (underline added; capitalization changed for clarity).

[513] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.46 (underline added).

[514] Panel Request, p. 2, part A.4.

[515] Canada's First Written Submission, para. 935.

[516] Canada's First Written Submission, para. 940.

[517] Canada's Responses to the Second Set of Panel Questions, para. 372.

defined, are all factors that could affect whether the method an investigating authority uses to assess adequacy of remuneration is consistent with Article 14(d)."[518] These variables all relate to the identification and grouping of the transactions under examination (or "the manner in which the financial contribution is defined"),[519] and Canada's subsequent discussion in its response to this question concerns properly identifying and grouping the transactions under examination that are to be compared to a benchmark or benchmarks to determine whether a benefit has been conferred. Canada expressly contends that "the best way to achieve the requisite 'careful matching' is to ensure that groups of transactions that were made under conditions that are comparable on both sides of the comparison are evaluated together",[520] and Canada suggests that the USDOC "could have compared the actual unit of transaction–the actual stand of trees–to a weighted average species benchmark".[521]

241. As discussed further below in the U.S. comments on Canada's responses to questions 267, 268, 272, subpart (b), and 273, subpart (b), Canada appears at this late stage of the panel proceeding to have shifted its argument significantly, and Canada now is raising concerns with how the USDOC identified or grouped the transactions under examination in the underlying countervailing duty investigation at issue in this dispute (or "the manner in which the financial contribution is defined"[522] or how the USDOC purportedly "discount[ed]" transactions[523]). As elaborated below in other U.S. comments on Canada's responses to the questions under this heading, a failure by an investigating authority to correctly identify or group the transactions under examination when assessing whether a benefit was conferred (*i.e.*, how the investigating authority defined the financial contribution) could, itself, potentially form the basis for a claim under Article 14(d) of the SCM Agreement. The panel in *US – Anti-Dumping and Countervailing Duties (China)* appears to have recognized as much when it reasoned 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."[524] But Canada did not make a claim in this dispute about the USDOC's identification or grouping of transactions or its definition of the financial contribution.

242. Rather, as Canada has confirmed, Canada's contention is that "it was the" alleged "decision to disregard the comparison results" – after the transactions and benchmarks had been identified and compared – "that rendered the benefit calculation methodology inconsistent with

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[518] Canada's Responses to the Second Set of Panel Questions, para. 372 (underline added).

[519] Canada's Responses to the Second Set of Panel Questions, para. 372.

[520] Canada's Responses to the Second Set of Panel Questions, para. 379.

[521] Canada's Responses to the Second Set of Panel Questions, para. 378.

[522] Canada's Responses to the Second Set of Panel Questions, para. 372.

[523] Canada's Responses to the Second Set of Panel Questions, para. 370.

[524] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.66.

Article 14(d)."[525] Canada has not challenged the USDOC's identification or grouping of the transactions. Instead, Canada has separately challenged the USDOC's selection of benchmarks, and Canada also claims that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[526] The United States has demonstrated that there is no support in the terms of the SCM Agreement or the GATT 1994 for finding a breach based on the claims that Canada actually made in this dispute.[527]

243. In the concluding paragraph of Canada's response to this question, Canada states that "Canada is not asking for 'offsets' to account for unsubsidized transactions".[528] Instead, Canada contends that it "is seeking an accurate determination of the adequacy of remuneration for Crown standing timber. The choices that Commerce made were such that its comparison results were not reliable indicators of the amount of any benefit for the examined transactions."[529] In the context of Canada's response to this question, the "choices that Commerce made" must refer to the choices that the USDOC made in identifying and grouping the transactions under examination, *i.e.*, the USDOC's definition of the financial contribution (and also identifying and selecting the benchmarks for comparison, which Canada has challenged separately). But Canada did not include a claim in its panel request challenging the "choices that Commerce made" in identifying and grouping the transactions under examination and defining the financial contribution. Canada challenged what the USDOC did with the "comparison results".[530] Specifically, again, Canada has claimed that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[531] That is a different claim altogether from the arguments that Canada is now making at the end of this panel proceeding concerning the definition of the financial contribution.

244. Canada, of course, is limited to pursuing only the claims identified in Canada's panel request, which established the Panel's terms of reference in this dispute.[532] The new claim that Canada has introduced at this late stage of the panel proceeding is inconsistent with Article 6.2 of the DSU because Canada did not raise this claim in its panel request. Article 6.2 of the DSU

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[525] Canada's Responses to the Second Set of Panel Questions, para. 395 (underline added).

[526] Panel Request, p. 2, part A.4.

[527] *See, e.g.,* U.S. First Written Submission, paras. 472-527; U.S. Second Written Submission, paras. 302-332.

[528] Canada's Responses to the Second Set of Panel Questions, para. 380.

[529] Canada's Responses to the Second Set of Panel Questions, para. 380 (underline added).

[530] Canada's Responses to the Second Set of Panel Questions, para. 380.

[531] Panel Request, p. 2, part A.4.

[532] *See* DSU, Arts. 6.2, 7.1.

"serves a pivotal function in WTO dispute settlement".[533] Article 6.2 provides, in relevant part, that:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly....

245. Compliance with Article 6.2 requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances."[534] The Appellate Body has observed that Article 6.2 has "two distinct requirements," namely:

> 1) "identification of the specific measures at issue", and
>
> 2) "the provision of a brief summary of the legal basis of the complaint (or the claims)".[535]

These elements comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under Article 7.1 of the DSU.[536] "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[537]

246. Given that Canada failed to identify any claim in its panel request concerning the USDOC's identification and grouping of the transactions under examination, *i.e.*, the USDOC's definition of the financial contribution, then any such claim is outside the Panel's terms of reference.

264. <u>To Canada</u>: 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).

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[533] *US – Carbon Steel (AB)*, para. 127.

[534] *US – Carbon Steel (AB)*, para. 127.

[535] *Australia – Apples (AB)*, para. 416 (citing *US – Carbon Steel (AB)*, para. 125).

[536] *Australia – Apples (AB)*, para. 416.

[537] *Australia – Apples (AB)*, para. 416.

U.S. Comment:

247. The United States welcomes Canada's confirmation that Canada is not arguing that an investigating authority is required by Article 14(d) of the SCM Agreement to apply an average-to-average comparison method for determining the benefit amount.[538]

248. The United States also notes Canada's reference to the explanation of the panel in *US – Anti-Dumping and Countervailing Duties (China)* that "the 'basic requirement' of Article 14(d) is that the benefit calculation methodology must 'correspond to the particular good at issue, as it is actually sold, at the time of the transaction being analysed (i.e., it must reflect the factual situation found to exist in respect of the government-provided good).'"[539] Again, in this response, as in its other responses to questions under this heading, Canada now is advancing arguments concerning the USDOC's identification and grouping of the transactions under examination, *i.e.*, the USDOC's definition of the financial contribution. Specifically, Canada contends that, "[h]aving made the decisions that it made with respect to benchmarks, and to the specific comparisons it was going to carry out" – *i.e.*, the identification and grouping of the transactions under examination – "the comparison results could not isolate and accurately ascertain the benefit. Accordingly, it was not open to Commerce to disregard some of those results as they did not provide an accurate determination of adequacy of remuneration for the transaction, or sub-part of the transaction, in isolation."[540] As the United States has shown, Canada's true complaint is about the matching of transactions and benchmarks, and now, at this late stage of the proceeding, about the USDOC's identification and grouping of the transactions under examination.

249. However, as explained in the U.S. comments on Canada's responses to other questions under this heading, Canada has not brought a claim against the USDOC's identification and grouping of the transactions under examination, *i.e.*, the USDOC's definition of the financial contribution. Given that Canada failed to identify such a claim in its panel request, any such claim is outside the Panel's terms of reference.[541] Canada has separately challenged the USDOC's selection of benchmarks, and Canada also claims that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[542] The United States has demonstrated that there is no support in the terms of the SCM Agreement or the GATT 1994 for finding a breach based on the

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[538] *See* Canada's Responses to the Second Set of Panel Questions, para. 381.

[539] Canada's Responses to the Second Set of Panel Questions, para. 381 (citing *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.56; underline added).

[540] Canada's Responses to the Second Set of Panel Questions, para. 382 (underline added).

[541] *See supra*, U.S. Comment on Canada's Response to Question 263.

[542] Panel Request, p. 2, part A.4.

claims that Canada actually made in this dispute.[543]

265. <u>To both parties</u>: 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?

<u>U.S. Comment</u>:

250. As explained in the U.S. response to this question, a review of the calculation memoranda that the USDOC prepared for the examined producers demonstrates that the USDOC established the existence of both transaction-specific benefits as well as the total benefit of the stumpage programs for each examined producer.[544] The United States respectfully refers the Panel to the U.S. response to this question.

251. With respect to Canada's contention that, if each individual transaction were a separate financial contribution, "the logical implication of the U.S. argument would be that an appropriate

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[543] *See, e.g.*, U.S. First Written Submission, paras. 472-527; U.S. Second Written Submission, paras. 302-332.

[544] *See* U.S. Responses to the Second Set of Panel Questions, paras. 374-381.

benchmark would then need to be selected for *each individual transaction*",[545] that implication is not logical at all. Canada itself has explicitly acknowledged that "[i]t may be that an average benchmark price that captures a range of market conditions is the best benchmark",[546] and "transaction-to-average comparisons can provide an accurate and reasonable benefit calculation if the individual comparison results are added together."[547] Logically, and consistent with Canada's own expressed view, a single, average benchmark could be compared to each individual transaction (*i.e.*, each separate financial contribution) to establish whether each financial contribution conferred a benefit. In that case, for each individual financial contribution where a benefit was conferred, a subsidy would be "deemed to exist", per the terms of Article 1 of the SCM Agreement.

266. <u>To Canada</u>: 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 conditions".

<u>U.S. Comment</u>:

252. The United States does not disagree with the observations about Article 14(d) of the SCM Agreement that Canada makes in its response to this question.

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[545] Canada's Responses to the Second Set of Panel Questions, para. 389.

[546] Canada's Responses to the Second Set of Panel Questions, para. 379.

[547] Canada's First Written Submission, para. 930.

253. That being said, while Canada correctly states that "the 'method used' encompasses all steps of the benefit calculation that an investigating authority uses to determine whether the provision of a good has been made for less the adequate remuneration",[548] Canada has not challenged in this dispute "all steps of the benefit calculation" undertaken by the USDOC.[549] Specifically, Canada has not challenged the USDOC's identification and grouping of the transactions under examination, *i.e.*, the USDOC's definition of the financial contribution. Given that Canada failed to identify such a claim in its panel request, any such claim is outside the Panel's terms of reference.[550] Canada has separately challenged the USDOC's selection of benchmarks, and Canada also claims that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[551] The United States has demonstrated that there is no support in the terms of the SCM Agreement or the GATT 1994 for finding a breach based on this latter claim, which is the claim that Canada actually made in this dispute.[552]

267. <u>To Canada</u>: 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?

<u>U.S. Comment</u>:

254. The United States notes that Canada, in its response to this question, does not take the

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[548] Canada's Responses to the Second Set of Panel Questions, para. 393.

[549] Canada's Responses to the Second Set of Panel Questions, para. 393.

[550] *See supra*, U.S. Comment on Canada's Response to Question 263.

[551] Panel Request, p. 2, part A.4.

[552] *See, e.g.*, U.S. First Written Submission, paras. 472-527; U.S. Second Written Submission, paras. 302-332.

position that the license agreements pursuant to which Crown timber was provided to investigated producers in New Brunswick and British Columbia were "contracts" of the kind to which the panel in *US – Anti-Dumping and Countervailing Duties (China)* referred in the passage quoted in the question. On the contrary, Canada explicitly states its view that "the Panel need not decide in this case whether the contract was the relevant financial contribution."[553] The United States agrees.

255. The United States further observes that the panel in *US – Anti-Dumping and Countervailing Duties (China)* was, in the passage quoted in the question, discussing the possibility 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."[554] That would go to the proper matching of transactions and benchmarks, which would involve, on the one hand, correctly identifying an appropriate benchmark, and, on the other hand, correctly defining the financial contribution by identifying (and possibly grouping, or not grouping) the transactions under examination. A failure by an investigating authority to correctly identify or group the transactions under examination when assessing whether a benefit was conferred (*i.e.*, how the investigating authority defined the financial contribution) could, itself, potentially form the basis for a claim under Article 14(d) of the SCM Agreement. But that is not the claim that Canada has made in this dispute.

256. As Canada confirms in its response to this question, Canada's contention is that it was the alleged "decision to disregard the comparison results" – after the transactions and benchmarks had been identified and compared – "that rendered the benefit calculation methodology inconsistent with Article 14(d)."[555] Canada has not challenged the USDOC's identification or grouping of the transactions, *i.e.*, the definition of the financial contribution. Given that Canada failed to identify such a claim in its panel request, any such claim is outside the Panel's terms of reference.[556] Canada has separately challenged the USDOC's selection of benchmarks, and Canada also claims that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[557] The United States has demonstrated that there is no support in the terms of the SCM Agreement or the GATT 1994 for finding a breach based on the claims that Canada actually made in this dispute.[558]

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

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[553] Canada's Responses to the Second Set of Panel Questions, para. 395.

[554] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.66.

[555] Canada's Responses to the Second Set of Panel Questions, para. 395 (underline added).

[556] *See supra*, U.S. Comment on Canada's Response to Question 263.

[557] Panel Request, p. 2, part A.4.

[558] *See, e.g.*, U.S. First Written Submission, paras. 472-527; U.S. Second Written Submission, paras. 302-332.

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.

U.S. Comment:

257. With respect to New Brunswick, Canada asserts that the USDOC "compared individual transactions from New Brunswick, which represented a specific set of transaction conditions, to the average" benchmark.[559] Canada does not, in its response to this question, appear to suggest that the "individual transactions from New Brunswick" together constituted one financial contribution, rather than a number of different financial contributions. Elsewhere, Canada has accepted that "[i]t may be that an average benchmark price that captures a range of market conditions is the best benchmark",[560] and "transaction-to-average comparisons can provide an accurate and reasonable benefit calculation if the individual comparison results are added together."[561] Logically, and consistent with Canada's own expressed view, a single, average benchmark could be compared to each individual transaction (*i.e.*, each separate financial contribution) to establish whether each financial contribution conferred a benefit. In that case, for each individual financial contribution where a benefit was conferred, a subsidy would be "deemed to exist", per the terms of Article 1 of the SCM Agreement. Canada has failed to establish that anything about the factual situation in New Brunswick supports the conclusion that the SCM Agreement required the USDOC to provide offsets for individual financial contributions that did not confer a benefit when it aggregated the benefit amounts determined for the individual financial contributions that did confer a benefit.

258. The situation in British Columbia, as Canada acknowledges, is not "identical" to the situation in New Brunswick.[562] With respect to British Columbia, Canada complains about the USDOC allegedly "deconstructing the stand–the unit transaction in the province–and creat[ing] artificial 'species-specific prices' to compare to its individual benchmark prices."[563] Canada

[559] Canada's Responses to the Second Set of Panel Questions, para. 397.

[560] Canada's Responses to the Second Set of Panel Questions, para. 379.

[561] Canada's First Written Submission, para. 930.

[562] Canada's Responses to the Second Set of Panel Questions, para. 396.

[563] Canada's Responses to the Second Set of Panel Questions, para. 398.

asserts that the USDOC "rejected the use of actual transactions involving stands".[564]

259. It appears that, late in this panel proceeding, Canada now is raising concerns with how the USDOC identified or grouped the transactions under examination in the underlying countervailing duty investigation at issue in this dispute, *i.e.*, how the USDOC defined the financial contribution. However, as noted above in the U.S. comments on Canada's responses to questions 263, 264, 266, and 267, and as discussed further below in the U.S. comment on Canada's response to question 273, subpart (b), Canada did not make a claim in this dispute about the USDOC's identification or grouping of transactions, *i.e.*, the definition of the financial contribution. Given that Canada failed to identify such a claim in its panel request, any such claim is outside the Panel's terms of reference.[565] Canada has separately challenged the USDOC's selection of benchmarks, and Canada also claims that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[566] The United States has demonstrated that there is no support in the terms of the SCM Agreement or the GATT 1994 for finding a breach based on the claims that Canada actually made in this dispute.[567]

269. <u>To Canada</u>: 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.

<u>U.S. Comment</u>:

260. Canada's response to question 269 is succinct. Canada simply asserts that, if "the amount of any benefit is improperly established, the United States has consequently failed to establish the existence of a benefit as required by Article 1.1(b)."[568] This mere assertion by Canada does nothing to 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", as the question requests. Canada's unsupported assertion is wholly insufficient to establish Canada's claim of a breach under Article 1.1(b) of the SCM Agreement.

261. As the United States has explained,[569] Article 1.1(b) of the SCM Agreement provides, in its entirety, that "a benefit is thereby conferred." This provision, when read together with Article

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[564] Canada's Responses to the Second Set of Panel Questions, para. 398.

[565] *See supra*, U.S. Comment on Canada's Response to Question 263.

[566] Panel Request, p. 2, part A.4.

[567] *See, e.g.*, U.S. First Written Submission, paras. 472-527; U.S. Second Written Submission, paras. 302-332.

[568] Canada's Responses to the Second Set of Panel Questions, para. 400.

[569] *See* U.S. First Written Submission, paras. 489-491; U.S. Second Written Submission, para. 331.

1.1(a) of the SCM Agreement concerning the "financial contribution," identifies the situation wherein "a subsidy shall be deemed to exist," *i.e.*, where "there is a financial contribution" under Article 1.1(a) and "a benefit is thereby conferred." Article 1.1(b) is simply part of a definition, and does not, on its face impose any obligations on WTO Members. It is not clear how it would even be possible for a Member to breach Article 1.1(b). It is Canada's burden to establish its claim, but Canada has not even attempted to make a *prima facie* case that the United States acted inconsistently with Article 1.1(b) of the SCM Agreement.

262. Additionally, assuming *arguendo* that the Panel were to make adverse findings against the United States with respect to a claim made by Canada under another provision of the SCM Agreement, such as Article 14(d) or Article 19.3 or Article 19.4, Canada has not explained how the Panel making an additional adverse finding against the United States on a purportedly consequential claim under Article 1.1(b) would be necessary for the resolution of the matter between the parties. In that case, it may be prudent for the Panel to exercise judicial economy with respect to Canada's claim under Article 1.1(b), as has been done in prior reports.[570]

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 Harvesting Costs)			**Province B (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.

[570] *See, e.g., US – Wool Shirts and Blouses (AB)*, pp. 17-20.

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>U.S. Comment</u>:

263. The purpose of the U.S. oral response during the second substantive meeting was to highlight that using different numbers and a different comparison approach in Canada's hypothetical example would yield a different result. Canada expanded on the U.S. point in its written response to this question by using those different numbers in the context of still another different comparison methodology.[571] Canada's hypothetical example, the U.S. variant, and Canada's further iteration ultimately do not help resolve the legal issues that are in dispute.

264. As Canada acknowledges, "there is nothing inherently wrong with selecting an average benchmark…. The problem arises when the method used for calculating benefit then fails to ensure as much symmetry as possible on both sides of the comparison, and distorts the calculation."[572] The purported "problem" of "symmetry" that Canada has identified relates to the selection and matching of transactions and benchmarks.

265. 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.[573] 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 "careful matching" that Canada insists is required.[574]

266. 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

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[571] *See* Canada's Responses to the Second Set of Panel Questions, paras. 401-408.

[572] Canada's Responses to the Second Set of Panel Questions, para. 409.

[573] *See, e.g.,* U.S. Second Written Submission, paras. 316-326; Opening Statement of the United States of America at the Second Substantive Meeting of the Panel (October 16, 2019) ("U.S. Second Opening Statement"), paras. 39-49.

[574] *See, e.g.,* Canada's Second Written Submission, paras. 284, 286, 291, 296.

have agreed with this proposition in response to an earlier question from the Panel,[575] and more recently Canada has expressly stated that it "is not asking for 'offsets' to account for unsubsidized transactions".[576]

267. As noted above in the U.S. comments on Canada's responses to questions 263, 264, 266, 267, and 268, and as discussed further below in the U.S. comment on Canada's response to question 273, subpart (b), it appears that, late in this panel proceeding, Canada now is raising concerns with how the USDOC identified or grouped the transactions under examination in the underlying countervailing duty investigation at issue in this dispute, *i.e.*, how the USDOC defined the financial contribution.[577] But Canada did not make a claim in this dispute about the USDOC's identification or grouping of transactions, *i.e.*, the definition of the financial contribution. Given that Canada failed to identify such a claim in its panel request, any such claim is outside the Panel's terms of reference.[578] Canada has separately challenged the USDOC's selection of benchmarks, and Canada also claims that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[579] The United States has demonstrated that there is no support in the terms of the SCM Agreement or the GATT 1994 for finding a breach based on the claims that Canada actually made in this dispute.[580]

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.**

b. <u>To both parties</u>: If the USDOC did make this assumption, discuss the

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[575] *See* Canada's Responses to the First Set of Panel Questions, para. 314.

[576] Canada's Responses to the Second Set of Panel Questions, para. 380.

[577] *See* Canada's Responses to the Second Set of Panel Questions, paras. 412 and 413.

[578] *See supra*, U.S. Comment on Canada's Response to Question 263.

[579] Panel Request, p. 2, part A.4.

[580] *See, e.g.*, U.S. First Written Submission, paras. 472-527; U.S. Second Written Submission, paras. 302-332.

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.

U.S. Comment:

268. As demonstrated in the U.S. response to question 273, subpart (a),[581] 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.[582] The USDOC then, based on record evidence, determined the amount of the benefit by comparing what the companies paid for stumpage to the benchmark prices identified.

269. In its response to this question, Canada refers to the USDOC's alleged "decision to deconstruct the stand, and assign parts of it artificial 'species-specific' prices".[583] Canada also refers to an unrelated proceeding under the *North American Free Trade Agreement* ("NAFTA"), in which a NAFTA panel reasoned that "Canada's claim" in that proceeding "'does not call for an 'offset', but rather for the valuation of the good' [sic] that B.C. provides, namely the authority to harvest standing timber, in accordance with the 'market conditions' under which the good is provided'."[584] As noted above in the U.S. comments on Canada's responses to questions 267, 268, and 272, subpart (b), Canada appears now to be raising concerns with how the USDOC identified or grouped the transactions under examination in the underlying countervailing duty investigation at issue in this dispute, *i.e.*, how the USDOC defined the financial contribution.

270. As noted above in the U.S. comment on Canada's response to question 267, a failure by an investigating authority to correctly identify or group the transactions under examination when assessing whether a benefit was conferred (*i.e.*, how the investigating authority defined the financial contribution) could, itself, potentially form the basis for a claim under Article 14(d) of the SCM Agreement. The panel in *US – Anti-Dumping and Countervailing Duties (China)* appears to have recognized as much when it reasoned 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."[585] But Canada did not make a claim in this dispute about the USDOC's identification or grouping of transactions, *i.e.*, the definition of the

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[581] *See* U.S. Responses to the Second Set of Panel Questions, paras. 397-400.

[582] *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."

[583] Canada's Responses to the Second Set of Panel Questions, para. 412.

[584] Canada's Responses to the Second Set of Panel Questions, para. 413.

[585] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.66.

financial contribution.

271. As Canada has confirmed, Canada's contention is that "it was the" alleged "decision to disregard the comparison results" – after the transactions and benchmarks had been identified and compared – "that rendered the benefit calculation methodology inconsistent with Article 14(d)."[586] Canada has not challenged the USDOC's identification or grouping of the transactions, *i.e.*, the definition of the financial contribution. Given that Canada failed to identify such a claim in its panel request, any such claim is outside the Panel's terms of reference.[587] Canada has separately challenged the USDOC's selection of benchmarks, and Canada also claims that the USDOC "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[588] The United States has demonstrated that there is no support in the terms of the SCM Agreement or the GATT 1994 for finding a breach based on the claims that Canada actually made in this dispute.[589]

12 THE USDOC'S DETERMINATION OF BENEFIT WITH REGARD TO PROVINCIAL ELECTRICITY PROGRAMMES

275. To Canada: 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.

Comment:

272. Notwithstanding its statement to the contrary, Canada has not challenged this part of the USDOC's determination as being inconsistent with the obligations of the United States under Articles 1.1(b) and 14(d) of the SCM Agreement. Canada's response to this question argues that "Article 14(d) permits that a mechanism other than a benchmark price may be used in certain circumstances to assess the adequacy of remuneration for the government purchase of goods."[590]

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[586] Canada's Responses to the Second Set of Panel Questions, para. 395 (underline added).

[587] *See supra*, U.S. Comment on Canada's Response to Question 263.

[588] Panel Request, p. 2, part A.4.

[589] *See, e.g.*, U.S. First Written Submission, paras. 472-527; U.S. Second Written Submission, paras. 302-332.

[590] Canada's Responses to the Second Set of Panel Questions, para. 415 (underline added; footnote omitted).

Canada's own use of noncompulsory language consequently acknowledges that Article 14(d) does not require the USDOC to select a mechanism other than a benchmark price to measure the benefit of the provincial electricity programs under investigation. Canada also has failed to demonstrate in its response (despite the Panel's request) where exactly Canada challenged the USDOC's determination that it is incongruent to compare an allegedly subsidized price with the same allegedly subsidized price.

273. Canada's additional assertion that the USDOC did not consider BC Hydro's Bioenergy Call Phase I prices[591] is simply not true. As already demonstrated,[592] the USDOC's determination starts with a detailed summary of the arguments made by Tolko, West Fraser, and British Columbia about BC Hydro's Bioenergy Power Call Phase I,[593] followed by a point-by-point discussion of why BC Hydro's purchases of electricity under the EPAs were not consistent with market principles and did not constitute an appropriate benchmark.[594]

274. Canada's last assertion, which argues that the inclusion of EPA prices in the selected benchmark represents a circular comparison,[595] underscores the absurdity of Canada's position. A benefit exists where the financial contribution provides an advantage to the recipient, making the recipient better off than it would otherwise have been, absent that financial contribution.[596] In the underlying investigation, the USDOC examined whether government purchases of electricity from respondents conferred a benefit – *i.e.*, made the recipient better off – because the government purchased the electricity for more than adequate remuneration.[597] In this regard, the USDOC determined that it would be inappropriate to compare the price at which the government purchased electricity from the respondents (*i.e.*, the prices of the four relevant EPAs) against a process generally used by the government to calculate these prices (*i.e.*, the Bioenergy Call Phase I winning bids).[598] Indeed, as the USDOC found, such a "comparison" is nonsensical, because it simply measures the prices at which one small set of self-generated energy providers sold electricity to BC Hydro under the investigated subsidy program against the prices at which another small set of self-generated energy providers similarly sold electricity to BC Hydro under

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[591] *See* Canada's Responses to the Second Set of Panel Questions, paras. 416-418.

[592] *See* U.S. First Written Submission, paras. 674-679, 681-684; U.S. Second Written Submission, paras. 437-442; U.S. Responses to the Second Set of Panel Questions, paras. 412-418.

[593] *See* Lumber Final I&D Memo, p. 163 (Exhibit CAN-010).

[594] *See* Lumber Final I&D Memo, pp. 164, 167 (Exhibit CAN-010).

[595] *See* Canada's Responses to the Second Set of Panel Questions, para. 419.

[596] *Canada – Aircraft (AB)*, para. 154 ("A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient.").

[597] *See* Lumber Preliminary Decision Memo, pp. 84-86 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 18, 158-174 (Exhibit CAN-010).

[598] *See* Lumber Final I&D Memo, p. 167 (Exhibit CAN-010).

the same investigated program.[599] The trade-distorting potential of a financial contribution cannot be identified by comparison to prices determined by that very financial contribution.

275. Meanwhile, the presence of the government on both sides of the electricity transaction presented the USDOC with a unique situation whereby the trade-distorting potential of this financial contribution could be measured directly. Unlike a standard program under Article 1.1(a)(iii) of the SCM Agreement – where a government either provides a good to, or purchases a good from, a recipient – here British Columbia (and Quebec) appeared as both buyer and seller.[600] That the prices at which BC Hydro bought electricity from Tolko and West Fraser sit on one side of this transaction, while the prices at which it sold electricity to respondents sit on the other side, does not render a comparison between the two incongruent or circular. The investigated subsidy program is clearly not being compared against itself. Instead, the investigated program is being compared to a benchmark that – precisely because it reflected the prices that electricity could be purchased in relation to prevailing market conditions – permitted the USDOC to identify with particularity whether the purchase price of that program was more favorable than what respondents could have otherwise procured. As Canada itself recognized in its counter-memorial before the International Centre for Settlement of Investment Disputes, "the financial incentive provided to the self-generator by the EPA corresponds to the difference between the price offered for the self-generated energy under the EPA and the relatively low price of electricity supplied by BC Hydro."[601]

276. The USDOC considered the arguments of respondents, the governments of British Columbia and Quebec, and the petitioner, and provided a reasoned and adequate explanation for its selection of the price at which BC Hydro and Hydro-Quebec sold electricity to recipients as the benchmark to compare against the price at which BC Hydro and Hydro-Quebec purchased electricity from respondents.[602] "[O]n this record … 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."[603] The USDOC's conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it. Therefore, the Panel should find that Canada has failed to

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[599] *See* Lumber Final I&D Memo, p. 167 (Exhibit CAN-010) ("Using rates from an investigated subsidy program to measure the benefit from that same investigated program is inconsistent with the benefit-to-the-recipient standard ….").

[600] *See* Lumber Final I&D Memo, pp. 164-167, 172 (Exhibit CAN-010).

[601] *See* Government of Canada Counter-Memorial, ICSID Case No. ARB(AF)/12/3, para. 91 (Aug. 22, 2014) (excerpted) (Exhibit USA-077) (Canada's Counter-Memorial is available online at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/ OnlineAwards/C2181/DC5119_en.pdf).

[602] *See* U.S. First Written Submission, paras. 674-697.

[603] Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

establish that the United States acted inconsistently with its obligations under Articles 1.1(b) and 14(d) of the SCM Agreement.

276. To both parties: 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?

Comment:

277. Canada asserts that the USDOC statement referenced in the Panel's question is "factually incorrect" because "no provincial law or regulation requires BC Hydro 'to purchase electricity from only sources within the province'."[604]

278. Canada's assertion is misleading and mischaracterizes the factual basis for the USDOC's statement. The USDOC did not state that a specific law or regulation required BC Hydro to purchase electricity from only sources within the province. Rather, the USDOC stated that the policy framework imposed by British Columbia on BC Hydro's purchase of electricity limited BC Hydro's sources of electricity to generation facilities located in that province.[605]

279. The USDOC's finding is supported by the evidence of record. British Columbia updated its energy plan in 2007 and 2008 so as to supply energy "solely from electricity generation facilities within British Columbia," and to ensure that at "least 93 percent of the electricity generated in British Columbia is to be from clean or renewable resources …."[606] The *Clean Energy Act* incorporated the government's policy objectives "to achieve electricity self-sufficiency" and "to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity."[607] In addition, the evidence to which Canada points as support for its argument that BC Hydro ignored British Columbia's energy plan and imported "substantial" amounts of electricity[608] actually proves the opposite. Specifically, imported electricity decreased in both value and volume over time, from 965.1 GWh and 39.50 MC$ in 2013 to just 146.2 GWh and 3.67 MC$ in 2015.[609] Further, the 2015 purchases of 146.2 GWh are miniscule when compared against either BC

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[604] Canada's Responses to the Second Set of Panel Questions, para. 420.

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

[606] GBC QR, BC Volume II, p. BC II-32 (Exhibit CAN-395).

[607] *Clean Energy Act*, 2(a) and (c) at Part 1 (British Columbia's Energy Objectives) (Exhibit CAN-403).

[608] Canada's Responses to the Second Set of Panel Questions, para. 421 and footnote 695 (referencing GBC QR, BC Volume II, p. BC II-69 (Exhibit CAN-395)).

[609] GBC QR, BC Volume II, p. BC II-69 (Exhibit CAN-395).

Hydro's FY2016 energy costs for electricity generated in British Columbia (63,300 GWh)[610] or the energy generated in FY2016 by BC Hydro-owned resources and others located in British Columbia (66,801 GWh[611]). Therefore, Canada's suggestion that BC Hydro – a provincial Crown corporation and an agent of the Government of British Columbia[612] – disavowed British Columbia's policy objectives lacks any credibility.

280. Further, Canada's assertion that BC Hydro was not required to purchase electricity from sources within the province conflicts with Canada's own statements to the Panel. For example, in its opening statement at the first substantive meeting, Canada said that "[i]n British Columbia, the government's 2007 Energy Plan and the *Clean Energy Act* dictated that BC Hydro had to include in its electricity portfolio 93% of its electricity from clean or renewable energy, including from biomass, and reducing waste by encouraging the use of biomass."[613] Thus the very terms that Canada used to describe British Columbia's energy plan and the *Clean Energy Act* – "dictated," "had to" – indicate that the policy objectives constitute requirements. Indeed, while Canada makes much of the fact that BC Hydro at times purchased energy supplied from spot markets outside of the province,[614] these purchases were made on a short-term basis and, even according to Canada, only when necessary to meet demand.[615] Therefore, Canada's own arguments show that BC Hydro made every effort to comply with and achieve British Columbia's energy objectives, and would look to sources of electricity located outside the province only under exceptional circumstances.

281. Canada's final arguments are based on the unsupported factual premise that "British Columbia, through the 2007 BC Energy Plan and its Clean Energy Act, created a market for biomass-based electricity that would not have existed otherwise."[616] As explained in the U.S. response to question 274, neither the guideline set out in Article 14(d) of the SCM Agreement, nor the Appellate Body report in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, suggest that an investigating authority is required to determine in every countervailing duty investigation whether the market for the investigated good, or inputs into that good, came

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[610] GBC QR, BC Volume II, pp. BC II-48-49 (Exhibit CAN-395) (For FY2016, BC Hydro generated 49,000 GWh of electricity and purchased 14,300 GWh of electricity under EPAs, or a total of 63,300 GWh).

[611] GBC QR, BC Volume II, p. BC II-58 (Exhibit CAN-395) (For FY2016, BC Hydro and other parties located in British Columbia generated 66,801 GWh of electricity).

[612] *See* Lumber Preliminary Decision Memorandum, pp. 65, 84 (Exhibit CAN-008); GBC QR, BC Volume II, p. BC II-69 (Exhibit CAN-395).

[613] Oral Statement of Canada at the First Substantive Meeting of the Panel – Day 2 (February 27, 2019) ("Canada's First Opening Statement (Day 2)"), para. 139 (underline added; footnotes omitted).

[614] *See* Canada's Responses to the Second Set of Panel Questions, paras. 420-421.

[615] *See* Canada's Responses to the Second Set of Panel Questions, para. 420, footnote 694.

[616] Canada's Responses to the Second Set of Panel Questions, para. 426.

into existence because of a government policy objective.[617]

282. In addition, the benchmark approach discussed in the Appellate Body report in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* is not applicable to the evidence of record here, because the evidence before the USDOC demonstrated that British Columbia did not intervene to create a renewable energy market that otherwise would not exist but for the subsidy program. Rather, as the United States has demonstrated, the evidence before the USDOC established that British Columbia intervened through the EPA process to support certain players in an already existing and well-established renewable energy market.[618] Therefore, contrary to Canada's argument,[619] the policy framework that British Columbia imposed on BC Hydro's purchase of electricity is nothing like the policy framework discussed in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, which dealt with Ontario's efforts to reduce reliance on fossil fuels.[620]

283. It is also not true that the USDOC "acted in a manner contrary to Article 14(d) because it failed to follow the correct analytical framework."[621] The USDOC started its benefit analysis by defining a relevant market reflective of a market price resulting from arm's length transactions between independent buyers and sellers. The USDOC also considered both the demand-side and the supply-side of this relevant market.[622] For example, on the demand side, the evidence before the USDOC demonstrated that BC Hydro considered the electricity it purchased from Tolko and West Fraser "the same as energy supplied to the system by BC Hydro-owned generation resources" (*i.e.*, completely substitutable).[623] "Indeed, BC Hydro itself does not track the source of the electricity that it sells to its customers."[624] On the supply side, the evidence before the USDOC demonstrated that Tolko and West Fraser considered the electricity that they sold to BC

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[617] U.S. Responses to the Second Set of Panel Questions, paras. 403-405.

[618] *See* U.S. Responses to the First Set of Panel Questions, paras. 414-416, 418; U.S. Second Written Submission, paras. 432, 434; U.S. Responses to the Second Set of Panel Questions, paras. 406-410.

[619] Canada's Responses to the Second Set of Panel Questions, para. 422.

[620] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.186.

[621] Canada's Responses to the Second Set of Panel Questions, para. 423.

[622] *See* U.S. First Written Submission, paras. 682-683, 694-696.

[623] GBC QR, p. BC II-42 (Exhibit CAN-395).

[624] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010). *See also* GBC QR, p. BC II-42 (Exhibit CAN-395) (BC Hydro's electricity sales of electricity "do not distinguish between energy supply sources (*e.g.*, electricity generated from biomass vs. hydro, wind, or natural gas) nor do its electricity sales distinguish between generation resource ownership (*e.g.*, BC Hydro vs. [Independent Power Producers])"); GBC QR, p. BC II-47 (Exhibit CAN-395) ("BC Hydro's rates for its customers are not linked to the energy resource used to generate the electricity", *i.e.*, biomass, and "[w]hen BC Hydro sells electricity to customers, it does not track whether the electricity supplied comes from an [independent power producer], a BC Hydro owned resource or, in some cases, energy purchased from other markets.").

Hydro completely substitutable with the electricity supplied by BC Hydro-owned generation resources.[625] The USDOC therefore concluded that the electricity tariffs that BC Hydro charged Tolko and West Fraser represented the benchmark that best reflected the "benefit-to-the-recipient" standard expressly endorsed by the chapeau of Article 14 of the SCM Agreement.

284. Finally, contrary to Canada's argument,[626] the benchmark approach discussed in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* is not applicable to the evidence of record here. Again, the evidence before the USDOC demonstrated that British Columbia did not intervene to create a renewable energy market that otherwise would not exist but for the subsidy program. Further, as the United States has demonstrated, and demonstrates again above in our comment on Canada's response to question 275, the USDOC's benchmark selection is supported by the evidence on the record, including the evidence confirming that electricity in British Columbia, regardless of how it is generated, is completely substitutable.[627]

285. The USDOC's conclusion that BC Hydro's purchases of electricity conferred a benefit on Tolko and West Fraser is one that an unbiased and objective investigating authority could have reached in light of the facts and arguments before it. Canada has failed to establish that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement.

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 backwards</u> 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?

<u>Comment</u>:

286. Canada is wrong when it states that the LIREPP's "working backwards" process "merely

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[625] *See, e.g.,* Tolko QR, pp. 137-138 (Exhibit CAN-067 (BCI)) (demonstrating that Tolko used its self-generated electricity along with that it purchased from BC Hydro); West Fraser Supp. QR, p. 5 (Exhibit USA-014) (demonstrating that "[a]ll of West Fraser's British Columbia facilities purchased electricity from BC Hydro during the [period of investigation]," paid for "in accordance with BC Hydro's standard applicable tariff rate schedules"). *See also* Lumber Preliminary Decision Memo, p. 85 (Exhibit CAN-008).

[626] *See* Canada's Responses to the Second Set of Panel Questions, para. 425.

[627] *See* U.S. First Written Submission, paras. 676, 678, 683; U.S. Second Written Submission, para. 432; U.S. Responses to the Second Set of Panel Questions, para. 425.

determines the maximum amount of renewable electricity that NB Power will purchase from the Irving entities."[628] As the LIREPP Agreement between NB Power and the Irving companies makes clear, New Brunswick implemented the LIREPP foremost "[[***]]"; for the "[[***]]"; and lastly to "[[***]]."[629] As Canada acknowledges in its response to this question, when the Target Discount is reached – *i.e.,* when the volume of electricity purchased by NB Power builds up to a credit amount that achieves the LIREPP program's objectives[630] – "NB Power stops purchasing renewable electricity from the Irving entities."[631]

287. While the USDOC acknowledged that the LIREPP involves, in part, the purchase of electricity, the USDOC also correctly recognized that this program focused more significantly on an effort to "bring New Brunswick's large industrial enterprises' net electricity costs in line with the average cost of electricity in other Canadian provinces."[632] In this regard, the amount of electricity that NB Power purchased from the participating Irving companies was immaterial to the Net LIREPP Adjustment that appeared as a credit on the companies' electricity bills.[633] Further, the predetermined LIREPP credit was separate and apart from any purchases of renewable energy from the participating Irving companies because the credit reduced their electricity bills. "In other words, NB Power … determined in advance the amount of credits it wishe[d] to give the participating Irving companies."[634] Therefore, because the LIREPP credit was not tied to the amount of the electricity purchased, the USDOC correctly concluded that "the credits reduce the participating Irving Companies' monthly electricity bills, and it is the amount of the monthly credits that … is the countervailable benefit."[635]

288. The LIREPP credit was the cash that participating Irving companies did not spend on the electricity bill they received from NB Power. The LIREPP credit thus decreased the amount of NB Power's revenue as a Crown corporation and was properly considered by the USDOC as a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement in the form of government revenue foregone.[636] This determination is one that an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

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[628] Canada's Responses to the Second Set of Panel Questions, para. 427.

[629] LIREPP Agreement, p. 6 (Exhibit CAN-448 (BCI)).

[630] *See* U.S. First Written Submission, para. 707. *See also* Lumber Final I&D Memo, pp. 212-213 (Exhibit CAN-010).

[631] Canada's Responses to the Second Set of Panel Questions, para. 427.

[632] Lumber Final I&D Memo, pp. 210-211 (Exhibit CAN-010) (footnote omitted). *See also* Lumber Preliminary Decision Memorandum, p. 79 (Exhibit CAN-008); JDIL Verification Report, p. 17 (Exhibit CAN-241 (BCI)).

[633] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010). *See also ibid.*, p. 212 (as government officials explained, "one of the reasons that the LIREPP program was implemented was for industries to get credit applied to their electricity bill for the renewable energy they generated").

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

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

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

Therefore, Canada has failed to establish that the USDOC's financial contribution and benefit determinations for the LIREPP program are inconsistent with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement.

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.

Comment:

289. The United States strongly disagrees with Canada's assertion that the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* concluded that, "when a government decides to include certain electricity types in its supply-mix, … electricity from different sources cannot be equated."[637]

290. The Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* found that Ontario's preference to reduce its reliance on electricity produced from fossil fuels suggested that the identification of a benefit benchmark should take into account the creation of a market for electricity produced from certain renewable sources.[638] In doing so, the Appellate Body acknowledged that it was wrong "to read an exception into Article 1.1(b) based on the rationale of the subsidy … [because such an exception] has no textual basis in the [SCM] Agreement."[639] The Appellate Body nonetheless ignored the text of Article 1.1(b) (and Article 14(d)), because it did "not think that a market-based approach to benefit benchmarks excludes taking into account situations where governments intervene to create markets that would otherwise not exist."[640] Articles 3.2 and 19.2 of the DSU stipulate that the findings and

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[637] Canada's Responses to the Second Set of Panel Questions, para. 430 (italics removed). Canada's response to this question relies almost exclusively on the Appellate Body report in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. *See ibid.*, para. 429, footnotes 707-708; *ibid*., para. 430, footnotes 709-710; *ibid*., para. 433, footnote 713.

[638] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, paras. 5.167-5.191.

[639] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.182. *See also ibid.*, para. 5.185 ("introducing legitimate policy considerations into the determination of benefit cannot be reconciled with Article 1.1(b) of the SCM Agreement").

[640] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.185 (underline added).

recommendations of panels and the Appellate Body cannot add to or diminish the rights and obligations provided in the WTO agreements. Therefore, if the Panel considers the Appellate Body's reasoning in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, it should, for the reasons set forth below, distinguish that finding[641] from the issues that present themselves in this dispute.

291. First, the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* confined its deviation from treaty text to situations in which the evidence suggests that the subsidy at issue creates a market that would not otherwise exist but for the subsidy.[642] The Appellate Body underscored that market creation should not be confused with "other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein."[643] As the Appellate Body recognized, "introducing legitimate policy considerations into the determination of benefit cannot be reconciled with Article 1.1(b) of the SCM Agreement."[644]

292. Second, the Appellate Body's review of the panel's findings in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* differs from the standard of review that the Panel must adhere to in this dispute. Unlike here, the panel in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* was not reviewing a determination made by an investigating authority based on evidence collected during a countervailing duty proceeding. Rather, the panel in *Canada – Renewable Energy* had "broad fact-finding powers" and could "seek information from any source."[645] The panel there was the initial trier of fact, tasked with the responsibility of developing its own reasoning based on the evidence submitted to, or collected by, the panel.[646]

293. In contrast, the Panel here "must not conduct a *de novo* review of the evidence nor substitute [its] judgement for that of the competent authority."[647] The United States is not

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[641] A WTO dispute settlement panel has no authority under the DSU or the *Agreement Establishing the World Trade Organization* ("WTO Agreement") simply to apply an interpretation in a report adopted by the DSB in a prior dispute, rather than to interpret and apply the text of the covered agreements. Further, under the DSU, neither the Appellate Body nor any panel can issue an authoritative interpretation of the covered agreements, because the DSB has no authority to adopt such an interpretation. That authority is reserved to the Ministerial Conference or the General Council acting under a special procedure. *See* WTO Agreement, Art. IX.2.

[642] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.185 ("[W]hile introducing legitimate policy considerations into the determination of benefit cannot be reconciled with Article 1.1(b) of the SCM Agreement, we do not think that a market-based approach to benefit benchmarks excludes taking into account situations where governments intervene to create markets that would otherwise not exist.").

[643] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.188.

[644] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.185.

[645] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.215.

[646] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.215.

[647] *US – Cotton Yarn (AB)*, para. 74. *See also* U.S. First Written Submission, paras. 40-44.

suggesting that the Panel simply defer to the conclusions of the USDOC, but the Panel should limit its review to an examination of "whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations."[648] As such, the Panel's task here, unlike the panel's task in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the USDOC, could have – not would have – reached the same conclusions that the USDOC reached. It would be inconsistent with the Panel's function under Article 11 of the DSU for the Panel to go beyond its role as reviewer and substitute its own assessment of the evidence and judgment for that of the investigating authority.[649]

294. Finally, as demonstrated in the U.S. responses to questions 136, 137, and 274,[650] the Panel should recognize that the Appellate Body's reasoning in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* relies, in substantial part, on policy objectives aimed at the reduction of electricity generated from fossil fuels.[651] The evidence before the USDOC in the countervailing duty investigation below did not suggest that similar policy objectives existed here.[652] The evidence before the USDOC also did not suggest that British Columbia or Quebec intervened in the marketplace to create new renewable markets or new biomass energy markets.[653] Indeed, both the Government of British Columbia (with respect to the EPA program) and Resolute (with respect to Hydro-Quebec's purchases of electricity) argued the exact opposite during the USDOC's investigation.[654] In sum, there is nothing in the evidence before the USDOC at the time of its determination that supports Canada's proposition that these provinces

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[648] *US – Tyres (China) (AB)*, para. 123. *See also* U.S. First Written Submission, paras. 40-44.

[649] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.

[650] U.S. Responses to the First Set of Panel Questions, paras. 414-417, 421; U.S. Responses to the Second Set of Panel Questions, para. 409.

[651] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.186.

[652] *See* U.S. Second Written Submission, paras. 432-433; Lumber Final I&D Memo, p. 167 (Exhibit CAN-010) ("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").

[653] *See* U.S. Second Written Submission, paras. 432-434.

[654] *See* Lumber Final I&D Memo, p. 162 (Exhibit CAN-010) ("The GBC argues that the EPA program is not specific because there is a broad and varied level of participation which includes many power providers other than companies that are sawmills. They state that, of the 105 active EPAs in place, less than 20 percent were biomass projects." (footnote omitted)); *ibid.*, p. 168 ("Resolute argues that Hydro-Québec enters into agreements to purchase electricity from a wide range of companies in addition to those involved in the forest industries. Resolute claims that forest biomass cogeneration represents less than six percent of the generating capacity of the long-term power purchase contracts to which Hydro-Québec was a party during the [period of investigation] …." (footnote omitted)).

sought to create new markets that otherwise would have not existed but for the subsidies at issue.[655]

295. The Panel should also reject Canada's repeated misrepresentation of the evidence of record.[656] As already demonstrated, the USDOC's benefit analysis defined a relevant market reflective of a market price resulting from arm's length transactions between independent buyers and sellers and considered both the demand-side and the supply-side of this relevant market.[657] Also, as already demonstrated, both British Columbia and Quebec considered biomass-generated electricity substitutable with clean and renewable electricity in both the wholesale and retail electricity markets.[658] Specifically, in British Columbia, the *Clean Energy Act* did not distinguish biomass from other clean and renewable energy resources[659] and the EPA process mostly promoted the purchase of electricity from energy resources other than biomass.[660] In Quebec, the discussion of "New Energy Technologies to Prepare the Future" focuses on "the development of renewable fuels, geothermal energy, passive and active solar energy and hydrogen fuels,"[661] not biomass. Indeed, the single reference to biomass in the Quebec Energy Strategy 2006-2015 report (upon which Canada relies[662]) actually undermines Canada's

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[655] Canada argued, in part, that because "Resolute had ceased producing electricity at its paper facilities prior to entering into its agreements under the PAE-2011-01," the United States had falsely asserted in its response to Panel question 136 "that Resolute's biomass facilities were already in operation at the time of the PAE 2011-01." Canada's Second Written Submission, para. 366. Contrary to Canada's allegation, the United States did not state that Resolute's facilities were "in operation" at the time of this program, but stated that they were "already existing" at the time of that program. *See* U.S. Responses to the First Set of Panel Questions, para. 417. The evidence of record confirms the accuracy of the U.S. statement. *See* Contrat d'approvisionnement en électricité entre PF Résolu Canada Inc. et Hydro-Québec distribution centrale de cogénération de Gatineau, Annexe 1 (p. 66 of the PDF version of Exhibit CAN 435 (BCI)); Contrat d'approvisionnement en électricité entre PF Résolu Canada Inc. et Hydro-Québec distribution centrale de cogénération de Dolbeau, Annexe 1 (p. 68 of the PDF version of Exhibit CAN 436 (BCI)).

[656] *See* Canada's Responses to the Second Set of Panel Questions, paras. 430-433.

[657] *See* U.S. First Written Submission, paras. 682-683, 694-696.

[658] *See* U.S. Second Written Submission, paras. 432-434.

[659] *See Clean Energy Act*, 1(1) Definitions (Exhibit CAN-403) (defining "clean or renewable resource" to mean, in addition to biomass, "biogas, geothermal heat, hydro, solar, ocean, wind or any other prescribed resource"); *ibid.*, Part 1, 2(c) British Columbia's energy objectives (biomass is not the focus of the government's objective to generate electricity from clean or renewable resources).

[660] *See* GBC QR, BC Volume II, pp. 62-63 (Exhibit CAN-395) (only 16 percent of BC Hydro's contractual commitments under the EPA process involved biomass).

[661] Quebec Energy Strategy 2006-2015, p. 60 (Exhibit CAN-429).

[662] *See* Canada's Responses to the Second Set of Panel Questions, para. 431, footnote 71 (citing Quebec Energy Strategy 2006-2015, p. 72 (Exhibit CAN-429)).

argument, because the reference indicates that biomass is one of many energy sources acceptable to Quebec.[663]

296. Articles 1.1(b) and 14(d) of the SCM Agreement do not preclude an investigating authority from considering government policy objectives in its definition of the relevant market for its benefit benchmark analysis. It is thus possible that an investigating authority could conclude that a government policy objective in support of the production of electricity from renewable sources renders otherwise identical electricity different because it is produced from non-renewable sources. If this determination is based on conclusions that are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations, it cannot be considered inconsistent with the obligations of Article 1.1(b) and 14(d). However, the fact that the text of Articles 1.1(b) and 14(d) do not prohibit an investigating authority from considering government policy objectives does not rise to an affirmative obligation to examine such objectives *sua sponte*, even when such policy objectives may have purportedly created markets that otherwise would not exist but for government intervention.[664]

[663] *See* Quebec Energy Strategy 2006-2015, p. 72 (Exhibit CAN-429) (For self-generating electricity, "[a]cceptable renewable energy sources include hydroelectricity, wind energy, photovoltaics, biogas, forest biomass and geothermal energy – for electricity production only."). *See also* GOQ QR, Volume III-a, p. 4 (Exhibit CAN-424 (BCI)) (most of the long-term contracts awarded to Hydro-Quebec Distribution – 68 percent – were with hydroelectric and wind facilities).

[664] *See* U.S. Responses to the Second Set of Panel Questions, paras. 403-405.