UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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US – Washing Machines (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
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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
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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)
USA-013	19 C.F.R. § 351.504(a) ("Grants - Benefit") (Regulation: U.S. Department of Commerce)

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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

I. INTRODUCTION

1. When the U.S. softwood lumber industry petitioned the U.S. Department of Commerce ("USDOC") for relief from the material injury being caused by unfairly subsidized imports of softwood lumber products from Canada, the petition explained that:

> The simple fact is that the Canadian provincial governments control access to the vast majority of Canada's softwood timber, the principal input product for softwood lumber, and therefore the government's role in the softwood lumber industry in Canada is deep and inextricable. Such a prominent role for government in this industry may seem natural in Canada, given its longstanding tradition of public ownership of forest land and government policy to favor the development of the infrastructure to exploit that publicly owned resource.
>
> But it is also quite natural to expect that, when those governments enter into arrangements to provide fiber to softwood lumber producers, they do not act like private timberland owners seeking purely to maximize the value of their timber. Rather, they act like governments concerned with fostering economic activity for their citizens, often in remote locations. It is thus entirely unsurprising that the terms of such arrangements typically would be far more advantageous to the lumber producer than if the public landowner were motivated solely by market principles. And . . . this describes precisely what is occurring in many Canadian provinces that account for the large majority of Canadian softwood lumber production and exports.[1]

2. The petition describes this conclusion as unsurprising, due, in part, to the fact that more than 93 percent of forest land in Canada is owned by the government while the forest land that private parties own amounts to a little over 6 percent.[2] Taken together, the evidence and information that the USDOC developed and analyzed during the course of its investigation overwhelmingly supports the conclusion that the government's role in the softwood lumber industry in Canada is, indeed, deep and inextricable, and it has resulted in the provision of substantial subsidies to Canada's softwood lumber producers.

3. In this dispute, Canada challenges the USDOC's determination in the countervailing duty investigation of softwood lumber products from Canada. Canada's claims lack any merit. Canada's claims rest on flawed interpretations of the *Agreement on Subsidies and Countervailing*

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[1] *See* Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada, Vol. III: Countervailing Duty Allegations (November 25, 2016) ("Petition"), pp. 1-2 (Exhibit CAN-005).

[2] Petition, pp. 1-2 (Exhibit CAN-005).

Measures ("SCM Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Canada calls on the Panel to interpret the SCM Agreement and the GATT 1994 in a manner that does not accord with customary rules of interpretation of public international law, contrary to the requirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").[3] When subjected to scrutiny, all of Canada's proposed interpretations of the SCM Agreement simply are not supported by the ordinary meaning of the text of the agreement, in context, and in light of the object and purpose of the agreement.

4. Canada's claims also rest on misrepresentations of the voluminous amount of evidence on which the USDOC relied in making its determination. Contrary to Canada's assertions, the USDOC did not "ignore[]" any evidence.[4] Rather, as reflected in this lengthy and detailed submission, the USDOC took into account all of the information it collected during the course of the investigation and made its determination based on the totality of that evidence. Through this dispute, Canada apparently seeks to have the Panel reweigh the evidence examined by the USDOC and make its own determination that Canadian softwood lumber is not subsidized. Canada's approach is contrary to the DSU because that is not the role that the DSU assigns to WTO dispute settlement panels.

5. 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*."[5] The role of a panel in a dispute involving a Member's application of a countervailing duty measure is to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner."[6] Put differently, the Panel's task in this dispute 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.

6. When the Panel reviews the USDOC's determination in the countervailing duty investigation of softwood lumber products from Canada, the Panel will find that the USDOC's determination accords with the requirements of the SCM Agreement, properly interpreted pursuant to customary rules of interpretation. The Panel will find that the USDOC provided a reasoned and adequate explanation for its determination, that determination is based on ample

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[3] *See* DSU, Art. 3.2.

[4] *See*, *e.g.*, First Written Submission of Canada (October 5,2018) ("Canada's First Written Submission"), paras. 4, 7, 9.

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

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

evidence, and the USDOC's conclusion in the investigation is one that any unbiased and objective investigating authority could have reached.

A. Structure of the U.S. Submission

7. The United States has structured this submission as follows.

8. Section I.B describes the rules of interpretation, standard of review, and burden of proof applicable in WTO dispute settlement proceedings.

9. **Section II** addresses Canada's claims under Articles 1.1(b) and 14 of the SCM Agreement regarding the provision of stumpage to Canadian producers. Section II.A provides an overview of the USDOC's approach to examining the elements of a stumpage subsidy and briefly summarizes the USDOC's determination in the underlying investigation. Section II.B.1 then sets out the appropriate legal framework for interpreting and applying Article 14(d) of the SCM Agreement. Section II.B.2 sets out the legal approach the Appellate Body has articulated for using out-of-country benchmarks when a market-determined price in the country of provision is not available. Section II.B.3 addresses and explains the errors in Canada's proposed interpretation of Article 14(d) and demonstrates that it does not follow from a proper application of customary rules of interpretation of public international law.

10. Section II.C demonstrates that the USDOC's use of an in-country stumpage benchmark (private prices from Nova Scotia) for New Brunswick, Quebec, Ontario, and Alberta is not inconsistent with the guidelines set forth in Article 14(d) of the SCM Agreement. Because the USDOC selected as a benchmark a private, market-determined price for the good in question from within the country of provision, and provided a reasoned and adequate explanation of the bases for its selection, the USDOC's determination should be found to meet the requirements of Article 14(d). Indeed, the Appellate Body previously has found that, "[t]o the extent that … in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)."[7]

11. Section II.C.1 demonstrates that the Nova Scotia benchmark satisfied the requirements of Article 14(d) and reflected the prevailing market conditions for the good in question. Section II.C.2 addresses Canada's arguments regarding cost adjustments and demonstrates that the USDOC justifiably declined to adopt Canada's proposals. Section II.C.3 addresses Canada's arguments regarding the reliability of the Nova Scotia private stumpage survey and demonstrates that Canada's allegations are unfounded and irrelevant. Section II.C.4 demonstrates that Canada has failed to show that the USDOC acted inconsistently with Article 14(d) when the USDOC

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

relied on a stumpage benchmark rather than resorting to constructing a benchmark for stumpage derived from log prices.

12. Canada argues that the USDOC's determination to use a Nova Scotia benchmark for New Brunswick, Quebec, Ontario, and Alberta should be judged according to the approach the Appellate Body has applied for out-of-country benchmarks. But contrary to what Canada contends, that standard does not apply here and, as a result, Canada cannot demonstrate any inconsistency with Article 14(d) on this basis. Section II.C.5 nevertheless proceeds to demonstrate that the USDOC's analysis of prices in New Brunswick, Quebec, Ontario, and Alberta comports with the distortion analysis that has been applied in disputes involving out-of-country benchmarks. This section demonstrates, for each of these provinces, exactly how the USDOC's determination and explanation establish that prices in these provinces are distorted and therefore not suitable to measure the adequacy of remuneration under Article 14(d).

13. Section II.D then demonstrates that the USDOC's single out-of-country benchmark determination (the benchmark for British Columbia stumpage) is not inconsistent with Article 14(d) of the SCM Agreement and comports with the approach in prior Appellate Body reports discussing the use of an out-of-country benchmark. Section II.D.1 confirms that the USDOC's investigative process, findings, and analysis for British Columbia reflect the execution of a diligent investigation and solicitation of the relevant facts regarding price distortion. The USDOC's analysis and explanation with regard to these issues confirms that any objective and unbiased investigating authority could have found, as the USDOC did here, that prices in British Columbia are distorted and therefore not suitable to measure the adequacy of remuneration under Article 14(d). Section II.D.2 demonstrates that the selected benchmark reflects the prevailing market conditions in Canada for British Columbia stumpage.

14. **Section III** responds to Canada's claims concerning the USDOC's methodology for calculating the amount of the benefit conferred by New Brunswick's and British Columbia's provision of standing timber. Canada fails to establish that the USDOC's methodology is inconsistent with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.

15. Nothing in the covered agreements obligates an investigating authority, when determining the amount of the benefit conferred by a financial contribution, to provide a credit for instances in which other financial contributions do not confer a benefit, as Canada proposes the USDOC should have done in the underlying investigation.

16. Indeed, the panel in *US – Anti-Dumping and Countervailing Duties (China)* rejected the very arguments that Canada now makes, and offered persuasive reasoning that justifies this Panel rejecting those arguments as well. That panel, as well as the Article 21.5 panel in *US – Countervailing Measures on Certain EC Products*, confirmed that Article 14 of the SCM Agreement, through its guidelines, leaves to Members' investigating authorities the scope to develop appropriate methodologies to calculate the benefit of a subsidy. Article 14 does not prescribe any particular level of aggregation at which the calculation of subsidy benefit must be

conducted, but instead permits investigating authorities to apply methodologies that account for different factual situations and the conditions under which the subsidy was provided. Nothing in Article 14(d) of the SCM Agreement imposes an obligation on Members to conduct an aggregate analysis, nor does Article 14(d) require Members to provide credit in the benefit calculation when a government provides goods for adequate remuneration.

17. Likewise, Canada has failed to establish that any such obligation is imposed by Articles 1.1(b), 19.3, or 19.4 of the SCM Agreement, or by Article VI:3 of the GATT 1994. Canada refers to Article 1.1(b) of the SCM Agreement only in passing, and offers no explanation for how the terms of Article 1.1(b) establish or contribute to the establishment of the obligation Canada proposes, nor any explanation of how the USDOC acted inconsistently with Article 1.1(b).

18. Canada's arguments concerning Articles 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 fail because Canada's proposed interpretation would override the text of Article 14 of the SCM Agreement with obligations in other provisions of the SCM Agreement and the GATT 1994 that have no textual connection to the "benefit to the recipient" guidelines set forth in Article 14, and would instead impose a specific and far-reaching obligation when calculating the amount of a subsidy. There is no basis in customary rules of interpretation of public international law to disregard the text of a specific provision (Articles 1 and 14 of the SCM Agreement) in relation to an issue (benefit) in favor of provisions (Articles 19.3 and 19.4 of the SCM Agreement) into which a specific meaning must be read ("credits") through text on different issues (non-discrimination and maximum levies).

19. Additionally, there is nothing specific to the USDOC's examination of New Brunswick's and British Columbia's provision of standing timber that obligated the USDOC to provide the credits for which Canada argues in the countervailing duty investigation of softwood lumber products from Canada that is under review in this dispute.

20. Ultimately, Canada's position is based on a misreading of the SCM Agreement and the GATT 1994, a misunderstanding of prior panel and Appellate Body reports, and factual arguments that lack any basis in logic.

21. **Section IV** responds to Canada's claims that the USDOC improperly investigated and countervailed British Columbia's and Canada's log export restraints. Canada's claims lack merit for a variety of reasons, including, fundamentally, that any unbiased and objective investigating authority could have concluded, as the USDOC did, that the particular log export restraints at issue, by which the Governments of British Columbia and Canada compelled the provision of logs to BC consumers, amount to the entrustment or direction of private log suppliers to provide logs to BC consumers.

22. Section IV.A summarizes the USDOC's analysis supporting its determination that the log export restraints result in a financial contribution by means of entrustment or direction of private bodies. In sum, official government action compels British Columbia log suppliers to provide a good – *i.e.*, logs – to British Columbia consumers, including mill operators.

23. Section IV.B presents an overview of the proper interpretation of Article 1.1(a)(1) of the SCM Agreement. The United States demonstrates that the concept of entrustment or direction encompasses a range of government actions, including the imposition by the Governments of British Columbia and Canada of log export restraints as a means by which to entrust or direct private log suppliers to carry out the function of providing logs to BC consumers, including mill operators.

24. Section IV.C rebuts Canada's arguments that the USDOC breached Article 1.1(a)(1)(iv) of the SCM Agreement. Canada's legal arguments are flawed, rest on false premises, and rely on prior reports that are inapposite. The implication of Canada's argument is that, in the absence of an explicit command to sell the particular good to a particular purchaser at a particular price, there can never be a finding of entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement. Canada's position has been rejected in numerous prior panel and Appellate Body reports, and it is contrary to the correct interpretation of the term "entrusts or directs" that follows from a proper application of customary rules of interpretation.

25. Canada relies on the panel reports in *US – Export Restraints* and *US – Countervailing Measures (China)*, but Canada's reliance on those panel reports is misplaced. The statements in the *US – Export Restraints* panel report to which Canada refers are *obiter dicta* concerning a hypothetical measure. The legal reasoning underlying that panel's statements has been thoroughly repudiated by other panels and the Appellate Body. And that panel's interpretation of Article 1.1(a)(1)(iv) of the SCM Agreement is contrary to customary rules of interpretation. The *US – Countervailing Measures (China)* panel expressly limited its findings to the facts before it, and those facts differ from the facts in the underlying investigation.

26. The record evidence that was before the USDOC supports the USDOC's determination of entrustment or direction and supports the USDOC's determination that providing logs is a type of function that would normally be vested in the Governments of British Columbia and Canada. After examining the record evidence, the USDOC found that the log export restraints require in-province processing of wood fiber, subject to exemption only if British Columbian timber processing facilities do not need or cannot economically use the input material, or if the material would otherwise be wasted. On this basis, the USDOC found that official government action compels suppliers of BC logs to supply to BC customers. The USDOC also found that logs are harvested from standing timber in forests, and the province of British Columbia controls over 94 percent of all forest land within its boundaries, which demonstrates its near total control over the timber supply. Where the government owns a resource, such as standing timber, the exploitation of that resource is necessarily, for that government, a function that would be vested in that government. Accordingly, the USDOC's determination is one that could have been reached by any other unbiased or objective investigating authority examining the same evidence.

27. Section IV.D responds to Canada's flawed arguments regarding the USDOC's initiation of a countervailing duty investigation of the log export restraints, which fail because they simply refer to and depend upon Canada's flawed arguments that the log export restraints do not result in a financial contribution as a matter of law or fact.

28. **Section V** addresses Canada's claims regarding grants for silviculture and forest management relative to Articles 1.1(a)(1)(i), 1.1(b), and 14(d) of the SCM Agreement.

29. Section V.A.1 summarizes the legal framework for Article 1.1(a)(1)(i) of the SCM Agreement. Section V.A.2 explains how the investigatory record demonstrates that the USDOC provided a reasoned and adequate explanation for its conclusion that the payments by New Brunswick to J.D. Irving, Limited ("JDIL") and by Quebec to Resolute constitute financial contributions in the form of grants under Article 1.1(a)(1)(i). Section V.A.3 demonstrates that the USDOC's conclusion is one an unbiased and objective investigating authority could have reached, and Canada therefore has failed to make out its claim that the United States acted inconsistent with its obligations under Article 1.1(a)(1)(i) of the SCM Agreement. Section V.A.4 requests that the Panel reject Canada's claims under Articles 19.3 and 19.4 of the SCM Agreement because Canada's first written submission does not include legal arguments in support of its claims pursuant to those provisions.

30. Section V.B.1 summarizes the legal framework for Articles 1.1(b) and 14(d) of the SCM Agreement. Section V.B.2 explains how the investigatory record demonstrates that the USDOC provided a reasoned and adequate explanation for its conclusion that the payments by New Brunswick to JDIL and by Quebec to Resolute conferred benefits in the amount of the grants provided. Section V.B.3 demonstrates that Canada has failed to make out its claim that the USDOC's determination is inconsistent with the obligations set out in Articles 1.1(b) and 14(d) of the SCM Agreement.

31. **Section VI** addresses Canada's claims regarding subsidies conferred through the provision and sale of electricity under Articles 1.1, 10, 14(d), 19.1, 19.3, and 19.4 of the SCM Agreement.

32. Section VI.A.1 summarizes the proper legal framework for Articles 1.1(b) and 14(d) of the SCM Agreement. Section VI.A.2 demonstrates that the USDOC's conclusion that BC Hydro's purchase of electricity conferred a benefit on Tolko and West Fraser is one an unbiased and objective investigating authority could have reached. Section VI.A.3 similarly demonstrates that the USDOC's conclusion that Hydro-Quebec's purchase of electricity conferred a benefit on Resolute is one an unbiased and objective investigating authority could have reached. Canada therefore has failed to establish that the USDOC's benefit determinations for BC Hydro's purchase of electricity from Tolko and West Fraser and for Hydro-Quebec's purchase of electricity from Resolute is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

33. Section VI.B.1 summarizes the legal framework for Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement. Section VI.B.2 explains how the investigatory record demonstrates that the USDOC evaluated the evidence in an unbiased and objective manner and provided a reasoned and adequate explanation for its conclusion that the LIREPP credits provided by NB Power constituted a financial contribution in the form of revenue forgone. Section VI.A.3 demonstrates that the USDOC's conclusion is one an unbiased and objective investigating authority could have reached. Canada therefore has failed to establish that the

USDOC's benefit calculation for the LIREPP, which follows from its determination that the Net LIREPP credits are revenue foregone by the Government of New Brunswick, is inconsistent with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement.

34. Section VI.C.1 summarizes the legal framework for Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Section VI.C.2 explains why the USDOC did not act inconsistently with the relevant provisions of the SCM Agreement and the GATT 1994 when it found that these subsidies were provided to the overall operations of the companies under investigation and therefore attributable to the sales of all products produced by these companies, including softwood lumber.

35. **Section VII** addresses Canada's claim under Article 2.1 of the SCM Agreement regarding the Accelerated Capital Cost Allowance tax program. Section VII.A.1 summarizes the proper legal framework for Article 2.1 of the SCM Agreement. Section VII.A.2 explains how the investigatory record demonstrates that the USDOC evaluated the evidence in an unbiased and objective manner and provided a reasoned and adequate explanation for its conclusion that access to the ACCA Class 29 assets program was *de jure* specific, as provided for under Article 2.1. Section VII.A.3 demonstrates that Canada has failed to demonstrate that the United States acted inconsistently with its obligations under Article 2.1(a) or Article 2.1(b) of the SCM Agreement.

36. Finally, **Section VIII** addresses Canada's claims concerning an alleged "Maritimes Stumpage Benchmark."

37. Canada claims that something it calls the "Maritimes Stumpage Benchmark" is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, but Canada's claim fails for a number of reasons. First, section VIII.A demonstrates that the so-called "Maritimes Stumpage Benchmark" is not susceptible to WTO dispute settlement because it is not a measure of "present and continued application." In this regard, Canada has failed to establish that the measure is attributable to the United States because, in fact, the alleged measure does not exist. Canada also has failed to identify the precise content of the alleged measure, instead describing it in various internally inconsistent ways. And Canada has failed to identify any evidence that the alleged measure is presently being applied and will continue to be applied. Next, section VIII.B demonstrates that the so-called "Maritimes Stumpage Benchmark" cannot be challenged as "ongoing conduct." Finally, section VIII.C demonstrates that, even if the "Maritimes Stumpage Benchmark" were susceptible to WTO dispute settlement, Canada has not demonstrated that it would necessarily result in an inconsistency with Articles 1.1(b) or 14(d) of the SCM Agreement.[8]

[8] *See* Canada's First Written Submission, paras. 1206-1208.

38. For all these reasons, Canada's claims must fail, and the United States respectfully requests the Panel to reject Canada's claims in their entirety.

B. Rules of Interpretation, Standard of Review, and Burden of Proof

39. 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." Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") has been recognized as reflecting such customary rules.[9] 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."

40. The applicable standard of review to be applied by WTO dispute settlement panels is that set forth in Article 11 of the DSU. Article 11 of the DSU provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

41. The Appellate Body, in *US – Tyres (China)*, summarized as follows the role of a panel under Article 11 of the DSU in a dispute involving a determination made by a domestic authority based on an administrative record:

> 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

[9] *US – Gasoline (AB)*, p. 17.

> 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.[10]

42. 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.[11]

43. The Article 21.5 panel in *US – Countervailing Measures on Certain EC Products* referred to the Appellate Body report in *US – Cotton Yarn*, as well as other reports concerning the Antidumping Agreement,[12] and observed that its role was to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner."[13] Numerous other WTO panels likewise have expressed this understanding of the role of the panel in a dispute involving claims under the SCM Agreement.[14]

44. Under the standard set forth in Article 11 of the DSU, as explained in numerous prior panel and Appellate Body reports, the Panel's task in this dispute is not to determine whether softwood lumber products from Canada were subsidized, or what was amount of the benefit conferred, or whether the subsidies were specific. Rather, the Panel's role is to assess whether the USDOC properly established the facts and evaluated them in an unbiased and objective

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

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

[12] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

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

[14] *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.

way.[15] Put differently, the Panel's task 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 is well established that 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*."[16] 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.[17]

45. Finally, it is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[18] Accordingly, Canada, as the complaining party, bears the burden of demonstrating that the U.S. measures within the Panel's terms of reference are inconsistent with a provision or provisions of the SCM Agreement or GATT 1994. Canada must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the United States, as the defending party, has the burden of showing consistency with that provision.[19]

II. THE USDOC'S BENCHMARK DETERMINATIONS ARE NOT INCONSISTENT WITH ARTICLES 1.1(B) AND 14(D) OF THE SCM AGREEMENT

46. Canada claims that the benchmarks the USDOC used to measure the benefit conferred by the government provision of stumpage[20] are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. Canada's claims under Articles 1.1(b) and 14(d) are based on a flawed understanding of those provisions and a failure to discern between the facts that are or are not relevant to the proper application of Article 14(d). In chief, Canada's reading of the phrase "prevailing market conditions . . . in the country of provision" ignores the significance of "the country of provision," equates "market conditions" with any "conditions" (even distortive

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[15] Canada appears to agree with this articulation of the Panel's role. *See*, *e.g.*, Canada's First Written Submission, paras. 22.i, 24.

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

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

[18] *US – Wool Shirts and Blouses (AB)*, p. 14. *See also China – Autos (US) (Panel)*, para. 7.6.

[19] *EC – Hormones (AB)*, para. 109 (*citing US – Wool Shirts and Blouses (AB)*, pp. 14-16). *See also China – Broiler Products (Panel)*, para. 7.6.

[20] "Stumpage" refers to standing timber and the right to harvest or a right of access to that timber. *See generally Memorandum to Ronald K. Lorentzen from Gary Taverman Subject: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (April 24, 2017) ("Lumber Preliminary Decision Memorandum"), pp. 24-25 (Exhibit CAN-008).

government "conditions"), and defines "market" as the region in which the subsidy is provided.[21] Each of these readings is contrary to the text and vitiates Canada's claim.

47. Canada's proposed understanding of Article 14(d) ignores the text that indicates it is a market-based benchmark that is necessary to evaluate the benefit to the recipient. The concept of interactions between independent buyers and sellers that is captured by the term "market" is fundamental to achieving a meaningful benchmark comparison. Canada's approach would undermine the ability of investigating authorities to determine the adequacy of remuneration of government-provided goods by requiring precisely the sort of circularity in the comparison that the Appellate Body previously has found would defeat the intended objective of Article 14(d).[22] Yet the extent of government predominance as the primary source of stumpage precludes a meaningful comparison with prices in most Canadian provinces.

48. With respect to stumpage provided by the provinces of New Brunswick, Quebec, Ontario, and Alberta, the USDOC's determination in these circumstances to rely on a market-determined price for stumpage in Nova Scotia – a benchmark within the country of provision – achieved a meaningful comparison as contemplated by Article 14(d). In contrast, the other in-country benchmarks that Canada and other respondent interested parties proposed for New Brunswick, Quebec, Ontario, and Alberta would have resulted in a circular comparison due to the extent of influence each provincial granting authority had over the prices within its jurisdiction.[23]

49. Importantly, no party alleged that the Nova Scotia private stumpage market was distorted – *i.e.*, no one suggested that private prices for stumpage in Nova Scotia were not market-determined prices in the country of provision. And the USDOC determined that the Nova Scotia benchmark reflected the prevailing market conditions in New Brunswick, Quebec, Ontario, and Alberta for the same three species, spruce, pine, and fir (collectively, "SPF"), such that purchases of stumpage in Nova Scotia were comparable to purchases in those other provinces.

50. Further, applying a proper interpretation of Article 14(d) (which we discuss below), an objective and unbiased investigating authority could have found, as the USDOC did here, that prices in British Columbia are distorted as a result of government predominance (among other things) and therefore cannot be used as market-determined prices to measure the benefit conferred by government-provided stumpage. In turn, the USDOC's determination to use an out-of-country benchmark for British Columbia stumpage achieved a meaningful comparison as contemplated by Article 14(d). To measure the adequacy of remuneration for British Columbia's provision of stumpage, the USDOC utilized price data for delivered logs in the eastern half of the U.S. state of Washington. That area of Washington is contiguous with the interior of British

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[21] *See* Canada's First Written Submission, paras. 25, 38, and 47-59.

[22] *US – Softwood Lumber IV (AB)*, paras. 93 and 101 (footnote omitted).

[23] The USDOC refers to these provincial governments by the acronyms GNB, GOQ, GOO, GOA, GNS, and GBC.

Columbia, where three of the mandatory respondents based their operations, and features comparable timber species and growing conditions.

51. The discussion below proceeds as follows: section A provides an overview of the USDOC's approach to examining the elements of a stumpage subsidy and briefly summarizes the USDOC's determination in the underlying investigation.

52. Section B.1 then sets out the appropriate legal framework for interpreting and applying Article 14(d). Section B.2 addresses the requirements for using out-of-country benchmarks when a market-determined price in the country of provision is not available. Section B.3 then addresses and explains the errors in Canada's proposed interpretation of Article 14(d) and demonstrates that it does not follow from a proper application of the customary rules of interpretation of public international law.

53. Section C then demonstrates that the USDOC's in-country benchmark determinations for New Brunswick, Quebec, Ontario, and Alberta are not inconsistent with the guidelines set forth in Article 14(d). Because Canada's claim is premised on a legal standard that does not in fact apply to in-country benchmarks, Canada has failed to demonstrate that the USDOC acted inconsistently with Article 14(d) when it relied on benchmark prices from the Canadian province of Nova Scotia.

54. Section C then proceeds, notwithstanding that Canada's claims fail because of the deficiencies in Canada's legal interpretation arguments, to demonstrate that the USDOC's analysis of prices in each province comports with the distortion analysis the Appellate Body has articulated in disputes involving out-of-country benchmarks. This section demonstrates how, for each province, the USDOC's determination and explanation meets the requirements of Article 14(d). Starting with the province of New Brunswick, followed by Quebec, Ontario, and Alberta, this section confirms that the USDOC's investigative process, findings, and analysis reflect the execution of a diligent investigation and solicitation of the relevant facts. And, in turn, the USDOC's analysis and explanation with regard to the issues in each province confirms that any objective and unbiased investigating authority could have found, as the USDOC did here, that prices in these Canadian provinces are distorted and therefore not suitable to measure the adequacy of remuneration under Article 14(d).

55. Finally, section D demonstrates that the USDOC's single out-of-country benchmark determination for British Columbia is not inconsistent with Article 14(d) and comports with findings in prior Appellate Body reports discussing the use of an out-of-country benchmark.

A. Stumpage Subsidy Background and U.S. Legal Framework

56. This section provides an overview of the USDOC's approach to examining the elements of a stumpage subsidy and briefly summarizes the USDOC's determination in the underlying investigation.

1. A Brief Background on the Elements of a Stumpage Subsidy

57. In Canada, more than 93 percent of forest land is owned by the government[24] and "the majority of standing timber that is sold originates from lands owned by the Crown."[25] It is undisputed that government-owned timber makes up the majority of the softwood timber harvest in each of the five provinces at issue – 50.79 percent in New Brunswick, 85 percent in Quebec, 90 percent in Ontario, 98 percent in Alberta, and 90 percent in British Columbia.[26] The USDOC found that "[e]ach of the Canadian provinces . . . Alberta, British Columbia, New Brunswick, Ontario, and Quebec, has established programs through which it charges stumpage."[27] The USDOC explained that "[d]uring the [period of investigation], each of the four mandatory respondents [Canfor, Tolko, West Fraser, and Resolute] and JDIL, the voluntary respondent, purchased Crown-origin standing timber from one or more Canadian provinces."[28] The USDOC further determined that each of the five provinces at issue provided subsidies to the mandatory respondents in the form of standing timber, *i.e.*, stumpage, sold for less than adequate remuneration.[29]

a. Financial Contribution

58. The USDOC explained that "the provincial stumpage programs constitute a financial contribution in the form of a good, and that the provinces are providing the good, *i.e.*, standing timber, to lumber producers."[30] The USDOC reasoned that:

> the Canadian provincial stumpage programs provided a financial contribution, because the provincial governments provided a good to lumber producers, and that good was standing timber. The . . . ordinary meaning of "goods" is broad, encompassing all "property or possessions" and "saleable commodities" . . . . [and] "nothing in

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[24] *See* Petition, pp. 1-2 (citing Government of Canada, "Response to the Department's July 12, 2016 New Subsidy Allegation Questionnaire," GOC Volume I, Countervailing duty Expedited Review of Supercalendared Paper from Canada, C-122-854, Expedited Review (01/01/2014 – 12/31/2014), GOC-15 (Aug. 12, 2016) (Exhibit 99)) (Exhibit CAN-005).

[25] Lumber Preliminary Decision Memorandum, pp. 24-25 (Exhibit CAN-008).

[26] GOC IQR at Exhibit GOC-Stump-5 (Exhibit CAN-014). The USDOC refers to Alberta, New Brunswick, Ontario, and Quebec as the "Eastern Provinces" to distinguish them from British Columbia which is located on Canada's west coast.

[27] Lumber Preliminary Decision Memorandum, pp. 24-25 (Exhibit CAN-008).

[28] Lumber Preliminary Decision Memorandum, pp. 24-25 (Exhibit CAN-008).

[29] Lumber Preliminary Decision Memorandum, pp. 24-25 (Exhibit CAN-008).

[30] Lumber Preliminary Decision Memorandum, pp. 24-25 (Exhibit CAN-008). Canada does not contest the finding of stumpage as a financial contribution.

> the definition of the term 'goods' indicates that things that occur naturally on land, such as standing timber, do not constitute 'goods.'" . . . . [T]o the contrary, the term specifically includes ". . . growing crops and other identified things to be severed from real property." . . . . [T]he primary purpose of the tenures was to provide lumber producers with standing timber. Thus . . . regardless of whether the provinces were supplying standing timber or making it available through a right of access, they were providing standing timber.[31]

b. Specificity

59. With respect to specificity, the USDOC "found that stumpage subsidy programs were used by a single group of industries, comprised of pulp and paper mills, and the sawmills and remanufacturers that produce the subject merchandise in each of the Canadian provinces under examination (*i.e.*, Alberta, British Columbia, New Brunswick, Ontario, and Quebec)."[32]

c. Benefit

60. With respect to the benefit conferred through the provision of standing timber, the USDOC determined that "stumpage provides a benefit . . . to the extent that the provincial government received less than adequate remuneration from the sale of standing timber when measured against an appropriate benchmark for stumpage."[33]

61. The USDOC explained its regulatory approach to the benefit determination under U.S. law as follows:

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

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[31] Lumber Preliminary Decision Memorandum, pp. 24-25 (citations omitted) (quoting Lumber IV, Preliminary Results of 1st AR at 69 FR 33204, 33213 (June 14, 2004), unchanged in Final Results of 1st AR and accompanying issues and decision memorandum, p. 8-9) (Exhibit CAN-008).

[32] Lumber Preliminary Decision Memorandum, pp. 25-26 (Exhibit CAN-008). Canada does not contest the specificity finding.

[33] Lumber Preliminary Decision Memorandum, pp. 26-27 (Exhibit CAN-008).

> consistent with market principles (tier-three). This hierarchy reflects a logical preference for achieving the objectives of the statute. In addition, as provided in 19 CFR 351.511(a)(2)(i), we take into consideration product similarity, quantity sold, imported or auctioned, and other factors affecting comparability.[34]

62. The USDOC explained further that:

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

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[34] Lumber Preliminary Decision Memorandum, pp. 26-27 (Exhibit CAN-008). We note that, in *US – Carbon Steel (India) (AB)*, the Appellate Body upheld the Panel's rejection of India's "as such" challenges to the U.S. benchmark regulation, 19 C.F.R. § 351.511(a)(2)(i)–(iv), which implements U.S. statutory provisions in 19 U.S.C. § 1677(5)(E). *US – Carbon Steel (India) (AB)*, paras. 4.129, 4.136, 4.177. The relevant statute was included as part of the Uruguay Round Agreement Act, 19 U.S.C. § 1677(5)(E), and was implemented to make U.S. law consistent with Article 14 of the SCM Agreement. The hierarchy is set forth in 19 C.F.R. § 351.511(a)(2)(i)-(iii), which provides:

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

> actual transactions within the country under investigation. This is because such prices generally would be expected to reflect more closely the commercial environment of the purchaser under investigation.
>
> Based on the hierarchy, we must first determine whether there are market-determined prices from actual sales transactions that can be used to determine whether the provincial governments sold stumpage to the respondents for LTAR. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where the Department finds that the government provides the majority or, in certain circumstances, a substantial portion of the market for a good or service, it may consider prices for such goods and services in the country to be significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit. This is because, where the government's role as provider of the good or service is so predominant, it, in effect, determines the prices for private sellers of the same or similar goods or services such that comparing the government prices to private prices would amount to comparing the financial contribution to itself.[35]

63. The USDOC also addressed the following:

> Concerning 19 CFR 351.511(a)(2)(i), the *CVD Preamble* states that the Department may use actual private or government-run competitive auction prices provided they are comparable and represent a significant portion of the good sold. In the case of government-run auctions, the Department will further consider whether they are open to all prospective buyers, protect confidentiality, and are based solely on price. The *CVD Preamble* also states that the Department will not use tier-one benchmark prices, such as prices from private parties or government-run auctions, in instances in which it is reasonable to conclude that tier-one prices are significantly distorted as a result of the government's involvement in the market.[36]

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[35] Lumber Preliminary Decision Memorandum, pp. 26-27 (citations omitted) (Exhibit CAN-008).

[36] Lumber Preliminary Decision Memorandum, pp. 26-27 (citations omitted) (Exhibit CAN-008). The "*CVD Preamble*" provides descriptions of the USDOC's CVD regulations. *See* Commerce, "Countervailing Duties," 63 Fed. Reg. 65,348 (Nov. 25, 1998) ("*CVD Preamble*") (Exhibit CAN-021).

64. The USDOC explained that "[t]he *CVD Preamble* indicates that we will normally assume that government distortion is minimal unless the government's sale of the good accounts for a majority or, in certain circumstances, a substantial portion of the market."[37]

2. The USDOC Determined the Adequacy of Remuneration by Comparing Government Prices to Market-Determined Prices

65. Based on the foregoing principles, the USDOC determined the adequacy of remuneration by comparing government prices to market-determined prices. For New Brunswick, Quebec, Ontario, and Alberta, the USDOC determined the adequacy of remuneration by comparing the government-administered prices to prices that reflect prevailing market conditions in Canada, specifically using prices from contemporaneous private transactions in Nova Scotia.[38] The USDOC used market-determined prices for the same species basket of softwood timber that producers obtained from the respective provincial governments: spruce, pine, and fir (SPF).[39] These market-determined prices reflected the prevailing market conditions for the same species basket of softwood timber sold in New Brunswick, Quebec, Ontario, and Alberta.[40] The record also demonstrated that it is possible for standing timber to be sold across provincial borders (as indeed occurred in this investigation).[41]

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[37] Lumber Preliminary Decision Memorandum, pp. 26-27 (citations omitted) (Exhibit CAN-008).

[38] *See* Nova Scotia, "Deloitte Survey Report of 2015 Transactions" (Exhibit NS-5) ("Nova Scotia Private Stumpage Survey") (Exhibit CAN-312). For New Brunswick, the USDOC used the respondent's own purchase data for stumpage the respondent purchased in Nova Scotia. *See Memorandum to Gary Taverman from James Maeder Subject: Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination* (November 1, 2017) ("Lumber Final I&D Memo"), pp. 107-123 (Exhibit CAN-010).

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

[40] In addition to reflecting these prevailing market conditions, the USDOC found in this investigation that timber could – and did – cross provincial boundaries. *See* Lumber Final I&D Memo, p. 108 (Exhibit CAN-010) (finding that "it is possible for standing timber to be sold across provincial borders," because "evidence on the record indicates that the New Brunswick-based JDIL purchased standing timber in Nova Scotia, and that one of Resolute's Quebec-based sawmills purchased standing timber in Ontario.") (citations omitted). Canada has not identified any information to suggest that companies located outside of Nova Scotia cannot purchase standing timber in Nova Scotia. We note further that Article 14(d) does not require the USDOC to ensure that the benchmark would be available to the respondent nor does it contain express language to that effect. Other provisions of Article 14, in contrast, do refer to what the respondent can actually obtain. For example, Article 14(b) refers to a loan "which the firm could actually obtain in the market." Here, the USDOC found that "[t]he purchase and transport of standing timber within Canada is not dependent upon a single, limited, means," and, "thus, it is possible for standing timber to be sold across provincial borders." Lumber Final I&D Memo, p. 108 (Exhibit CAN-010).

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

66. For British Columbia, the USDOC determined that the prices in Nova Scotia did not reflect the prevailing market conditions for the good in question.[42] The USDOC therefore determined the adequacy of remuneration for government-provided stumpage in British Columbia by deriving market prices from the prices of harvested logs in the contiguous part of the state of Washington in the United States, where the same timber species are found.[43] Specifically the USDOC constructed a stumpage benchmark using prices from contemporaneous private log transactions in Washington, adjusting the costs as necessary in order to reflect the prevailing market conditions for the timber species at issue.[44] The USDOC determined the adequacy of remuneration by comparing the resulting constructed prices to the government-administered prices for stumpage.

B. The Proper Legal Approach under Article 14(d) of the SCM Agreement

67. Canada argues in its first written submission that the USDOC should have used regional benchmarks from each province instead of relying on the Nova Scotia and Washington state prices.[45] Canada has not argued, however, that Nova Scotia prices do not constitute market-determined prices in the country of provision. Nor has Canada argued that out-of-country benchmarks are precluded by Article 14(d) when the circumstances justify an alternative approach. We begin below by first explaining the text of the relevant provisions and then turning to prior reports addressing out-of-country benchmarks, and then finally demonstrating that Canada's distortion claims are based on a misinterpretation of Article 14(d) of the SCM Agreement.

1. Article 14(d) of the SCM Agreement Provides a "Guideline" for Determining Adequacy of Remuneration So That Any Benefit to the Recipient Is Assessed Against a Market-Determined Benchmark

68. A proper analysis of a claim under Article 14 of the SCM Agreement begins with the text of that provision. First, Article 14 concerns the calculation of a subsidy "in terms of the benefit to the recipient".[46] The chapeau of Article 14 provides that "any method used by the investigating authority to calculate the benefit to the recipient . . . shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to

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[42] *See* Lumber Preliminary Decision Memorandum, pp. 46-47 (Exhibit CAN-008); Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

[43] *See* Lumber Preliminary Decision Memorandum, p. 49 (Exhibit CAN-008); Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[44] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008); Lumber Final I&D Memo, p. 71 (Exhibit CAN-010).

[45] *See* Canada's First Written Submission, paras. 599-600.

[46] *See* SCM Agreement, Art. 14 ("*Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*").

each particular case shall be transparent and adequately explained." Further, "any such method shall be consistent with the . . . guidelines" found in subparagraphs (a) through (d) of Article 14.

69. This text establishes that the benefit conferred by a financial contribution is assessed from the perspective of the recipient – that is, how much better off was the recipient made in comparison to an alternative transaction available to it. In addition, the text establishes that the subparagraphs lay out "guidelines", such that an investigating authority may consider approaches given the facts of particular investigated transactions. The Appellate Body has explained that:

> Taken together, these terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus, we find merit in the United States' submission that the use of the term "guidelines" in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance".[47]

70. Among those guidelines, subparagraph (d) of Article 14 provides that:

> The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

71. Prior reports have emphasized the importance of the use of the term "market conditions," as "[t]his language 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."[48]

72. The second sentence of Article 14(d) specifies that "adequacy of remuneration" must be determined "in relation to prevailing market conditions . . . in the country of provision." Such conditions "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[49] Accordingly, "the primary benchmark, and therefore the starting point of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the prices at which the same or

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[47] *US – Softwood Lumber IV (AB)*, para. 92.

[48] *EC – Large Civil Aircraft (AB)*, para. 975 (underline added).

[49] *US – Carbon Steel (India) (AB)*, para. 4.150.

similar goods are sold by private suppliers in arm's-length transactions in the country of provision."[50]

73. The phrase "in relation to" in the second sentence of Article 14(d) does not denote a rigid comparison, but rather implies a broader sense of "relation, connection, reference."[51] Likewise, the reference to "any" method in the chapeau of Article 14 implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.[52]

74. Article 14(d) of the SCM Agreement thus reflects that an investigating authority has scope to consider the particular circumstances presented in an investigation in selecting an appropriate benchmark. Where an investigating authority has selected as a benchmark a private, market-determined price for the good in question from within the country of provision, and has provided a reasoned and adequate explanation of the bases for its selection, the investigating authority's determination should be found to meet the requirements of Article 14(d). Indeed, the Appellate Body previously has found that, "[t]o the extent that … in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)."[53]

2. Prior Reports Addressing Out-of-Country Benchmarks

75. As the Appellate Body found in *US – Softwood Lumber IV*, the Article 14(d) "guideline does not require the use of private prices in the market of the country of provision in every situation."[54] Rather, "that guideline 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."[55]

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

[51] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 89).

[52] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 91).

[53] *US – Countervailing Measures (China) (AB)*, para. 4.46 (quoting *US – Carbon Steel (India) (AB)*, para. 4.151 (referring to *US – Softwood Lumber IV (AB)*, para. 89). *See also, e.g.*, *US – Coated Paper (Indonesia) (Panel)*, para. 7.33 ("The Appellate Body has found, and the parties agree, that the primary benchmark and, therefore, the starting point of the analysis under Article 14(d) is the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision. They also agree that, while the analysis begins with a consideration of these in-country prices, it would not be appropriate to rely on private domestic prices as the benchmark in certain situations where those prices are not market-determined.").

[54] *US – Softwood Lumber IV (AB)*, para. 96.

[55] *US – Softwood Lumber IV (AB)*, para. 96.

76. Although an investigating authority should first consider proposed in-country prices for the good in question, it would be not be appropriate to rely on such prices if they are not market-determined as a result of governmental intervention in the market.[56] Government intervention may distort in-country prices in a variety of ways – for example, administratively setting the price, or through its participation as a buyer or seller. Likewise, where the government is the predominant supplier of a good, the government "may distort in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align."[57] In such circumstances, "the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular."[58]

77. Numerous past reports have found that the sort of circularity in the comparison advocated by Canada would defeat the intended objective of Article 14(d).[59] In *US – Softwood Lumber IV*, the Appellate Body explained that, in such a case, "the comparison contemplated by Article 14 [may] become circular"[60] and therefore fail to "ensure . . . the provision's purposes are not frustrated" as a result.[61] Recognizing that such a result "would lead to a calculation of benefit that was artificially low, or even zero," the Appellate Body reasoned that "the right of Members to countervail subsidies could be undermined or circumvented in such a scenario."[62]

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

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

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

[59] *See, e.g.*, *US – Softwood Lumber IV (AB)*, paras. 93 and 100; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 10.44 ("to require an effectively circular price comparison in such a situation is not supported by the objective of Article 14 which, as indicated by its title, deals with the calculation of the amount of a subsidy in terms of the benefit to the recipient"); *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446 ("an investigating authority may reject in-country private prices" to avoid "rendering the comparison required under Article 14(d) of the SCM Agreement circular"); *US – Carbon Steel (India) (Panel)*, para. 7.39 ("it would be circular, and therefore uninformative, to include the government price for the good provided by the government in the establishment of the market benchmark when assessing whether such governmental provision confers a benefit"); *US – Carbon Steel (India) (AB)*, para. 4.155 ("The Appellate Body [in *US – Softwood Lumber IV*] reasoned that, in such a situation, 'there may be little difference, if any, between the government price and the private prices' in the country of provision. In other words, 'the government's role in providing the financial contribution [may be] so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.' . . . . Article 14(d) 'ensures that the provision's purposes are not frustrated in such situations' by permitting investigating authorities to use an alternative benchmark to in country private prices."); *US – Countervailing Measures (China) (AB)*, para. 4.50 (same); and *US – Coated Paper (Indonesia) (Panel)*, paras. 7.34, 7.69-7.70, and 7.76.

[60] *US – Softwood Lumber IV (AB)*, para. 93 (footnote omitted).

[61] *US – Softwood Lumber IV (AB)*, para. 101.

[62] *US – Carbon Steel (India) (AB)*, para. 4.284 (quoting *US – Softwood Lumber IV (AB)*, para. 93).

78. Where the government plays a predominant role as a supplier in the market, it is "likely" that private prices for the good in question will be distorted.[63] Although there is no market share threshold above which an investigating authority may conclude *per se* that price distortion exists, the more predominant a government's role in the market, the more likely that role results in the distortion of private prices.[64] For example, in *US – Anti-Dumping and Countervailing Duties (China)*, the panel and the Appellate Body found that China's predominant role in the input market showed that it was "likely that the government as the predominant supplier has the market power to affect through its own pricing strategy the pricing by private providers for the same goods, and induce them to align with government prices."[65] Further, the Appellate Body has explained that "[t]here may be cases . . . where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight."[66]

79. In any case, an investigating authority must establish price distortion on the basis of the particular facts of the underlying countervailing duty investigation.[67] Thus, it may not refuse to consider evidence relating to factors other than government market share that may be relevant to the distortion analysis.[68] The analysis that the investigating authority undertakes "will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record."[69]

80. In sum, prior reports have reasoned that, consistent with Article 14(d), an investigating authority may rely on an out-of-country benchmark when it finds that prices are distorted in the country of provision. The Appellate Body has noted that:

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

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

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

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

[67] *US – Countervailing Measures (AB)*, para. 4.51; *US – Softwood Lumber IV (AB)*, para. 102.

[68] *US – Countervailing Measures (AB)*, para. 4.51 (referring to *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446).

[69] *US – Carbon Steel India) (AB)*, para. 4.157.

- a benchmark price "consists of" market-determined prices;[70]
- an investigating authority should not exclude, as a rule, consideration of in-country or "government-related" prices *a priori*;[71]
- the analysis of benchmarks must be preceded by a diligent investigation and solicitation of relevant facts;[72] and
- an investigating authority must explain the basis for a decision to rely on an external benchmark.[73]

3. Canada's Distortion Claims Are Based on a Misinterpretation of Article 14(d) of the SCM Agreement

81. The following discussion demonstrates that Canada's understanding of the proper legal approach is rooted in its failure to comprehend the plain meaning of the term "market" in "prevailing market conditions." The benchmark selection is not limited to "in-market" prices in the manner that Canada suggests.[74] For example, Canada suggests that:

> The only criteria for determining if there is a valid in-market benchmark under Article 14(d) are whether that benchmark consists of prices for the same or similar good, and whether these

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[70] *See US – Carbon Steel (India) (AB)*, para. 4.190 ("We have found that, in accordance with the second sentence of Article 14(d), the benchmark required for the purposes of that provision consists of market-determined prices that reflect prevailing market conditions in the country of provision.").

[71] *See US – Carbon Steel (India) (AB),* para. 4.190 ("We have emphasized above that the analysis of prices within the country of provision does not, at the outset, exclude prices from any particular source, including government-related prices other than the financial contribution at issue.").

[72] *See US – Carbon Steel (India) (AB),* para. 4.190 ("Moreover, we have considered that the obligation under Article 14 to calculate the amount of subsidy in terms of the benefit to the recipient encompasses a requirement to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts, and to base a determination on positive evidence on the record. To our minds, it is only once an investigating authority has properly complied with its obligation to investigate whether there are in-country prices that reflect prevailing market conditions in the country of provision that it may, consistently with Article 14(d) of the SCM Agreement, use alternative benchmarks." (underline added)).

[73] *See US – Carbon Steel (India) (AB),* para. 4.190 ("Finally, where an investigating authority considers that it must have recourse to a benchmark other than in-country prices, it must explain its basis for doing so." (underline added)).

[74] *See, e.g.*, Canada's First Written Submission, paras. 54 and 264.

> prices are market-determined and relate to the prevailing market conditions in the relevant jurisdiction.[75]

Likewise, Canada suggests that:

> An investigating authority must therefore establish a clear causal link between the government intervention in the market and an alleged substantial distortion of in-market prices. Any other conclusion would displace the primacy of in-market prices under Article 14(d), and would be irreconcilable with the Appellate Body's finding that an investigating authority may only rely on out-of-country benchmarks in 'very limited' circumstances.[76]

82. In these examples, Canada errs in substituting the term "in-market" and "jurisdiction" for the phrase "in the country of provision."[77] Both formulations are incorrect, as the text of Article 14(d) does not contain or suggest anything like the verbiage Canada has used. Rather, Article 14(d) states that the adequacy of remuneration should be determined "in relation to the prevailing market conditions" for the good in question "in the country of provision".[78]

83. In relation to New Brunswick, Quebec, Ontario, and Alberta, Canada errs because Article 14(d) does not require a special showing of distortion as a prerequisite for using in-country benchmarks.[79] Canada argues that because stumpage can be described in terms of regional markets, Article 14(d) required the USDOC to use prices from the province of provision unless the USDOC could show that circumstances in that province satisfied the limited exception for the use of out-of-country benchmarks.[80] Here, however, the circumstances did not require resorting to an out-of-country benchmark for New Brunswick, Quebec, Ontario, or Alberta because the record provided in-country benchmark prices from Nova Scotia.

84. The text of Article 14(d) provides that the adequacy of remuneration should be determined "in relation to the prevailing market conditions" for the good in question "in the country of provision." In light of this language, prior reports have considered that in-country benchmarks reflect the approach of Article 14(d); the Appellate Body, for example, has stated

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[75] Canada's First Written Submission, para. 264 (underline added).

[76] Canada's First Written Submission, para. 54 (underline added).

[77] *See also, e.g.*, Canada's First Written Submission, paras. 52-55 ("The legal and evidentiary thresholds that must be met for an investigating authority to reject in-market prices are also high").

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

[79] This, of course, does not mean that the USDOC did not have to explain its decision with respect to these provinces (and that the USDOC did so in clear and adequate detail is demonstrated in the discussion that follows this section).

[80] *See* Canada's First Written Submission, paras. 51, 54-55, and 57.

that, "[t]o the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)."[81]

85. Canada has pursued its claims according to an invalid legal approach and, as a result, Canada has failed to demonstrate that the USDOC acted inconsistently with Article 14(d) when it relied on the in-country Nova Scotia benchmark to measure the benefit conferred by the provision of stumpage by New Brunswick, Quebec, Ontario, and Alberta.

86. As discussed above, 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 "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.

87. With respect to British Columbia, the one province for which the USDOC did use a price from outside of Canada, Canada errs in describing the extent to which the use of out-of-country benchmarks is "limited" under the proper legal approach.[82] The circumstances of the underlying countervailing duty investigation present precisely the scenario in which reference to out-of-country benchmarks is justified under Article 14(d) of the SCM Agreement.[83]

88. The following discussion explains these errors in Canada's legal approach in further detail, demonstrating that (1) the use of out-of-country benchmarks is not limited in the manner Canada suggests; (2) the phrase "prevailing market conditions" in Article 14(d) presupposes a functioning market; and (3) Canada's emphasis on the "regional" aspects of a "market" is not supported by the text or context of the SCM Agreement.

a. Article 14(d) of the SCM Agreement Permits the Use of Out-of-Country Benchmarks in These Circumstances

89. Canada errs in describing the extent to which the use of out-of-country benchmarks is "limited," particularly in circumstances such as those at issue in the underlying investigation here.[84] As a general matter, Article 14(d) of the SCM Agreement permits the use of out-of-country prices as benchmarks.[85] WTO Members, including Canada, have broadly acknowledged

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

[82] *See* Canada's First Written Submission, paras. 51, 54-55, and 57.

[83] *US – Softwood Lumber IV (AB)*, paras. 93 and 101 (footnote omitted).

[84] *See* Canada's First Written Submission, paras. 51, 54-55, and 57.

[85] *See US – Carbon Steel (India) (AB)*, para. 4.188 (explaining that, in *US – Softwood Lumber IV (AB)*, "the Appellate Body interpreted Article 14(d) of the SCM Agreement, in accordance with its text, context, and object and

this. For example, there was "common ground between the participants" in *US – Carbon Steel (India)* that "Article 14(d) permits the use of out-of-country benchmarks, and does so in situations where in-country prices are distorted by governmental intervention in the market."[86] In *US – Carbon Steel (India)*, the Appellate Body explained that this understanding is consistent with the text of Article 14(d). It accords with the logic the Appellate Body has articulated when applying that text in past disputes:

> In our view, the rationale underpinning the Appellate Body's findings in *US – Softwood Lumber IV* is that, properly interpreted in the light of its context and object and purpose, Article 14(d) of the SCM Agreement does not prohibit the use of alternative benchmarks in situations where in-country prices cannot properly be used as a basis for determining a benchmark.[87]

90. In particular, the Appellate Body emphasized that:

> Although the benchmark analysis begins with a consideration of in-country prices for the good in question, it would not be appropriate to rely on such prices <u>when they are not market determined</u>.[88]

91. As these findings indicate, absent from Article 14(d) is any requirement that in-country prices must be used in all situations.[89] Indeed, in many situations, imposing such a requirement would be incompatible with the purpose of Article 14, that is, to calculate a benefit in terms of

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purpose, and established that Article 14(d) does not require the use of in-country prices for benchmarking purposes in every case.").

[86] *US – Carbon Steel (India) (AB)*, para. 4.183. *See, e.g.*, *US – Softwood Lumber IV (AB)*, para. 91 ("Panel's interpretation of paragraph (d) that, whenever available, private prices have to be used exclusively as the benchmark, is not supported by the text of the chapeau, which gives WTO Members the possibility to select any method that is in conformity with the 'guidelines' set out in Article 14.").

[87] *US – Carbon Steel (India) (AB)*, para. 4.189; *cf. US – Softwood Lumber IV (AB)*, para. 90 ("This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods. However, this may not always be the case. As will be explained below, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.").

[88] *US – Carbon Steel (India) (AB)*, para. 4.155 (underline added).

[89] *See, e.g.*, *US – Softwood Lumber IV (AB)*, para. 89 ("the use of the phrase 'in relation to' in Article 14(d) suggests that, contrary to the Panel's understanding, the drafters did not intend to exclude any possibility of using as a benchmark something other than private prices in the market of the country of provision.").

how much better off a recipient is compared to what the recipient would have paid to obtain the good under market conditions.[90]

92. Situations where in-country prices cannot properly be used as a basis for determining a benchmark include those "where in-country prices are distorted by governmental intervention in the market."[91] The Appellate Body has found that, "in accordance with the second sentence of Article 14(d), the benchmark required for the purposes of that provision consists of market-determined prices that reflect prevailing market conditions in the country of provision."[92] Where "market-determined prices" are not available in the country of provision, prices in that country cannot be considered to reflect prevailing market conditions and an investigating authority "would not be required to use in-country prices to determine a benchmark for the purposes of Article 14(d)."[93]

93. Indeed, given the breadth of considerations that may be relevant in different circumstances, Canada's characterization of the "limited" circumstances in which it is appropriate to reject distorted prices in favor of external benchmarks is not credible.[94] The Appellate Body has explained that:

> we do not consider that in-country prices may not be used to determine a benchmark only where such prices are distorted as a result of governmental intervention in the market. Indeed, there may be other circumstances where an investigating authority would not be required to use in-country prices to determine a benchmark for the purposes of Article 14(d) . . . . As we see it, to find that an investigating authority is precluded from using

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[90] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 93). *See US – Softwood Lumber IV (AB)*, para. 93 ("As the title indicates, Article 14 deals with the 'Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient'. As noted above, in *Canada – Aircraft* [at para. 157], the Appellate Body stated that the 'there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution'. According to Article 14(d), this benefit is to be found when a recipient obtains goods from the government for 'less than adequate remuneration', and such adequacy is to be evaluated in relation to prevailing market conditions in the country of provision. Under the approach advocated by the Panel (that is, private prices in the country of provision must be used whenever they exist), however, there may be situations in which there is no way of telling whether the recipient is 'better off' *absent the financial contribution*.") (internal citations omitted).

[91] *US – Carbon Steel (India) (AB)*, para. 4.183.

[92] *US – Carbon Steel (India) (AB)*, para. 4.190.

[93] *US – Carbon Steel (India) (AB)*, para. 4.189.

[94] *See, e.g.*, Canada's First Written Submission, para. 54.

> alternative benchmarks in these situations would be contrary to a proper interpretation of Article 14(d).[95]

94. Accordingly, Canada's basic arguments regarding the interpretation of Article 14(d) of the SCM Agreement lack merit. The circumstances of this case present precisely the scenario in which reference to out-of-country benchmarks is justified under Article 14(d) of the SCM Agreement.[96]

b. The Term "Prevailing Market Conditions" in Article 14(d) of the SCM Agreement Presupposes a Functioning Market

95. Canada also fails to recognize that the reference in Article 14(d) to "prevailing market conditions" presupposes a functioning market. By overlooking this important understanding, Canada mistakenly characterizes price distortion as itself constituting a "prevailing market condition." In doing so, Canada reverses the logical order of the analysis. As the USDOC explained, the "analysis of whether a proposed benchmark is market-determined must precede any analysis of how to account for prevailing market conditions in a benchmark comparison."[97] Reversing the order of that analysis "would lead to the absurd result that the Department could never rely on anything other than [an in-country benchmark], regardless of the level of distortion, because such benchmarks would always reflect 'prevailing market conditions' in the country of provision."[98] That result "would effectively nullify" the language in Article 14(d) that guides the determination of adequate remuneration.[99]

96. The analysis under Article 14(d) serves to illustrate the difference – if any – between the price the recipient paid to the government and the price it would have paid under market conditions to another supplier. Where proposed benchmark prices are distorted, they cannot serve as a meaningful basis of comparison – particularly where they incorporate the same government behavior that gave rise to the subsidies in the first place. Prior reports have therefore found that the sort of circularity in the comparison advocated by Canada would defeat the intended objective of Article 14(d).[100] In *US – Softwood Lumber IV*, the Appellate Body

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[95] *US – Carbon Steel (India) (AB)*, para. 4.189 (underline added).

[96] *See US – Softwood Lumber IV (AB)*, paras. 93 and 101 (footnote omitted).

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

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

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

[100] *See, e.g.*, *US – Softwood Lumber IV (AB)*, paras. 93 and 100; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 10.44 ("to require an effectively circular price comparison in such a situation is not supported by the objective of Article 14 which, as indicated by its title, deals with the calculation of the amount of a subsidy in terms of the benefit to the recipient"); *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446 ("an investigating authority may reject in-country private prices" to avoid "rendering the comparison required under Article 14(d) of the SCM Agreement circular"); *US – Carbon Steel (India) (Panel)*, para. 7.39 ("it would be circular,

explained that, in such a case, "the comparison contemplated by Article 14 [may] become circular"[101] and therefore fail to "ensure . . . the provision's purposes are not frustrated" as a result.[102] Recognizing that such a result "would lead to a calculation of benefit that was artificially low, or even zero," the Appellate Body reasoned that "the right of Members to countervail subsidies could be undermined or circumvented in such a scenario."[103] Here, adopting Canada's approach would fail to "ensure . . . the provision's purposes are not frustrated."[104]

97. Canada cites to *Canada – Renewable Energy / Feed-in-Tariff*, to argue that government policies and actions affect conditions and are therefore part of the prevailing market conditions.[105] The Appellate Body's finding in that dispute, however, 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.[106] The issue in that dispute did not involve, as this dispute does, a question of particular government predominance in what otherwise could have been a functioning market. Private markets for natural resources such as timber are common, by and large, among Members' economies. Moreover, the real issue being addressed in *Canada – Renewable Energy / Feed-in-*

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and therefore uninformative, to include the government price for the good provided by the government in the establishment of the market benchmark when assessing whether such governmental provision confers a benefit"); *US – Carbon Steel (India) (AB)*, para. 4.155 ("The Appellate Body [in *US – Softwood Lumber IV*] reasoned that, in such a situation, 'there may be little difference, if any, between the government price and the private prices' in the country of provision. In other words, 'the government's role in providing the financial contribution [may be] so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.' . . . . Article 14(d) 'ensures that the provision's purposes are not frustrated in such situations' by permitting investigating authorities to use an alternative benchmark to in country private prices."); *US – Countervailing Measures (China) (AB)*, para. 4.50 (same); and *US – Coated Paper (Indonesia) (Panel)*, paras. 7.34, 7.69-7.70, and 7.76.

[101] *US – Softwood Lumber IV (AB)*, para. 93 (footnote omitted).

[102] *US – Softwood Lumber IV (AB)*, para. 101.

[103] *US – Carbon Steel (India) (AB)*, para. 4.284 (quoting *US – Softwood Lumber IV (AB)*, para. 93).

[104] *US – Softwood Lumber IV (AB)*, para. 101.

[105] *See* Canada's First Written Submission, para. 53 (citing *Canada – Renewable Energy / Feed-in-Tariff*, para. 5.185).

[106] *Canada – Renewable Energy / 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 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.").

Tariff arose from comparing different electricity inputs to the type of input used as a benchmark.[107] 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.

98. 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.[108] 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.[109] Here, the various provincial governments provided stumpage to the Canadian respondents in an existing stumpage market, not a market of the provinces' own invention.

99. In the scenario at issue in the investigation in this dispute, using Canada's preferred prices as a benchmark would not serve as a meaningful basis of comparison because the distortive role of the government is such that prices would not reflect arm's-length transactions between independent buyers and sellers. As the USDOC established, provincial government involvement affects not just one or even many firms, but rather pervades the entire lumber sector in each of the five provinces at issue.[110] The artificial market conditions that Canada and its provinces have designed and implemented for the Canadian lumber sector affect all of the participants in that sector. Thus, any difference observed in comparing one firm's price to another price among that same cohort cannot meaningfully serve to illustrate the difference – if any – between the price the recipient paid to the government and the price it would have paid under market conditions to another supplier. As noted, the reference to "market conditions" in Article 14(d) rather "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."[111]

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

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

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

[110] *See*, *infra*, sections II.C.5 and II.D.1.

[111] *EC – Large Civil Aircraft (AB)*, para. 975.

100. Thus, the essential and primary question in selecting a benchmark is whether prices are or are not market determined in the first place. A proper interpretation of the term "market" must give meaning to that term, and in particular, what the term "market" means in the context of the search for an appropriate benchmark against which to evaluate the level of benefit resulting from a government subsidy. It is a functioning market, in which the forces of supply and demand determine prices through the interactions of participants operating at arm's-length, that permits the subsidized price to be compared to the price at "which the goods or services at issue would, under market conditions, be exchanged."[112] However, it is only when "market-determined prices" exist in the country of provision that prices in that country can serve to measure the adequacy of remuneration. As the Appellate Body has emphasized, the term "prevailing market conditions" assumes a functioning market.[113]

101. The Appellate Body in *US – Countervailing Measures (China)* addressed the meaning of "prevailing market conditions" in this regard and explained that:

> 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).[114]

102. Prior reports of panels and the Appellate Body have recognized the key importance of analyzing the foundational question of the existence or not of a functioning market.[115] For

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[112] *EC – Large Civil Aircraft (AB)*, para. 975.

[113] *See, e.g.*, *US – Countervailing Measures (China) (AB)*, para. 4.46.

[114] *US – Countervailing Measures (China) (AB)*, para. 4.46 (quoting *US – Carbon Steel (India) (AB)*, para. 4.151 (referring to *US – Softwood Lumber IV (AB)*, para. 89)) (italics in original; underline added; citations omitted).

[115] *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 ("accepting 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.").

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."[116] 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. In *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body highlighted the compliance panel's explanation that, "in certain situations where government involvement in the market is substantial, the prices of private suppliers may be artificially suppressed because of the prices charged for the same goods by the government."[117] In that instance, the USDOC had "found that there were no 'usable' market-determined prices from transactions involving Canadian buyers and sellers that could be used to measure whether the provincial stumpage programs provide goods for less than adequate remuneration."[118] When the panel nevertheless found against the USDOC, the "Panel itself acknowledged that there were problems of 'economic logic' inherent in its interpretation of Article 14(d)" because the result would require the USDOC to use those very same non-market-determined prices.[119] For that reason, the Appellate Body reversed the panel's finding and instead interpreted Article 14(d) in a manner that was consistent with the economic logic of that provision. Ultimately, what the panel mistook as a conflict between the text of the agreement and economic logic was merely the result of misinterpreting Article 14(d) as requiring domestic benchmarks.[120]

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

[117] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 156.

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

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

[120] More specifically, the panel in that dispute recognized that "a comparison of the conditions of the government financial contribution" with "the conditions prevailing in the private market" would "not fully capture the extent of the distortion arising from the government financial contribution." *US – Softwood Lumber IV (AB)*, para. 94, footnote 118 (quoting panel report). The panel conceded that such an interpretation would have "a result that in our view would not necessarily be the most sensible one from the perspective of economic logic." *US – Softwood Lumber IV (AB)*, para. 94, footnote 118 (quoting panel report). The Appellate Body reversed the panel's mistake and addressed this issue on appeal. In particular, the Appellate Body clarified that a *proper* interpretation of Article 14(d) indeed takes that economic logic into account and, as a result, reversed the panel's erroneous interpretation. The Appellate Body explained that "the Panel's interpretation of Article 14(d) appears, in our view, to be overly restrictive and based on an isolated reading of the text," and that, moreover, "such a restrictive reading of Article 14(d) is not supported by the text of the provision, when read in the light of its context and the object and purpose of the *SCM Agreement*, as required by Article 31 of the *Vienna Convention*." *US – Softwood Lumber IV (AB)*, para. 96.

c. Canada's Emphasis on the "Regional" Aspect of "Market" Is Not Supported by the Text or Context of Article 14(d) of the SCM Agreement

103. While Canada argues that the region of provision should dictate where the benchmark can be found within the country of provision, Canada fails to demonstrate any support for this assertion in the text of Article 14(d). Instead, 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)."[121] The reference in Article 14(d) to prevailing market conditions refers in the first place to market-determined prices, not simply 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."[122] 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.

104. The Appellate Body report in *US – Carbon Steel (India)* addressed this issue at length:

> 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

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

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

> market conditions in the country of provision that is prescribed by the second sentence of Article 14(d).[123]

105. The common tenet among these findings is the "economic logic"[124] underlying the proper interpretation of Article 14(d) – in other words, the role of market-determined prices as the right basis for comparison.[125] 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."[126] Absent market conditions, the adequacy of remuneration may not be discernible if the examination is limited to the local jurisdiction.

106. In past reports, the Appellate Body addressed the meaning of the phrase "prevailing market conditions" from a variety of perspectives:[127]

> In looking at the term "prevailing market conditions", we first note that the term "conditions" refers to characteristics or qualities.[735] Importantly, such characteristics or qualities are modified by the term "market". In *US – Upland Cotton*, the Appellate Body endorsed the panel's finding that the meaning of the term "market", in the context of Article 6.3(c) of the SCM Agreement, is "'a place ... with a demand for a commodity or service'; 'a geographical area of demand for commodities or services'; 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices'".[736] We note that the "market conditions" are further modified by the word "prevailing", which means "predominant", or "generally accepted".[737] Taken together, these terms suggest that "prevailing market conditions", in the context of Article 14(d) of the SCM Agreement, consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices.

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[123] *US – Carbon Steel (India) (AB)*, para. 4.151 (quoting *EC – Large Civil Aircraft (AB)*, para. 975 (italics in *US – Carbon Steel (India) (AB)*) and *US – Softwood Lumber IV (AB)*, para. 89) (underline added; citations omitted).

[124] *US – Softwood Lumber IV (AB)*, para. 94, footnote 118 (quoting panel report).

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

[126] *See US – Carbon Steel (India) (AB)*, para. 4.151 (quoting *EC – Large Civil Aircraft (AB)*, para. 975 (italics in *US – Carbon Steel (India) (AB)*).

[127] *US – Carbon Steel (India) (AB)*, para. 4.150 (underline added).

[735] Relevant definitions of the term "condition" are "[n]ature, character, quality; a characteristic, an attribute". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 483)

[736] Appellate Body Report, *US – Upland Cotton*, para. 404 (quoting Panel Report, *US – Upland Cotton*, para. 7.1236). Although the Appellate Body considered the term "market" in the context of Article 6.3(c), we consider that such a meaning would apply equally in the context of Article 14(d).

[737] Relevant definitions of the term "prevailing" include "predominant in extent or amount; generally current or accepted". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2340)

This analysis suggests that the critical question is whether prices are determined by the "market."

107. The United States notes that the *US – Carbon Steel (India)* Appellate Body report cites to the Appellate Body report in *US – Upland Cotton*, which concerned a different issue regarding the evaluation of a market, namely, whether the term "same market" could be interpreted to include "world market" for the purposes of Article 6.3(c) of the SCM Agreement. In that context, the Appellate Body in *US – Upland Cotton* stated: "We accept that this is an adequate description of the ordinary meaning of the word 'market' for the purposes of this dispute, and we do not understand the parties to dispute it."[128] In the current dispute, however, that is not necessarily the case. A more critical question to consider here under Article 14(d) of the SCM Agreement may be whether the qualities conveyed by the term "market" are present, as the term "market" in Article 14(d) appears as an attributive noun, modifying "conditions," *viz.*, the "prevailing market conditions." Of greater emphasis here is the nature of the "market" – more so than any limits to its geographical scope.

108. The Appellate Body's discussion of the term "market" in *US – Upland Cotton* illustrates another point, however, that is useful to consider for the purposes of this dispute.[129] In *US – Upland Cotton*, the Appellate Body observed that the "ordinary meaning does not, of itself, impose any limitation on the 'geographical area' that makes up any given market."[130] The Appellate Body also observed:

[128] *See US – Upland Cotton (AB)*, paras. 404-405.

[129] *See US – Upland Cotton (AB)*, paras. 402-410.

[130] *US – Upland Cotton (AB)*, para. 405.

> recalling that one accepted definition of "market" is "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices", it seems reasonable to conclude that two products would be in the same market if they were engaged in actual or potential competition in that market. Thus, two products may be "in the same market" even if they are not necessarily sold at the same time and in the same place or country.[131]

Thus, even in the context of interpreting "market" as a singular noun, as it appears in Article 6.3(c) of the SCM Agreement, the Appellate Body rejected the notion that "market" should be equated with "place."

109. The difference between the terms of Articles 6.3(c) and 14(d) of the SCM Agreement helps illustrate the error in Canada's reading of Article 14(d). The Appellate Body observed that, with respect to Article 6.3(c), the language of the provision containing the phrase "same market" did not include any other language describing the geographical scope of that phrase:

> The only express qualification on the type of "market" referred to in Article 6.3(c) is that it must be "the same" market. Aside from this qualification (to which we return below), Article 6.3(c) imposes no explicit geographical limitation on the scope of the relevant market. This contrasts with the other paragraphs of Article 6.3: paragraph (a) restricts the relevant market to "the market of the subsidizing Member"; paragraph (b) restricts the relevant market to "a third country market"; and paragraph (d) refers specifically to the "world market share". We agree with the Panel that this difference may indicate that the drafters did not intend to confine, *a priori*, the market examined under Article 6.3(c) to any particular area. Thus, the ordinary meaning of the word "market" in Article 6.3(c), when read in the context of the other paragraphs of Article 6.3, neither requires nor excludes the possibility of a national market or a world market.[132]

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[131] *US – Upland Cotton (AB)*, para. 408.

[132] *US – Upland Cotton (AB)*, para. 406. *See also US – Upland Cotton (AB)*, para. 405 (observing further that "As the Panel indicated, the 'degree to which a market is limited by geography will depend on the product itself and its ability to be traded across distances'."); para. 408 ("As the Panel correctly pointed out, the scope of the 'market', for determining the area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs. This market for a particular product could well be a 'world market'. However, we agree with the Panel that the fact that a world market exists for one product does not necessarily mean that such a market exists for every product. Thus the determination of the

110. Article 14(d), in contrast to Article 6.3(c), includes language that speaks to the geographical scope of the provision. Specifically, Article 14(d) refers to "prevailing market conditions … in the country of provision." What this means is that even if the term "market" (within the phrase "prevailing market conditions") is interpreted as relating to a particular geographical location in Article 14(d), that location would be the "country of provision" – not, as Canada suggests, the local jurisdiction of the subsidy. Moreover, as discussed above, the "prevailing market conditions" are not limited to the country of provision, but rather the adequacy of remuneration must be determined "in relation to" the prevailing market conditions in the country of provision.

111. The Appellate Body, when examining these issues in other disputes, likewise has focused on the function and nature of a market rather than emphasizing the geographical aspect of the term, as Canada does. In *EC – Large Civil Aircraft*, for example, the Appellate Body took into account the following considerations in interpreting Article 14(d):

> The marketplace to which the Appellate Body referred in *Canada – Aircraft* reflects a sphere in which goods and services are exchanged between willing buyers and sellers. . . . A market price is not determined solely by reference to either supply-side or demand-side considerations without reference to the other. Even where a market is limited for a particular good or service, that market price is not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market.…
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> * * *
>
> Accordingly, we do not consider that it is consistent with Articles 1.1(b) and 14(d) to establish a market benchmark for a good or service by referring to the demands or expectations only of a seller or lessor, or, alternatively, only of a buyer or lessee. The price of a good or service must reflect the interaction between the supply-side and demand-side considerations under prevailing market conditions.[133]

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relevant market under Article 6.3(c) of the SCM Agreement depends on the subsidized product in question. If a world market exists for the product in question, Article 6.3(c) does not exclude the possibility of this 'world market' being the 'same market' for the purposes of a significant price suppression analysis under that Article.").

[133] *EC – Large Civil Aircraft (AB)*, paras. 981-82. *See also Japan – DRAMs (Korea) (AB)*, para. 172 (discussing whether a challenged government investment conferred a benefit under Articles 1.1(b) and 14 of the SCM

112. The foregoing passage illustrates that, while the term "market" is not qualified in the text of Article 14(d), a proper interpretation must give meaning to what a market really is. It would be contrary to the principles of treaty interpretation to construe "market" in a way that would change its plain meaning – for example, if it were to be interpreted without reference to whether the market in question is or is not a functioning market. It is the operation of market functions that permits the subsidized price to be compared to the price at "which the goods or services at issue would, under market conditions, be exchanged."[134]

C. The Nova Scotia Benchmark Is Not Inconsistent with Article 14(d) of the SCM Agreement

113. The discussion below demonstrates in subpart 1 that the Nova Scotia benchmark satisfied the requirements of Article 14(d) of the SCM Agreement and reflected the prevailing market conditions for the good in question in the country of provision. The USDOC relied on private, market-determined prices from Nova Scotia, and Nova Scotia is "in the country of provision" and therefore serves as a valid basis for comparison as directly contemplated by Article 14(d). Subpart 2 addresses Canada's arguments regarding cost adjustments and demonstrates that the adjustments Canada seeks would render the comparison meaningless by incorporating extraneous costs that are not included in the benchmark for the good in question itself. Subpart 3 addresses Canada's arguments regarding the reliability of the Nova Scotia private stumpage survey and demonstrates that Canada's allegations have no basis in fact. Subpart 4 demonstrates that Canada has failed to show that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement when the USDOC relied on a stumpage benchmark rather than resorting to constructing a benchmark for stumpage derived from log prices.

1. The Nova Scotia Benchmark Satisfied the Requirements of Article 14(d) of the SCM Agreement

114. The benchmark the USDOC selected from Nova Scotia satisfied the requirements of Article 14(d) of the SCM Agreement. As explained in section II.B, above, Article 14(d) provides that the benchmark for conducting an assessment of the adequacy of remuneration consists of "market-determined prices for the same or similar goods in the country of provision – *i.e.* prices that relate or refer to, or are connected with, the prevailing market conditions in the country of provision."[135] Article 14(d) focuses on prices "in the country of provision." In particular, "[t]he second sentence of Article 14(d) . . . makes clear that a benchmark for adequate remuneration must be determined 'in relation to prevailing market conditions', and that the

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Agreement) ("The terms of a financial transaction must be assessed against the terms that would result from unconstrained exchange in the relevant market. . . . There is but one standard—the market standard—according to which rational investors act.").

[134] *EC – Large Civil Aircraft (AB)*, para. 975.

[135] *US – Carbon Steel (India) (AB)*, para. 4.167 (underline added).

relevant conditions are those existing 'in the country of provision'."[136] Here, Nova Scotia provides market-determined prices "in the country of provision." These prices would therefore relate to the prevailing market conditions in that country. 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)."[137]

115. Here, the USDOC found, based on positive record evidence, that the stumpage market in Nova Scotia reflected the prevailing market conditions in Alberta, Ontario, and Quebec because (1) the species included in eastern SPF in Nova Scotia were also the primary and most commercially significant species reported in the species groupings for Alberta, Ontario, and Quebec; [138] and (2) the average diameter at breast height ("DBH") of SPF standing timber in Nova Scotia and New Brunswick was comparable to the same measurement in Alberta, Ontario, and Quebec.[139]

116. First, the USDOC found that SPF species' share of the Crown-origin standing timber harvest volume was 99.98 percent in Alberta, 94.8 percent for New Brunswick, 67.85 percent for Ontario, and 81.76 percent for Quebec, and the respondents data demonstrated that SPF species represent the majority of the companies' respective Crown timber harvests.[140] Similarly, Nova Scotia reported that the SPF species were "by far the predominant group of trees harvested in Nova Scotia…."[141]

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[136] *US – Coated Paper (Indonesia) (Panel)*, para. 7.32 ("How to determine whether adequate remuneration was paid is dealt with in the second sentence of Article 14(d), which provides that the adequacy of remuneration shall be determined in relation to prevailing *market conditions in the country of origin*. The second sentence of Article 14(d) thus makes clear that a benchmark for adequate remuneration must be determined 'in relation to prevailing market conditions', and that the relevant conditions are those existing 'in the country of provision.' Prevailing market conditions in the country of provision is thus the standard for assessing the adequacy of remuneration.") (italics in original) (citing *US – Countervailing Measures (China) (AB)*, para. 4.45; *US – Carbon Steel (India) (AB)*, para. 4.149).

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

[138] Canada does not dispute that the stumpage market in Nova Scotia reflects prevailing market conditions in New Brunswick. *See* Canada's First Written Submission, para. 600 ("For its part, New Brunswick, while similar to Nova Scotia in certain respects, should have been benchmarked to private market prices in New Brunswick, which reflected prevailing market conditions there. However, the discussions in the following sections are limited to . . . the Washington State log price benchmark and the Nova Scotia benchmark survey"). As noted, for New Brunswick, the USDOC used the respondent's own purchase data for stumpage the respondent purchased in Nova Scotia. *See* Lumber Final I&D Memo, pp. 107-123 (Exhibit CAN-010).

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

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

[141] GNS QR, p. 7 (Exhibit CAN-313).

117. Canada argues that Nova Scotia's forest differs from the forest in Alberta, Ontario, and Quebec;[142] however, the USDOC found, relying on positive record evidence, that both types of forests were dominated by species in the SPF basket and (as discussed below) that the sizes of SPF timber, as measured by diameter at breast height, were comparable.[143] In particular, as discussed above, the USDOC found that the eastern SPF species basket, which grows in Nova Scotia, was "the primary and most commercially significant species reported in the species groupings" for Alberta, Ontario, and Quebec.[144] Similarly, the respondents' verified, actual transaction data demonstrated that SPF species "continue to be the dominant species that grow in all [three] provinces," Alberta, Ontario, and Quebec.[145]

118. Canada disputes the USDOC's treatment of SPF as a basket in evaluating the comparability of the timber in these four provinces, arguing that specific SPF species are more or less prevalent in Nova Scotia compared to Alberta, Ontario, and Quebec.[146] However, the USDOC's treatment of SPF species as a basket mirrored the provincial governments' treatment of those species, and products made from those species, as being interchangeable. The record before the USDOC demonstrated that several provinces treat SPF timber as a single category for data collection and pricing purposes.[147] In Alberta, Ontario, and Quebec, the provincial governments charge a single, "basket" price for Crown-origin standing timber that falls within the SPF species category.[148] Therefore, the USDOC's conclusion – that despite some difference in SPF species between provinces, "the provinces do not distinguish between SPF species when setting Crown timber prices" – was supported by positive record evidence.[149] Thus, minor differences in the prevalence of specific SPF species between provinces did not undercut the positive evidence indicating that the species mix in Nova Scotia reflected the same prevailing market conditions as in the other three provinces.

119. Similarly, Canada's contention that certain species within the SPF basket exhibit different characteristics that affect their commercial value[150] does not undermine the USDOC's SPF-wide comparison between provinces. The provincial governments themselves did not deem these species-specific differences in commercial value to be significant enough to warrant different

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[142] Canada's First Written Submission, paras. 757-71.

[143] Lumber Final I&D Memo, pp. 110-111, 113 (Exhibit CAN-010).

[144] Lumber Final I&D Memo, pp. 110-111, 113 (Exhibit CAN-010).

[145] Lumber Final I&D Memo, pp. 110-111, 113 (Exhibit CAN-010).

[146] Canada's First Written Submission, paras. 763-765.

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

[148] Lumber Final I&D Memo, pp. 110-111, 113 (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) (Exhibit CAN-010).

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

[150] Canada's First Written Submission, para. 766.

pricing among SPF species.[151] Canada argues that the USDOC incorrectly determined that the provinces do not differentiate between SPF species when setting Crown stumpage prices, pointing for support to the transposition equation used in Quebec to derive Crown stumpage rates from auction results.[152] However, Quebec's transposition equation is used to convert auction prices into Crown stumpage prices – and although the equation may take individual species differences into account when evaluating auction blocks' sale prices, the Crown stumpage prices that result from the transposition equation are the same for all species in the SPF basket.[153] Thus, that evidence fails to support Canada's argument.

120. The fact that none of the provincial governments for which the Nova Scotia benchmark was applied recognize commercial differences between specific SPF species supports the USDOC's SPF-wide comparison of provincial stumpage markets.[154] Accordingly, Canada's evidence regarding the commercial value of particular SPF species does not undercut the USDOC's determination that Nova Scotia reflected the same prevailing market conditions as in Alberta, Ontario, and Quebec because of the dominance of SPF generally in each of those provinces.

121. Second, the USDOC found that Nova Scotia stumpage reflected the prevailing market conditions in Alberta, Ontario, and Quebec because the average diameter at breast height of the SPF standing timber in Nova Scotia was comparable to that in Alberta, Ontario, and Quebec.[155] In particular, Nova Scotia reported that the quadratic mean diameter at breast height is 17.29 cm for all softwood species on private land, and 15.9 cm for SPF standing timber.[156] Alberta reported that the diameter at breast height of SPF standing timber in Alberta ranges from 18.2 cm for black spruce to 24.6 cm for white spruce. Quebec reported that the diameter at breast height for SPF and larch ("SPFL") standing timber in Quebec ranges from 16 cm to 24 cm. And Ontario reported that the diameter breast at height of SPF logs destined to sawmills and

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[151] Canada's First Written Submission, para. 766.

[152] Canada's First Written Submission, para. 769.

[153] *See* GOQ Mar. 13, 2017 QR Vol. I at 53 (Exhibit CAN-170).

[154] *See* GOA IQR at ABIV-34 (timber dues rates set uniformly for "coniferous timber'') (Exhibit CAN-097); GNB IQR at NBII-6 (Crown timber prices for "SPF Sawlogs" and "SPF Studwood & Lathwood") (Exhibit CAN-240 (BCI)); Lumber Final I&D Memo, p. 110 (single price for "Spruce/Jack Pine/Scots Pine/Balsam Fir/Larch") (citing Petition Exhibit 181 "Ontario Crown Timber Charges for Forestry Companies") (Exhibit CAN-010); *ibid.* (describing equation to set stumpage "for SPFL") (citing GOQ IQR at QC-S-37) (Exhibit CAN-010). *See also* Lumber Preliminary Decision Memorandum, p. 44 (Exhibit CAN-008).

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

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

pulpmills in 2015 was 15.32 cm.[157] Accordingly, the USDOC found that SPF standing timber in Nova Scotia – with a diameter at breast height of 17.29 cm for all softwood species on private land and 15.9 cm for SPF standing timber – is comparable to that in Alberta, Ontario, and Quebec.

122. Canada argues that the USDOC's conclusion that the diameter of standing timber in Nova Scotia is comparable to that in Alberta, Ontario, and Quebec was not supported by record evidence.[158] In particular, Canada argues that the diameter at breast height statistic in Nova Scotia includes non-harvested timber that was excluded from the stumpage price benchmark.

123. However, the USDOC verified that the statistic measured the diameter at breast height for trees on private land, *i.e.*, the sales from which the Nova Scotia benchmark could have been derived.[159] Moreover, it is not evident that all provinces reported the diameter at breast height for harvested trees. For example, Quebec reported average diameters at breast height ranging from roughly 15 cm to 22 cm for SPFL based on "official forest inventory data for stand[s] that contain a minimum of 25% of softwood," without any indication that those stands measured only harvested trees.[160] Accordingly, in weighing the evidence before it, the USDOC found that the diameter at breast height measurements adequately reflected the diameter at breast height of private timber, *i.e.*, the type of timber transactions included in the Nova Scotia Private Stumpage Survey, and were a useful data point with which to examine the comparability of Nova Scotia timber and timber in Alberta, Ontario, and Quebec.

124. In any event, the USDOC found that even if some small variations in the relative average diameter of trees harvested in Nova Scotia compared to Alberta, Ontario, or Quebec existed, neither Canada nor the Canadian respondents had established that this difference rendered the timber incomparable such that it did not reflect the prevailing market conditions in Alberta, Ontario, or Quebec.[161]

125. In addition, Canada contends that by using a Nova Scotia stumpage benchmark that was limited to sawlogs and studwood, where the definitions of "sawlogs" and "studwood" differ among provinces, the timber composing the Nova Scotia benchmark differed from the timber purchased by the respondents – *i.e.*, Canada alleges the Nova Scotia timber was of higher quality.[162] However, as the USDOC explained, in this investigation, it asked the Canadian

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

[158] Canada's First Written Submission, paras. 774-780.

[159] GNS Verification Report, pp. 4-5 (Exhibit CAN-318).

[160] *See* GOQ QR, pp. 23-24 (Exhibit CAN-170).

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

[162] Canada's First Written Submission, paras. 785-803.

respondents "to report the volume and value of standing saw timber that their respective sawmills purchased from the Crown during the [period of investigation]."[163] Thus, "the volume of Crown-origin standing timber reported to [the USDOC] by the respondents does not include logs destined for pulp mills," but included both studwood and sawlogs.[164] The USDOC found that the Nova Scotia benchmark's exclusion of pulpwood was appropriate, because the prices in the survey "similarly reflect the prices paid for standing timber identified as sawlogs and studwood, which are the two log types that are processed by sawmills," and, thus, matched the log types reported to the USDOC by the respondents.[165]

126. Furthermore, the USDOC determined, based on an objective assessment of the evidence before it, that Alberta, Ontario, and Quebec also define timber based on "intended use," notwithstanding Canada's argument to the contrary.[166] Canada does not dispute that Ontario employs a use-based definition. Alberta "tracks timber harvested to the point at which it is known that the logs are used to produce some product in a broad category encompassing lumber, pulp and roundwood products," at which point the timber is classified.[167] This classification system is based on the intended use of the timber, *i.e.*, "the point at which it is known that the logs were used to produce some product…."[168] Although Canada contends that Alberta does not employ a use-based definition, to support this contention, Canada refers to Alberta's pricing scheme.[169] That Alberta does not price stumpage differently based on the use of the timber does not change the positive record evidence, upon which the USDOC relied, that Alberta categorizes timber by its use.

127. Neither does Canada's contention that the omission of lower-quality pulpwood artificially inflated the price of sawable timber in Nova Scotia demonstrate that the Nova Scotia benchmark failed to reflect the prevailing market conditions in Alberta, Ontario, and Quebec.[170] As discussed above, the USDOC "instructed the respondent firms to report the volume and value of Crown-origin sawlogs that they purchased during the [period of investigation]," and the Nova Scotia stumpage benchmark reflected prices for sawable timber in Nova Scotia.[171] The USDOC found that "includ[ing] pulplogs into the Nova Scotia benchmark would create a mismatch

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[163] Lumber Final I&D Memo, p. 116 (Exhibit CAN-010).

[164] Lumber Final I&D Memo, p. 116 (Exhibit CAN-010).

[165] Lumber Final I&D Memo, p. 116 (Exhibit CAN-010).

[166] Lumber Final I&D Memo, p. 116 (citing, *e.g.*, GOO QR, p. 4) (Exhibit CAN-010).

[167] GOA Mar. 13, 2017 QR Pt. 1, p. ABIV-3 (Exhibit CAN-097).

[168] GOA Mar. 13, 2017 QR Pt. 1, p. ABIV-3 (Exhibit USA-097).

[169] Canada's First Written Submission, para. 791 (discussing that Alberta's Crown timber dues do not discriminate based on use of the timber).

[170] Canada's First Written Submission, para. 799.

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

between the respondents' reported sawable timber (exclusive of pulplogs) and a broader Nova Scotia benchmark including both sawable logs and pulplogs."[172] Although Canada argues that omitting pulpwood (*i.e.*, limiting reporting only to sawable timber) inflates the average stumpage price in Nova Scotia, Canada does not address why a benchmark that appropriately matches the type of standing timber purchased by the respondents and reported to the USDOC would not be comparable to the respondents' reported standing timber purchases.

128. Although Canada casts the USDOC's comparison as one between low-quality timber in Alberta, Ontario, and Quebec and "the most valuable half of the harvest in Nova Scotia,"[173] Canada ignores that the inclusion of timber not processed by sawmills in Nova Scotia would have distorted the comparison by including products in the benchmark (*i.e.*, non-sawable timber such as pulplogs) that were not reported by the Canadian respondents.

129. Accordingly, the USDOC's determination that the Nova Scotia stumpage market reflected the same prevailing market conditions as in Alberta, Ontario, and Quebec is a reasonable one in light of the facts, and one that could have been reached by an objective and unbiased investigating authority.

2. Canada's Arguments Regarding Cost Adjustments Lack Merit

130. Canada argues that the USDOC should have adjusted the Nova Scotia benchmark prices to account for (1) costs resulting from the alleged differences in prevailing market conditions in Nova Scotia and the other provinces and (2) additional amounts that Canada alleges must be included in the "full cost" of stumpage. Both of Canada's arguments lack merit. First, Canada failed to quantify any alleged differences between prevailing market conditions for stumpage in Nova Scotia and Alberta, Ontario, and Quebec, and thus, there was no basis to make any adjustments to the Nova Scotia benchmark. Second, the Nova Scotia benchmark already accounts for the "full cost" of stumpage, which the USDOC explained in detail in the underlying investigation. Both of Canada's arguments are addressed in turn below.

a. Canada Failed to Quantify Alleged Differences between Prevailing Market Conditions for Stumpage in Nova Scotia and Alberta, Ontario, and Quebec, and thus There Was No Basis to Make any Adjustments to the Nova Scotia Benchmark

131. Canada claims that other factors, including the prevalence of pulp mills, supply of timber, infrastructure, terrain, and climate, differ significantly between Nova Scotia and Alberta, Ontario, and Quebec, and the resulting differences in costs to harvesters are prevailing market conditions that the USDOC failed to take into account in evaluating the comparability of the

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[172] Lumber Final I&D Memo, pp. 112, 116 (Exhibit CAN-010).

[173] Canada's First Written Submission, para. 794.

benchmark.[174] However, no evidence before the USDOC quantified the effect of these alleged differences on stumpage prices and, therefore, the USDOC could not evaluate whether these alleged differences were prevailing market conditions for which adjustments to the Nova Scotia benchmark should be made. Indeed, even Canada acknowledges that the effect of these alleged differences is not quantified on the record. For example, Canada argues that it is "likely" that a longer growing season and faster regeneration of forests in Nova Scotia (as a result of the climate there) would result in sawmills requiring a smaller geographic area to sustain their operations and lower transportation costs, but points to no record evidence quantifying this alleged effect on costs.[175]

132. Similarly, Canada alleges that Nova Scotia has a "heavy demand" for pulpwood compared to other provinces, and that this demand "has an effect on Nova Scotia's standing timber market."[176] It also alleges that the supply of standing timber in Nova Scotia is declining, and this declining supply inflates timber prices in Nova Scotia.[177] Canada does not attempt to quantify either of these alleged differences in price.

133. Furthermore, Canada alleges that transportation costs in Nova Scotia are lower than in Alberta, Ontario, and Quebec.[178] In particular, Canada claims that Nova Scotia has a denser public road network, which increases mills' access to timber without corresponding increases in cost, and when combined with mills' proximity to timber, private woodlot owners are able to negotiate higher stumpage prices.[179]

134. However, the USDOC found that the study relied upon by the Canadian Parties for their argument was largely conjecture. The Asker Report, for example, states that Nova Scotia contains slightly more road (measured in kilometers) per square kilometer of land than Alberta, and from that information concludes:

> assuming the same cost for constructing a meter of road, and assuming this road density difference is similar in forest regions, the road density difference between Nova Scotia and Alberta could

[174] Canada's First Written Submission, paras. 781-783, 800-818.

[175] Canada's First Written Submission, para. 782.

[176] Canada's First Written Submission, para. 803.

[177] Canada's First Written Submission, paras. 814-818.

[178] Canada's First Written Submission, paras. 804-813.

[179] Canada's First Written Submission, para. 810.

> result in total construction differences of approximately C$1,000 per square kilometer….[180]

Thus, the USDOC, having objectively evaluated the record evidence, found "the conclusions in the Asker Report to be based on speculation."[181]

135. The USDOC further found that record evidence undermined the Asker Report's conclusions as applied to the respondents in this proceeding. Specifically, the USDOC observed that some of the respondents' mills "are located close to their respective standing timber sources, thereby resembling the conditions that Canadian Parties claim exist in Nova Scotia."[182] Thus, the USDOC found that, to the extent differences in hauling distance and infrastructure development existed between Nova Scotia and Alberta, Ontario, and Quebec, it found those differences not to be substantiated (or quantified in their effect on timber prices) such that the Nova Scotia stumpage market failed to reflect the prevailing market conditions in the other three provinces.[183]

136. Canada argues that the USDOC did not seek evidence from either respondents or Nova Scotia that would allow it to quantify these alleged differences in market conditions.[184] Canada asserts that "it was the USDOC that was required to carry out a 'systematic inquiry' and 'seek out relevant information' with respect to its chosen benchmark."[185] Canada's arguments, however, do not speak to the USDOC's obligations to undertake that sort of additional evaluation for an in-country benchmark in the countervailing duty investigation underlying this dispute. Canada points to *US – Anti-Dumping and Countervailing Duties (China)*, for example, in which the Appellate Body stated that an investigating authority has "a duty to seek out relevant information" from respondents with regard to whether a financial contribution had been made by a public body and "evaluate [the information] in an objective manner."[186] However, an obligation to proactively seek factual information from respondents in the context of a public body determination is different than proactively seeking factual information from non-respondents regarding a benchmark that the USDOC found, based on substantial evidence, reflected the prevailing market conditions in the country of provision.

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

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

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

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

[184] Canada's First Written Submission, paras. 756, 800.

[185] Canada's First Written Submission, paras. 800, 806 (quoting *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 199; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 344; *US – Wheat Gluten (AB)*, para. 53; *US – Carbon Steel (India) (AB)*, para. 4.152).

[186] *See, e.g.*, Canada's First Written Submission, para. 23 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 344).

137. Here, the USDOC determined, based on positive evidence regarding the dominance of the SPF basket of species in the Eastern Provinces, that Nova Scotia timber was comparable to timber in those provinces, and the Nova Scotia stumpage market reflected prevailing market conditions in Canada, including Alberta, Ontario, and Quebec. To the extent that Canada or the Canadian respondents contend that Nova Scotia stumpage prices were not the benchmark most reflective of the prevailing market conditions in Canada, the burden was on Canada and the Canadian respondents to substantiate those alleged differences and their effect such that the USDOC could evaluate their arguments. They failed to do so. Their failure does not render the USDOC's conclusion that the Nova Scotia stumpage prices reflected prevailing market conditions in Canada one that an objective and unbiased investigating authority could not have reached in light of these facts.

138. Finally, Canada contends that the USDOC was "required … to attempt to adjust its benchmark to reflect the different prevailing market conditions in each regional market."[187] But Canada failed to establish that Nova Scotia stumpage prices did not reflect the prevailing market conditions in the Eastern Provinces for the reasons explained above. And, in any event, as discussed above, Canada and the Canadian respondents failed to provide the USDOC with information that would be necessary to quantify the effect that any alleged differences in prevailing market conditions would have on stumpage prices. Absent such information – and where the bulk of the evidence demonstrated that in-country Nova Scotia prices reflect the prevailing market conditions in Canada – the USDOC did not act inconsistently with the SCM Agreement in declining to adjust the Nova Scotia stumpage benchmarks to account for unquantified differences alleged to exist among the prevailing market conditions.

b. Canada's Argument Regarding the Alleged "Full Cost" of Stumpage Lacks Merit

139. Canada additionally argues that the USDOC failed to account for the "full cost" of stumpage paid by the Canadian respondents in calculating the benefit conferred by the provinces' provision of stumpage for less than adequate remuneration, and in so doing acted inconsistently with Article 14(d) of the SCM Agreement.[188]

140. The USDOC objectively evaluated the record evidence in determining not to adjust upward the stumpage prices paid by the Canadian respondents for extraneous costs not associated with the respondents' purchases of stumpage. Although an investigating authority must determine the adequacy of remuneration in relation to prevailing market conditions for the good or service being provided, including "other conditions of purchase or sale," Article 14(d) does not require an investigating authority to adjust its benefit calculation to include additional conditions of purchase or sale that go beyond what the benchmark is meant to measure, *i.e.*, adequacy of remuneration for the good in question. Where the respondents' reported stumpage

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[187] Canada's First Written Submission, para. 820.

[188] Canada's First Written Submission, paras. 863-866.

price (i.e., the allegedly subsidized price) does not include certain costs, it would not be accurate to adjust that price when the benchmark reflects a market-determined price for the good, *i.e.*, what the recipient would have paid under market conditions. In other words, an upward adjustment to a respondent's purchase price for the good would not accurately reflect the benefit conferred to the recipient of the subsidy.

141. Here, the USDOC's determination not to adjust the respondents' stumpage purchase prices to account for certain costs was based on an objective assessment of the record and supported by positive evidence – namely, the Nova Scotia stumpage benchmark, and lack of evidence on the record that those costs for which the Canadian respondents requested an adjustment were incorporated into the Nova Scotia benchmark. Rather, the USDOC determined that the Nova Scotia stumpage prices reflected a "pure" stumpage price.[189]

142. First, with regard to administrative and overhead costs, the USDOC found that "overhead expenses … are not directly related to stumpage prices," and, in any event, there was no record evidence reflecting that these administrative costs were included in the Nova Scotia benchmark prices.[190]

143. Second, with regard to "in-kind costs (*e.g.*, for silviculture, road construction, forest management and planning, etc.)," the USDOC again found "that no record evidence supports concluding that in-kind costs associated with harvesting Crown timber are included in the [Nova Scotia Private Stumpage Survey] prices."[191] For silviculture specifically, the USDOC found that the Nova Scotia charge of C$3.00/$m^3$ for silviculture (if the Registered Buyers chose not to perform their own silviculture) reflected that silviculture costs in the province were "in addition to, and thus separate from," the purchase prices of stumpage reflected in the Nova Scotia stumpage survey.[192]

144. Third, with regard to "long-term tenure obligations (*e.g.*, annual fees, FRIAA dues, holding and protection charges, etc.[)]," the USDOC found no indication that these costs were reflected in either the Nova Scotia benchmark (which, again, was a "'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees") or accounted for by the Eastern Provinces in setting stumpage rates.[193] In addition, these costs were "billed on separate invoices or as separate line items by the provinces, rather than incorporated into the stumpage prices," further reinforcing that long-term tenure costs were separate from

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

[190] Lumber Final I&D Memo, p. 136 (Exhibit CAN-010).

[191] Lumber Final I&D Memo, p. 137 (Exhibit CAN-010).

[192] Lumber Final I&D Memo, p. 137 (Exhibit CAN-010).

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

respondents' purchases of stumpage.[194] Finally, because the USDOC found that the Nova Scotia private stumpage purchase prices used as benchmarks in this investigation "are stumpage prices, *i.e.*, prices charged to the purchaser for the right to harvest timber," it found that those prices "do not reflect any post-harvest costs to the private landowner, since those costs are borne by the harvester, not the private landowner."[195]

145. The USDOC declined to adjust respondents' stumpage purchase prices to account for administrative costs, in-kind costs, costs associated with long-term tenure obligations, or post-harvest costs, to maintain a pure stumpage-to-stumpage comparison.

146. Canada argues that "a determination of the adequacy of remuneration in relation to prevailing market conditions in the country of provision must capture the full cost to the recipient of receiving the government-provided good in question," and that in declining to adjust upward the Canadian respondents' stumpage purchase prices to include the extraneous additional costs discussed above, the USDOC failed to account for the "full cost" to the Canadian respondents of receiving Crown stumpage.[196] However, having determined that the Nova Scotia stumpage benchmark prices were a "pure" stumpage price, the USDOC compared that stumpage price with respondents' "pure" stumpage prices, and in so doing, accounted for the full cost to the Canadian respondents of receiving stumpage, the good in question.

147. The prior disputes to which Canada refers to support its argument that these extraneous costs form part of the "full cost" of stumpage are distinguishable factually and legally from the investigation at issue in this dispute, and thus do not undermine the USDOC's determination. For example, Canada points to the panel report in *US – Softwood Lumber IV* for the proposition that "[t]he price to be paid for the timber, in addition to the volumetric stumpage charge for the trees harvested, consists of various forest management operations and other in-kind costs relating to road-building and silviculture for example."[197] However, the panel in that dispute made that statement in connection with its evaluation of whether stumpage agreements constituted a financial contribution in the form of the provision of a good, not whether these aspects of certain stumpage agreements constituted costs that should be reflected in a benefit calculation.[198]

148. Similarly, the USDOC's determination to include extraneous costs, such as administrative costs, mandatory fees and charges, and in-kind costs, in respondents' benefit

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

[195] Lumber Final I&D Memo, p. 136 (Exhibit CAN-010).

[196] *US – Carbon Steel (India) (AB)*, para. 4.245; Canada's First Written Submission, para. 869 (discussing *US – Carbon Steel (India) (AB)*).

[197] *US – Softwood Lumber IV (Panel)*, para. 7.15; Canada's First Written Submission, para. 870 (discussing *US – Softwood Lumber IV (Panel)*).

[198] *US – Softwood Lumber IV (Panel)*, paras. 7.9-7.30.

calculations in prior investigations was based on a different factual record. Specifically, in certain of the prior proceedings discussed by Canada,[199] the USDOC relied upon an out-of-country benchmark, rather than an in-country benchmark.[200] In addition, based on the factual records of those proceedings, the USDOC found that "certain adjustments are required to reflect the different costs borne by purchasers in both markets," and made adjustments to ensure that the costs reflected in the log benchmark were similarly reflected in the Crown stumpage purchase price, and *vice versa*.[201]

149. Here, as in those prior proceedings, the USDOC evaluated the record with regard to the costs reflected in the Nova Scotia stumpage benchmark, and sought to compare a purchase price and a benchmark on the same level to determine whether the provinces' provision of stumpage conferred a benefit on the Canadian respondents.

150. The USDOC's approaches to adjusting the Canadian respondents' purchases of stumpage in the Eastern Provinces and adjusting the respondents' purchases of stumpage in British Columbia also are not inconsistent with one another as Canada suggests.[202] In both instances, the USDOC sought to adjust respondents' purchase prices to reflect the costs incorporated into the benchmark. Because the USDOC relied upon a "pure" stumpage benchmark to measure the adequacy of respondents' remuneration for purchases of stumpage in the Eastern Provinces, the USDOC declined to adjust their stumpage purchase prices, which also reflected "pure" stumpage prices.[203] Because the USDOC relied upon a log benchmark to measure the adequacy of respondents' remuneration for purchases of stumpage in British Columbia, the USDOC adjusted their stumpage purchase prices to account for additional costs to place those stumpage purchases on the same level as the log benchmark.[204]

151. In concluding that the respondents' stumpage purchase prices were "pure" stumpage prices like the Nova Scotia benchmark, the USDOC considered evidence on the record regarding the costs incorporated by provincial governments into those stumpage rates, including the legal instruments setting provincial government stumpage rates.[205] Canada contends that it is

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[199] Canada's First Written Submission, paras. 871-872.

[200] *See Lumber IV IDM*, p. 56 (selecting a Maine log benchmark for Quebec), p. 93 (selecting a Michigan and Minnesota log benchmark for Ontario), pp. 106-107 (selecting a Minnesota benchmark for Alberta) (Exhibit CAN-087).

[201] *Lumber IV IDM*, p. 58 (Exhibit CAN-087). *See also Lumber IV AR2 Final Results*, p. 107 ("Where such costs are incurred by harvesters in either the Maritimes [(from which the benchmark was derived)] or the subject provinces, we have included them in our benefit calculations.") (Exhibit CAN-223).

[202] *See* Canada's First Written Submission, para. 874.

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

[204] Lumber Final I&D Memo, pp. 68-75 (Exhibit CAN-010).

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

"irrelevant whether the statutory or regulatory instrument that establishes the administered price in a province directly refers to the additional remuneration" for which the USDOC declined to adjust, but that, in any event, Alberta and Quebec do take these additional costs into account when setting provincial stumpage rates.[206] However, the surveys of additional costs by Alberta and Quebec only collect information regarding costs in those provinces; those surveys do not demonstrate that Alberta and Quebec actually took the survey results into consideration in setting stumpage prices in those provinces.[207] Accordingly, that information does not undermine the USDOC's determination that no evidence indicated that those costs were affirmatively taken into account by provincial governments when setting stumpage prices.[208]

152. Additionally, Canada contends that silviculture obligations differ between Nova Scotia and the Eastern Provinces, particularly Alberta and Quebec.[209] However, these alleged differences do not undermine the USDOC's determination that silviculture costs were not incorporated into the Nova Scotia stumpage benchmark, which reflected a "pure" stumpage price. Accordingly, the USDOC's determination not to adjust respondents' stumpage purchase prices in the Eastern Provinces to reflect additional, extraneous costs not incorporated into the Nova Scotia benchmark was supported by positive evidence.

153. Although Canada disagrees with the USDOC's determination not to adjust the Canadian respondents' stumpage purchase prices to include these additional costs, Canada's argument to the Panel does not establish that the USDOC failed to make an objective assessment of the evidence on the record. For example, Canada continues to contend that certain dues in Alberta and Quebec were required of companies wishing to harvest Crown timber,[210] but the Canadian respondents' invoices reflect that those costs were billed separately on separate invoices (or as separate line items on stumpage invoices) by the provinces, and were not incorporated into the stumpage prices charged by the provinces.[211] Similarly, although Canada continues to contend that the provinces delegate certain activities to the Canadian respondents (including silviculture, road construction and maintenance, and forest management and protection obligations)[212] such that the respondents bore those additional costs, those costs were not included in the Nova Scotia benchmark, and thus the USDOC properly compared a stumpage benchmark exclusive of those costs to respondents' stumpage purchase prices exclusive of those costs.[213]

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[206] Canada's First Written Submission, para. 875.

[207] *See generally* Exhibit CAN-097 and Exhibit CAN-177.

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

[209] Canada's First Written Submission, paras. 876-878.

[210] Canada's First Written Submission, paras. 880-886.

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

[212] Canada's First Written Submission, paras. 889-918.

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

154. The USDOC determined not to adjust the Canadian respondents' stumpage purchase prices where the requested adjustments would rather reflect extraneous costs not included in the Nova Scotia stumpage benchmark. The USDOC's determination in this regard is not inconsistent with Article 14(d). Rather, the USDOC selected as a benchmark a private, market-determined price for the good in question from within the country of provision – the Nova Scotia private stumpage benchmark – as directly contemplated by Article 14(d). An unbiased and objective investigating authority could have considered, as the USDOC did, that the in-country, market-determined Nova Scotia benchmark prices 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).

3. Canada's Arguments Regarding the Reliability of the Nova Scotia Survey Lack Merit

155. In addition to its arguments that the Nova Scotia stumpage benchmark did not reflect the prevailing market conditions in Alberta, Ontario, and Quebec, Canada also contends that the Nova Scotia stumpage benchmark was unreliable for a variety of reasons. The use of that unreliable benchmark, Canada contends, was inconsistent with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 to "precisely calculate the correct amount of any subsidy," and its obligations under Article 10 of the SCM Agreement to "actively seek out" the information required to do so.[214] Canada's arguments lack merit. The USDOC's determination is supported by record evidence, and, in using the Nova Scotia benchmark, the USDOC did not act inconsistently with its obligations under the SCM Agreement or the GATT 1994.

156. Canada first contends that the Nova Scotia survey upon which the USDOC relied for the stumpage benchmark in Alberta, Ontario, and Quebec was prepared in anticipation of the underlying investigation and **[[BCI]]**.[215]

157. The Canadian Parties did not argue that the USDOC should not rely on the Nova Scotia Private Stumpage Survey on this basis in the underlying investigation, and the USDOC was not afforded the opportunity to rebut the contentions Canada now makes. In any event, Canada's allegation is wholly unsupported in the record. Indeed, Canada reveals as much by supporting its argument with unsupported speculation regarding Nova Scotia's "incentives to produce a survey that was useful to **[[BCI]]**."[216]

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[214] Canada's First Written Submission, para. 826 & footnote 1382.

[215] Canada's First Written Submission, paras. 833-836.

[216] Canada's First Written Submission, para. 834.

158. Furthermore, Canada argues that the **[[BCI]]** based on the time frame covered by the survey, the **[[BCI]]**.[217]

159. However, Nova Scotia has commissioned at least five surveys of private stumpage since 2000. That Nova Scotia regularly commissions surveys of private stumpage prices, when the USDOC has conducted only two countervailing duty investigations of softwood lumber from Canada during the same time period, indicates that Nova Scotia commissions surveys of private stumpage prices at times other than when the USDOC investigates the subsidization of softwood lumber from Canada. Indeed, Nova Scotia reported that its Department of Natural Resources has a policy of setting Crown timber rates in the province to reflect negotiated private stumpage purchase prices, and that periodic surveys of Registered Buyers who routinely purchase stumpage assist Nova Scotia in implementing that policy.[218]

160. Moreover, although recent surveys of Nova Scotia private stumpage prices also included **[[BCI]]**,[219] and this survey did not, Nova Scotia represented that it was **[[BCI]]**.[220] No evidence provided by **[[BCI]]** to the USDOC contradicts this statement. Accordingly, that the **[[BCI]]** survey undertaking dissolved into **[[BCI]]** does not indicate an intent by Nova Scotia to conduct a survey for the purpose of submitting it in the USDOC's investigation.

161. Thus, aside from theories based on changes to Nova Scotia's conduct of the survey, Canada points to no record evidence indicating that the Nova Scotia survey was conducted **[[BCI]]**.[221] Accordingly, the USDOC's determination that the survey was conducted in Nova Scotia's **[[BCI]]** was based on an objective assessment of the record before the USDOC, and Canada's allegations to the contrary are without support in the record.

162. Second, Canada alleges that Nova Scotia's survey, "by design," attempted to hide information collected through confidentiality agreements between the survey conductor and survey respondents, and that as a result, "the survey responses and data underlying the Nova Scotia benchmark were not subject to review by the USDOC…."[222] This is incorrect. As discussed further below, the USDOC conducted a verification of Nova Scotia, including transactions reported in the Nova Scotia survey.[223]

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[217] Canada's First Written Submission, paras. 835-836.

[218] *See* GNS QR, p. 5 (Exhibit CAN-313).

[219] *See* GNS QR, p. 5 (Exhibit CAN-313).

[220] *See* GNS Verification Report, p. 6 (**[[BCI]]**) (Exhibit CAN-318 (BCI)).

[221] Canada's First Written Submission, para. 834.

[222] Canada's First Written Submission, para. 838.

[223] *See generally* GNS Verification Report (Exhibit CAN-318 (BCI)).

163. Third, Canada contends that the Nova Scotia stumpage benchmark was unreliable because Nova Scotia "provided no information or evidence that would confirm" that the transactions reported in the survey were "representative" of the Nova Scotia stumpage market.[224] In particular, Canada alleges that the limitation of survey respondents to a number of Registered Buyers in Nova Scotia ensured that the survey was not geographically representative of harvest volumes in Nova Scotia.[225]

164. The USDOC had a sufficient evidentiary basis to find otherwise. Nova Scotia sets the prices it charges for Crown-origin standing timber based on the prices paid by Registered Buyers (*i.e.*, buyers who acquire more than 5,000 m^3 of standing timber in a year), and the limitation of survey respondents to private-origin standing timber purchases made by Registered Buyers reflected the practice of the Government of Nova Scotia.[226] In any event, the USDOC found that high-volume purchases, like those made by Registered Buyers, would result in unit prices that are lower than the unit prices from relatively low-volume purchases made by small loggers and harvesters.[227] Accordingly, by limiting the survey respondents to large purchases made by Registered Buyers, the survey results represented a conservative benchmark for stumpage purchase prices.

165. Regardless of the limitation to particular Registered Buyers, however, the USDOC found that the approximately 36 percent of the private softwood volume represented by the Nova Scotia survey was "sufficiently robust and representative" of the stumpage market in the province.[228] Moreover, Canada points to no evidence supporting a conclusion that the prices reported in the survey were skewed because they were not geographically representative of harvest volumes in Nova Scotia.

166. Fourth, Canada argues that the record before the USDOC did not evidence "how the Nova Scotia Survey respondents understood the meaning of the 'stumpage transactions' they were asked to report," and the survey is unreliable because of those respondents' potential misinterpretation of "stumpage transactions."[229]

167. However, the USDOC evaluated this issue extensively at verification. Nova Scotia explained that the survey included "initial studwood and sawmill grade purchases, as bought at

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[224] Canada's First Written Submission, para. 840.

[225] Canada's First Written Submission, para. 841.

[226] Lumber Final I&D Memo, p. 122 (quoting GNS QR, p. 19) (Exhibit CAN-010).

[227] Lumber Final I&D Memo, p. 123 (Exhibit CAN-010).

[228] Lumber Final I&D Memo, p. 123 (Exhibit CAN-010).

[229] Canada's First Written Submission, para. 843.

the mill gate," following which "[c]ompanies will sell the portion of the harvest not suited to their mill as roadside sales to other mills."[230]

168. Moreover, the company that conducted the survey "conducted on-site verifications to ensure that survey respondents submitted accurate information that adhered to the survey instructions."[231] At verification, the USDOC found no evidence of lump sum transactions in the source documents examined, although it examined the largest transaction by volume reported in the Nova Scotia survey.[232] Because it found no evidence of misreporting, and the survey conductor itself conducted on-site verifications of survey respondents to ensure their accurate reporting of transactions, Canada's argument that transactions must have been misreported is not supported by positive evidence. As discussed above, the USDOC verified the source documents underlying the Nova Scotia stumpage survey's reporting, and, in conjunction with the survey conductor's representation that it also verified proper reporting of transactions, concluded based on an objective assessment of the evidence before it that the survey adequately reported transactions.

169. Fifth, Canada contends that the survey's "intended use"-based definitions for pulpwood, sawlogs, and studwood could have been misinterpreted by survey respondents, and, in any event, the survey's exclusion of pulpwood transactions artificially inflated the survey's reported price.[233] Nova Scotia represented that although trees may produce several different log types, "the harvester can determine the best use of the tree" based on its "general characteristics," and would "sell the section of the tree to the appropriate mill for that quality of the wood (*e.g.*, the studwood length to a studmill, the sawmill length to a sawmill, etc.)."[234] And, as discussed above, the USDOC determined that, at minimum, Ontario and Alberta similarly rely on use-based definitions in determining whether a log is properly classified as a sawlog or a pulplog.

170. Furthermore, also as discussed above, the timber reported in the Nova Scotia stumpage survey matched that reported by the Canadian respondents in the USDOC's investigation, and "includ[ing] pulplogs into the Nova Scotia benchmark would create a mismatch between the respondents' reported sawable timber (exclusive of pulplogs) and a broader Nova Scotia benchmark including both sawable logs and pulplogs."[235] Canada's argument that the exclusion of pulplogs skewed the stumpage prices reported in the Nova Scotia survey does not address why a benchmark that appropriately matches the type of standing timber purchased by the

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[230] Canada's First Written Submission, para. 843.

[231] Canada's First Written Submission, para. 843 (citing GNS Verification Report at NS-VE-6, pp. 45-47).

[232] *See* Lumber Final I&D Memo, p. 118 (Exhibit CAN-010); GNS Verification Report, p. 8 (Exhibit CAN-318 (BCI)).

[233] Canada's First Written Submission, paras. 850-854.

[234] Lumber Final I&D Memo, p. 117 (quoting GNS Verification Report, p. 4) (Exhibit CAN-010).

[235] Lumber Final I&D Memo, p. 116 (Exhibit CAN-010).

respondents and reported to the USDOC would not be comparable to the respondents' reported standing timber purchases.

171. Finally, Canada argues that the Nova Scotia survey employed an inaccurate conversion factor to convert the weight of stumpage transactions reported by survey respondents to volumes (cubic meters).[236] Specifically, Canada contends that this conversion factor is outdated, fails to account for seasonal weight differences, and lacked detail with regard to the sample size and species mix measured to devise the conversion factor.

172. The USDOC determined that this conversion factor was reliable based on an objective assessment of record evidence, namely, that the conversion factor is used by Nova Scotia in its ordinary course of business, and Nova Scotia conducted sampling programs between 2001 and 2009 that confirmed the accuracy of the conversion factor.[237] These checks "yielded almost the exact same conversion factor," and found that any "minor differences noted were statistically insignificant."[238] Moreover, both the original and follow-up sampling was conducted using the standardized conversion factor development methodology outlined in the Canadian Standards Association's scaling standards for roundwood.[239]

173. Canada's contention that this conversion factor was not used in the ordinary course of business by Nova Scotia because the USDOC "had no evidence that the Nova Scotia industry used this conversion factor" fails to acknowledge the uncontroverted evidence that "Nova Scotia used the conversion factor in government business."[240] Canada's attempt to narrow the eligible users of the conversion factor in the ordinary course of business to survey respondents in the industry does not undermine the positive evidence relied upon by the USDOC in finding the conversion factor to be reliable, *i.e.*, the evidence that the provincial government relies upon this conversion factor in its ordinary course of business.

174. Thus, the USDOC's conclusion that the Nova Scotia stumpage survey was a reliable benchmark that reflected the prevailing market conditions in Alberta, Ontario, and Quebec is a reasonable one in light of the facts, and one that could have been reached by an objective and unbiased investigating authority.

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[236] Canada's First Written Submission, paras. 855-862.

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

[238] GNS QR, p. 14 (Exhibit CAN-313). *See also* Lumber Final I&D Memo, p. 119 (Exhibit CAN-010).

[239] GNS QR, p. 14 (Exhibit CAN-313).

[240] Canada's First Written Submission, para. 861 (underline added).

4. Canada Has Failed to Show that the USDOC's Decision Not to Use Prices for Logs Is Inconsistent with Article 14(d) of the SCM Agreement

175. Canada further contends that alternative in-province proposed benchmarks were "preferable" to the Nova Scotia benchmark chosen by the USDOC.[241] However, the alternative benchmarks for certain provinces as put forth by Canada are not actual prices for stumpage, the good alleged to have been provided by the provincial governments for less than adequate remuneration.

176. Article 14(d) emphasizes that the adequacy of remuneration "shall be determined in relation to prevailing market conditions for the good … in question."[242] Here, that good is stumpage, not logs. Having determined that the Nova Scotia private stumpage benchmarks reflected the prevailing market conditions in the Eastern Provinces, the USDOC's determination that that benchmark was preferable to a proposed benchmark for an alternate good, logs, was based on an objective assessment of record evidence and consistent with Article 14(d).

177. The only other alternative in-province benchmark proposed by Canada (for use in Ontario) does not even reflect actual prices paid for a good. Rather, Canada proposes the use of a study that applied Quebec's transposition equation to Ontario standing timber to derive a value for the Ontario timber.[243] No company actually paid these derived prices for Ontario timber. The USDOC's preference for a benchmark that reflected actual prices paid for stumpage in Canada was a reasonable one in light of the facts, and one that could have been sustained by an objective and unbiased investigating authority.

5. Canada's Claim Fails for the Additional Reason that the USDOC Demonstrated Price Distortion in New Brunswick, Quebec, Ontario, and Alberta

178. Canada argues that the USDOC's determination to use private prices from Nova Scotia is inconsistent with Article 14(d) of the SCM Agreement because, according to Canada, the USDOC did not meet the standard the Appellate Body has applied for out-of-country benchmarks. As explained in section II.B, above, Canada's argument is based on the wrong legal standard. That standard does not apply here and, as a result, Canada cannot demonstrate any inconsistency with Article 14(d) on this basis.

179. This is reason alone for the Panel to reject this claim by Canada in relation to Article 14(d), and the Panel need not continue to evaluate it further. Even aside from this flaw in

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[241] Canada's First Written Submission, paras. 822-824.

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

[243] Canada's First Written Submission, para. 824. *See also* Lumber Final I&D Memo, pp. 96-97 (Exhibit CAN-010).

Canada's argument, and for completeness, the United States notes that Canada's claim would fail for the additional reason that the USDOC's explanation in fact addressed each of the considerations that the Appellate Body has indicated previously may be relevant to a distortion finding that would justify using an out-of-country benchmark. Those elements include: (1) the starting point for the analysis should be private prices; (2) those prices should be market-determined rather than distorted by government intervention (including through government predominance); (3) government prices or presence in the market are not automatically disqualifying, but government predominance "likely" indicates distortion (especially when other facts also support a finding of distortion); and (4) the analysis may require an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, or the behavior of the entities operating in that market.

180. The discussion below summarizes the USDOC's findings with regard to the distortion analysis in each province for which the USDOC used the Nova Scotia benchmark and demonstrates that the USDOC conducted a thorough investigation, provided a reasoned explanation for its findings with respect to all four provinces, and in each case reached a conclusion that any objective and unbiased investigating authority could have reached.

181. For each province, the discussion in this section begins with a review of the investigative process followed by a summary of the USDOC's findings. As the Panel will discover, Canada's argument that the investigation the USDOC conducted was somehow deficient or inadequate lacks any merit.[244] The investigative process and analysis that the USDOC undertook for each province confirms that the USDOC conducted a diligent investigation and solicitation of the relevant facts consistent with its role as an investigating authority. The discussion below also demonstrates that the USDOC's analysis and explanation in response to the arguments Canada and Canadian interested parties raised for each province confirms that the USDOC provided a reasoned and adequate explanation of its determination. Canada has therefore failed to demonstrate that the USDOC's determination is inconsistent with Article 14(d) of the SCM Agreement.

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[244] The reason for Canada's tactic is simple: Canada invites the Panel to re-weigh the evidence over the course of just two written submissions and two panel meetings in hopes that a new finding will be reached to replace the results of the year-long CVD investigation that was duly conducted by the U.S. investigating authority – a proceeding which involved many more participants, the exchange of questionnaires, verification site visits, extensive briefing, hearings, and meetings with the parties. The DSU does not permit a panel to re-weigh the evidence, of course, for exactly that reason. *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188; *China – Broiler Products (Panel)*, para. 7.4 (*citing US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103).

a. Stumpage Provided by New Brunswick: Respondent's Own Purchase Prices Are an Appropriate Benchmark under Article 14(d) of the SCM Agreement

(1) Investigative Process for New Brunswick

182. The investigative process for New Brunswick stumpage proceeded as follows. On January 19, 2017, the USDOC sent a CVD questionnaire to Canadian provincial authorities in New Brunswick responsible for providing the subsidies under investigation.[245] As part of its standard CVD questionnaire, the USDOC solicits information regarding the government entities responsible for administering the alleged subsidy programs, the nature of the programs, and the history of distributions under each of the programs at issue. For each specific type of subsidy, the government CVD questionnaire instructs respondents to complete a standard annex form tailored to the relevant subsidy type. In this case, the USDOC also issued an addendum to the Initial Questionnaire regarding stumpage for New Brunswick on January 31, 2017.[246]

183. The USDOC received the response to the Initial Questionnaire and its addendum from New Brunswick on March 17, 2017.[247]

184. Three reports on the record provided several key pieces of evidence. These included the *Report of the Auditor General – 2008*,[248] the *2012 Private Forest Task Force Report* (*2012 PFTF Report*),[249] and the *Report of the Auditor General – 2015*.[250] The New Brunswick Auditor General reports were prepared by New Brunswick in the ordinary course of business and described details regarding the percentage of land holdings, the total harvest volume, the royalty fees paid, as well as a discussion of the process to set royalty rates.[251] The Auditor General reports also "describe non-market factors that have a distortive effect upon New Brunswick's

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[245] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[246] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[247] *See* GNB QR (Exhibit CAN-259 (BCI)); GNB QR (Exhibit CAN-240 (BCI)).

[248] "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).

[249] "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).

[250] "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).

[251] Lumber Final I&D Memo, Comment 28 (citing Lumber Preliminary Decision Memorandum, p. 32; Petition at Exhibit 228).

private stumpage prices through the [period of investigation], such that private stumpage prices in the province are not market-determined."[252]

185. The Auditor General reports that New Brunswick issued also explained that Crown lands accounted for roughly half[253]of the softwood volume during the relevant time period and New Brunswick Crown stumpage accounted for a plurality of the softwood harvest volume during the 2015-2016 harvesting season.[254] According to the Auditor General reports, the consumption of Crown-origin standing timber by sawmills is concentrated among a small number of corporations and those same corporations also dominate the consumption of standing timber harvested from private lands.[255] The Auditor General reports also demonstrate that the leverage of private mills as dominant consumers suppresses prices from private woodlots, and that those suppressed private prices lead to an artificially low price for Crown stumpage.[256] In particular, the Auditor General reports state:

> The fact that the mills directly or indirectly control so much of the source of the timber supply in New Brunswick means that the market is not truly an open market. In such a situation it is not possible to be confident that the prices paid in the market are in fact fair market value. … [T]he royalty system provides an incentive for processing facilities to keep prices paid to private land owners low…[257]

186. On the basis of these reports and the information that New Brunswick reported in its questionnaire response, the USDOC issued an additional supplemental questionnaire regarding stumpage-specific issues and received responses from New Brunswick on April 12, 2017.[258]

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[252] Lumber Final I&D Memo, Comment 29.

[253] The report indicated 49.9 percent at that time, however, based on updated information, the USDOC found that Crown stumpage accounted for 50.79 percent. *See* Lumber Final I&D Memo, Comment 28 (citing GNB Verification Report, Exhibit VE-1 at Table 3) ("Total Volume of Timber Sourced from Crown Land: 2,675,207 m^3 divided by total volume 5,266,858 m^3 (Total Volume of Timber Sourced from Crown Land: 2,675,207 m^3 + Total Volume of Timber Sourced from Private Woodlots Land: 2,675,207 m^3 + Total Volume of Timber Sourced from USA or Other Canadian Provinces: 457,914 m^3 + Total Volume of Timber Sourced from First Nations: 169,385 m^3) equals 50.79 percent.") (Exhibit CAN-010).

[254] Lumber Final I&D Memo, Comment 28.

[255] Lumber Final I&D Memo, Comment 28.

[256] Lumber Final I&D Memo, Comment 28 (citing Lumber Preliminary Decision Memorandum, p. 32; Petition at Exhibit 228).

[257] Lumber Final I&D Memo, Comment 28 (citing "Analysis" section of 2008 report).

[258] *See* Lumber Preliminary Decision Memorandum, p. 6 (citing GNBSQR) (Exhibit CAN-008).

187. In addition to reviewing their responses to the questionnaires (and supplemental questionnaires), the USDOC conducted on-site verifications for JDIL and the government of New Brunswick shortly after the preliminary findings were disclosed.

188. From June 19, 2017, through June 23, 2017, the USDOC investigators met with representatives of JDIL at Saint John, New Brunswick, Canada, to conduct verification of JDIL's questionnaire responses.[259] At the commencement of verification, JDIL submitted corrections to its questionnaire responses that resulted from its verification preparation and the USDOC accepted the following corrections:

> **Stumpage Data**
>
> 1. JDIL made revised the Fair Market Value (FMV) for "other Non-Saw Material".
> 2. JDIL revised its reported operational adjustments for its stumpage purchased on License #7.
> 3. JDIL revised the reported harvest and delivery costs for its allocation of overhead and road costs for softwood Crown stumpage.
> 4. JDIL corrected inadvertent errors in the volumes reported for its allocations and harvest of Crown stumpage during the 2014/2015 operating year.
> 5. JDIL clarified that it did not purchase Crown stumpage from Nova Scotia during the period of investigation (POI).[260]

189. The USDOC compiled a description and detailed list of these corrections to include as part of the record of the investigation.[261] In turn, the USDOC verified information relating to the company's structure, affiliates, and sales and purchases.[262] A large portion of the verification was also dedicated to verifying information related to stumpage.[263]

190. The USDOC's verification report provides a detailed description of the information that the USDOC reviewed during the on-site visit. The report explains:

> JDIL officials provided an overview of how the company sourced its logs (stumpage and wood purchases). Company officials explained that, during the POI, it purchased stumpage rights from

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[259] *See* JDIL Verification Report, p. 1 (Exhibit CAN-241 (BCI)).

[260] JDIL Verification Report, p. 2 (Exhibit CAN-241 (BCI)).

[261] JDIL Verification Report, p. 2 (Exhibit CAN-241 (BCI)).

[262] See discussion of company information at JDIL Verification Report, pp. 4-5 (Exhibit CAN-241 (BCI)).

[263] See discussion of stumpage at JDIL Verification Report, pp. 5-10 (Exhibit CAN-241 (BCI)).

> both New Brunswick Crown land and from private land owners in New Brunswick and Nova Scotia. In addition, JDIL reported harvesting wood from its own private industrial freehold land.
>
> Additionally, JDIL also purchases delivered wood (*i.e.*, logs harvested by an outside party) from operators on both private woodland and New Brunswick Crown land. JDIL officials explained that wood originating from private woodlots in NB is sold through marketing boards; there are seven marketing boards throughout the province that market the logs coming from the private woodlots. JDIL officials stated that in some instances, the marketing boards will be involved in the negotiations for selling the logs, however in other instances, the marketing board is just responsible maintaining the data for these sales.[264]

191. The USDOC also took note of the following explanation that JDIL provided regarding the obligations imposed upon it by the provincial stumpage administration:

> JDIL officials explained, as stipulated under the *Crown Lands and Forests Act*, that the company is required to source its stumpage and wood purchases proportionally between Crown and private sources within New Brunswick. We asked how much the company was required to purchase from each source annually. JDIL officials explained that there were no specific amounts, instead the company is expected to maintain a consistent level of purchases from these various sources. Through the timber utilization surveys, JDIL officials explained, the Government of New Brunswick (GNB) monitors the wood consumption coming into the mills to ensure that there are not significant increases or decreases in wood from different sources.[265]

192. The USDOC also completed additional verification steps:

> We reviewed the stumpage figures reported by JDIL. We tied to the company's accounting system and financial statements the harvest figures for License #7 (as a licensee) and #9 (as a sub-licensee) as reported in the provided stumpage chart. We also tied the reported information to separate invoices and accounting entries. We performed similar reviews of the figures reported for JDIL's Crown harvest as a sub-licensee on License #1, JDIL's

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[264] JDIL Verification Report, pp. 6-7 (Exhibit CAN-241 (BCI)).

[265] JDIL Verification Report, p. 7 (Exhibit CAN-241 (BCI)).

> reported private stumpage purchases from New Brunswick and Nova Scotia, and JDIL's private log purchases. We observed no inconsistencies with the information reported in the questionnaire responses as updated by the applicable corrections presented at verification.
>
> Next, we reviewed the costs reported for Crown stumpage harvesting. These expenses included the legally imposed obligations stipulated in the FMA, as well as other relevant costs including transportation, overhead, and harvesting. We reviewed the expenses reported by JDIL in the company's accounting system and general ledger, which in turn tied to the audited financial statements. We performed a similar review of the costs for private stumpage harvests from New Brunswick and Nova Scotia and found no discrepancies.[266]

193. After completing the verification of JDIL, the USDOC officials also conducted an on-site verification of New Brunswick from June 26, 2017, through June 28, 2017.[267]

194. During that time, USDOC investigators met with representatives of the government of New Brunswick to conduct verification of the information provided by the provincial government in its questionnaire responses.[268] At the commencement of verification, New Brunswick submitted corrections to its questionnaire responses that resulted from its verification preparation and the USDOC determined it would accept the following corrections:

> The GNB originally reported delivered volumes of Crown wood by user allocations. Sorting the delivered Crown wood by destination (*i.e.*, the sawmills) resulted in minor corrections to the volume processed by each sawmill. This included the delivery of . . . Crown pulpwood to Chaleur Sawmills Associations which was not previously reported. . . .
>
> The GNB originally reported the delivery of . . . Crown wood to J.D. Irving Ltd. (JDIL). However, JDIL is not a physical location. The GNB corrected its response to reflect the individual JDIL sawmills to which the wood was delivered. . . .
>
> According to the GNB, in its reporting of total private timber harvests, it initially limited its reporting of harvests from "private"

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[266] JDIL Verification Report, p. 7 (Exhibit CAN-241 (BCI)).

[267] *See* GNB Verification Report (Exhibit CAN-268 (BCI)).

[268] *See* GNB Verification Report, p. 1 (Exhibit CAN-268 (BCI)).

> land in accordance with the *Forest Products Act of 2012*, which provides a definition of private land that excludes industrial freeholds. The GNB corrected its reporting of private timber harvests to include timber harvested from industrial freehold land. The GNB noted that the private timber harvest reported in the aggregate data worksheet of the original questionnaire included the harvest on industrial freehold land. Thus, information regarding harvest on industrial freehold lands had been included in the original response.[269]

195. The USDOC noted, among other things, that "based on the updated information provided by [New Brunswick] at verification, the fiscal year data indicate that Crown lands accounted for a slight majority of the softwood timber harvest volume in the province, which is greater than the plurality of the total harvest volume that we found for the Preliminary Determination," *i.e.*, 50.79 percent.[270]

196. With respect to stumpage, the USDOC requested the provincial government to be prepared to address the following:

> Please be prepared to provide an overview of the program, and explain the methods (i.e., license, sub-license, etc.) and process by which companies are given permission to harvest stumpage on crown lands in the province.
>
> You have provided information regarding ownership of harvestable land (provincial, federal, private) in the province at NB-STUMP-10 of the IQR. Please be prepared to explain how these figures were calculated and provide source documentation. . . .
>
> Be prepared to review the licenses and sub-licenses under which JDIL harvested Crown timber during the POI. . . .
>
> Be prepared to demonstrate that the stumpage fees charged to JDIL were consistent with the relevant laws and schedules. Be

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[269] GNB Verification Report, p. 2 (Exhibit CAN-268 (BCI)).

[270] Lumber Final I&D Memo, Comment 28 (citing GNB Verification Report, Exhibit VE-1 at Table 3) ("Total Volume of Timber Sourced from Crown Land: 2,675,207 m^3 divided by total volume 5,266,858 m^3 (Total Volume of Timber Sourced from Crown Land: 2,675,207 m^3 + Total Volume of Timber Sourced from Private Woodlots Land: 2,675,207 m^3 + Total Volume of Timber Sourced from USA or Other Canadian Provinces: 457,914 m^3 + Total Volume of Timber Sourced from First Nations: 169,385 m^3) equals 50.79 percent.") (Exhibit CAN-010).

> prepared to demonstrate that the fees charged were collected in full.[271]

197. With respect to evidence New Brunswick had submitted from its consultant, Mr. Kelly, the USDOC requested the provincial government to be prepared to address the following:

> Be prepared to discuss the study conducted by Professor Brian Kelly on behalf of the GNB, provided in NB-STUMP-13 of the FIS, including any guidelines Mr. Kelly followed in conducting this study.
>
> On pages 6 and 7 of the SQR1, the GNB states that Mr. Kelly relied upon information by the New Brunswick Forest Products Commission and the Forestry Division of the Government of New Brunswick. Please have all information provided to Dr. Kelly available at verification.
>
> On page 10 of the SQR1, the GNB indicates that an analysis concerning the effects of two marketing boards (not included in the Woodlot Survey) was not included in Mr. Kelly's report. Please be prepared to discuss this analysis, as well as any other analysis the results of which were not included in Mr. Kelly's final report.[272]

198. At verification, the provincial government provided responses to the foregoing questions and explained in further detail how the government administers pricing for stumpage through a variety of mechanisms.[273] A detailed discussion is provided at pages 4-10 of the verification report.[274] With respect to the Kelly Report, the USDOC noted:

> The Department was told that all communication between Mr. Kelly, the GNB, and the GNB's counsel was subject to attorney-

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[271] GNB Verification Report, p. 4 (Exhibit CAN-268 (BCI)) (italics removed).

[272] GNB Verification Report, p. 4 (Exhibit CAN-268 (BCI)) (italics removed).

[273] GNB Verification Report, p. 4; *ibid.*, pp. 9-10 ("The Department asked how the 20 and 30 percent figures were determined. GNB officials explained that there is no official source for these figures . . . . The GNB officials were unable to provide any supporting documentation demonstrating that approximately 30 percent of the harvest on the private lands was lump-sum harvests.") (Exhibit CAN-268 (BCI)).

[274] See discussion of provincial stumpage administration at GNB Verification Report, pp. 4-10 (Exhibit CAN-268 (BCI)).

> client privilege. As such, the GNB did not provide the requested correspondence for our review.[275]

199. The USDOC took note of the foregoing and completed the verification. As explained below, the information examined at verification became an integral part of the administrative record and served as the basis for clarifying several key points with regard to stumpage.

(2) Findings for New Brunswick

200. The USDOC determined, as a result of its investigation, to measure the adequacy of remuneration for stumpage provided by New Brunswick using JDIL's own private purchases from Nova Scotia as a benchmark.[276] The USDOC found that it could not use New Brunswick prices as a benchmark because the provincial government predominance in the market, combined with JDIL's own singular role as the overwhelmingly predominant consumer, resulted in price distortions that would generate a circular comparison and, therefore would not serve as a meaningful benchmark.

201. In reaching this conclusion, the USDOC considered a number of factors. These included the government's market share, the structure of the relevant market, the types of entities operating in that market (and their behavior), as well as any entry barriers or other impediments or price-influencing factors. The USDOC considered these factors using the approach outlined in its three-tiered hierarchy for analyzing potential benchmarks.

202. In terms of government market share, the USDOC found that, based on relevant evidence from New Brunswick's *Report of the Auditor General – 2008*, the *2012 PFTF Report*, and the *Report of the Auditor General – 2015*,[277] "private Forest accounted for 38.1 percent; First Nation accounted for 3.25 percent; and log imports (from the United States another Canadian Provinces) accounted for 8.7 percent."[278] The USDOC found, based on updated information, that Crown stumpage accounted for 50.79 percent of the total.[279] The USDOC also "found that the Crown-

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[275] GNB Verification Report, p. 10 (discussing attempts to obtain further explanation and information from Mr. Kelly during verification) (Exhibit CAN-268 (BCI)). *See also* New Brunswick, Kelly Report, (Exhibit CAN-265 (BCI)).

[276] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[277] Lumber Final I&D Memo, Comment 28, footnote 474 (Exhibit CAN-010) (citing Lumber Preliminary Decision Memorandum).

[278] Lumber Final I&D Memo, Comment 28, footnote 475 (citing Lumber Preliminary Decision Memorandum) (Exhibit CAN-010).

[279] *See* Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

origin standing timber's share of the harvest volume increases to 54.7 percent when examining standing timber that originated in the province."[280]

203. The USDOC explained further that:

> Our objective in performing this market share calculation was to determine the source (*i.e.*, Crown, private, import) of the logs that could be used in the production of subject merchandise. On that basis, we have calculated market share using the volume of logs from each source (*i.e.*, Crown, private, import) entering sawmills, because these logs are used in the production of softwood lumber. Including other inputs that would not be used in the production of softwood lumber, such as pulpwood or chips, would skew the results, and would not reflect the market conditions for the producers of subject merchandise. . . . Further, as noted above, based on corrections to the harvest data at verification, the record indicates that the Crown-origin timber accounts for the majority of the stumpage harvest volume in New Brunswick.[281]

204. The USDOC concluded that:

> the evidence on the record established that [New Brunswick] held a majority share of the market for stumpage in New Brunswick, and that it restricted eligibility for Crown stumpage rights to companies that operate pulp and paper or lumber mills. Moreover, the Department found that the evidence established that private woodlot owners supplied a much smaller share of the New Brunswick stumpage market than the government, and that the mills' status as the dominant consumers of stumpage creates an oligopsony effect, such that both private woodlot owners and the Crown are responsive to price-setting behavior by the dominant mills. Further, the Department found that private woodlots were a supplemental source of supply for the tenure-holding mills in New Brunswick because an "overhang" existed with regard to the volume of Crown-origin standing timber allocated to tenure holders. As such, the Department concluded that tenure-holding mills could harvest additional Crown timber if needed and, thus, given this additional supply of Crown-origin standing timber,

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[280] Lumber Final I&D Memo, Comment 28, footnote 475 (citing Lumber Preliminary Decision Memorandum) (Exhibit CAN-010).

[281] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

> private woodlot owners served mainly as a supplemental source of supply to the large mills and, consequently, could not expect to charge prices higher than Crown stumpage prices.[282]

205. The USDOC concluded that the evidence continued to demonstrate that New Brunswick is the dominant supplier (50.79 percent) and the mills remain the dominant consumers:

> [The] consumption of Crown-origin standing timber by sawmills is concentrated among a small number of corporations, and that the corporations that dominate the consumption of Crown-origin standing timber also dominate the consumption of standing timber harvested from private lands. Finally . . . we found that tenure-holding corporations are not consuming the full volume of Crown timber allocated to them for harvest during the POI. Specifically, we found that total "overhang" of Crown volume was approximately 47 percent of the softwood Crown harvest during the Fiscal Year 2015-2016.[283]

206. With respect to these observations, the USDOC emphasized that, according to its hierarchy, it would further consider government prices in any case:

> [R]egardless of whether the total Crown-origin volume is just above or just below 50 percent, the Department's finding regarding the private stumpage market in New Brunswick is not based solely on [New Brunswick]'s market share. The *CVD Preamble* states that government involvement in the market "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market." However, the Department does not apply a *per se* rule that a government majority market share equates to government distortion of that market. Rather, the Department will consider any evidence on the record of other relevant factors or measures that

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[282] Lumber Final I&D Memo, Comment 28 (citations omitted) (Exhibit CAN-010).

[283] Lumber Final I&D Memo, Comment 28 (citations omitted) (Exhibit CAN-010). The USDOC also explained that "based on the updated information provided by [New Brunswick] at verification, the fiscal year data indicate that Crown lands accounted for a slight majority of the softwood timber harvest volume in the province, which is greater than the plurality of the total harvest volume that we found for the Preliminary Determination." Lumber Final I&D Memo, Comment 28 (citing GNB Verification Report, Exhibit VE-1 at Table 3) ("Total Volume of Timber Sourced from Crown Land: 2,675,207 m^3 divided by total volume 5,266,858 m^3 (Total Volume of Timber Sourced from Crown Land: 2,675,207 m^3 + Total Volume of Timber Sourced from Private Woodlots Land: 2,675,207 m^3 + Total Volume of Timber Sourced from USA or Other Canadian Provinces: 457,914 m^3 + Total Volume of Timber Sourced from First Nations: 169,385 m^3) equals 50.79 percent.") (Exhibit CAN-010).

> may distort a market. As such, consistent with the *CVD Preamble* and our practice, while we have considered the share of [provincial government] production as one factor in evaluating whether the New Brunswick market is distorted, we have also evaluated other record information in making this determination, as discussed below.[284]

207. As noted by the Appellate Body, the focus of the analysis is not on the source of the price, but rather on price distortion itself.[285] In this regard, and in considering the structure of the market, the USDOC observed that New Brunswick "grants multi-year, non-transferable tenure rights, and that it administratively sets its stumpage fees."[286] With regard to the entities operating in the market and their behavior, the USDOC observed that a few major players – and even JDIL alone – accounted for a majority of the purchase and consumption volumes within the province and even with respect to timber imported into the province. In particular, the USDOC found that "a significant volume of the imports was comprised of JDIL's imports from its own privately held land in Maine, *i.e.*, [that] these imports did not represent arm's-length transactions,"[287] in part because the USDOC "found that JDIL is the largest landowner in Maine."[288] Thus, the ability of JDIL's mills to import logs provided even more leverage over the New Brunswick private stumpage market. Taking this into account, the USDOC concluded that "these non-arm's-length imports are among the factors that suppress private timber prices in New Brunswick."[289] Therefore, they "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."[290]

208. The USDOC found that "the dominance of the mills (in particular, the JDIL mills), coupled with the overhang, indicates that the prices that the mills are willing to pay for private stumpage are limited by the availability of additional volume of Crown stumpage at prices set by the Crown."[291] Specifically, the USDOC found that:

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[284] Lumber Final I&D Memo, Comment 28 (citations omitted) (Exhibit CAN-010).

[285] *See generally US – Carbon Steel (India) (AB)*, paras. 4.151-159 and 4.167; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

[286] Lumber Preliminary Decision Memorandum, pp. 21-22 (Exhibit CAN-008).

[287] Lumber Final I&D Memo, Comment 28 (citing GNB NFI Submission at Exhibit NB-STUMP-22 (FY 2015 Timber Utilization Report)) (Exhibit CAN-010).

[288] Lumber Final I&D Memo, Comment 28 (citations omitted) (Exhibit CAN-010).

[289] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[290] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[291] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

> Crown tenure holders harvested significantly less than their allocated volume of Crown-origin standing timber during calendar year 2014: on average, tenure holders harvested only approximately 47 percent of their Crown-origin standing timber allocation during calendar year 2014. Therefore, the record evidence demonstrates that the mill owners can source timber from alternative sources (*i.e.*, Crown land allocations, and industrial freehold land) if the prices from those sources are more advantageous than the prices available from private woodlot owners in New Brunswick. The mills also have the incentive not to purchase timber from private woodlots unless the price is lower than the Crown prices, because these private purchase prices form the basis of the New Brunswick Crown stumpage prices. The mills' ability to source timber from outside of the private woodlots means that mills possess the leverage to keep prices on private woodlots low, and they have an interest in doing so beyond their mere ability to source from private woodlot owners for low prices. As such, we find that, because 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.[292]

209. Based on this evidence, the USDOC concluded that "a small group of mills dominate the industry in the province, or that significant overhang exists within the province, leading to the circular price suppression of private and Crown stumpage prices."[293] The USDOC explained that because two parties dominate the transactions, and prices for a large proportion of the total harvest are set administratively, it is difficult to establish fair market value.[294]

210. The USDOC based this finding in part on statements from the New Brunswick Auditor General. In the first place, the New Brunswick Auditor General found that "the leverage of private mills as dominant consumers suppresses prices from private woodlots, and that those

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[292] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[293] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[294] Lumber Preliminary Decision Memorandum, pp. 21-22 (quoting *SC Paper from Canada – Expedited Review*) (Exhibit CAN-008).

suppressed private prices lead to an artificially low 'market-based' price for Crown stumpage."[295] Second, the New Brunswick Auditor General explained the following:

> The fact that the mills directly or indirectly control so much of the source of the timber supply in New Brunswick means that the market is not truly an open market. In such a situation it is not possible to be confident that the prices paid in the market are in fact fair market value...the royalty system provides an incentive for processing facilities to keep prices paid to private land owners low.[296]

211. The USDOC also "credited the conclusion in the *Report of the Auditor General – 2015*" that:

> [New Brunswick] has not complied with its responsibilities under the *Crown Lands and Forests Act*, because it has not enforced that *Act's* requirement that private woodlots maintain their proportional supply of the market over time (*i.e.*, that private woodlot owners had not sold a sufficient volume of standing timber relative to Crown-origin standing timber).[297]

212. The USDOC noted the Auditor General's conclusion that although New Brunswick "has mechanisms available to it to address shortfalls in purchases of wood from private woodlots . . . [New Brunswick] has 'never taken action under these sections of the *Crown Lands and Forests Act*.'"[298]

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[295] Lumber Preliminary Decision Memorandum, pp. 21-22 (citing *Report of the Auditor General – 2008*) (Exhibit CAN-008).

[296] Lumber Preliminary Decision Memorandum, pp. 21-22 (citing *SC Paper from Canada – Expedited Review* and *Report of the Auditor General – 2008*) (Exhibit CAN-008). NB The USDOC considered similar issues, parties, and provinces in a 2016 proceeding involving supercalendered paper ("SC Paper"). *See, e.g.*, Irving, "*SC Paper from Canada – Expedited Review* – New Brunswick Verification Report" (Exhibit CAN-441). In particular, during that proceeding the USDOC considered certain aspects of stumpage and thus, the analyses at issue in the current dispute contain extensive discussion of the parallel findings in SC Paper.

[297] Lumber Preliminary Decision Memorandum, pp. 21-22 (citing *SC Paper from Canada – Expedited Review* and *Report of the Auditor General – 2015*) (Exhibit CAN-008).

[298] Lumber Preliminary Decision Memorandum, pp. 21-22 (citing *SC Paper from Canada – Expedited Review* and *Report of the Auditor General – 2015*) (Exhibit CAN-008).

213. Based on this information, the USDOC concluded that the provincial government "held a majority share of the market for stumpage in New Brunswick, and that it restricted eligibility for Crown stumpage rights to companies that operate pulp and paper or lumber mills."[299]

214. The USDOC also found that "the evidence established that private woodlot owners accounted for a much smaller share of the New Brunswick stumpage market than the government and that . . . both private woodlot owners and the Crown are responsive to price-setting behavior by the dominant private mills."[300]

215. The USDOC also explained why it could not use the alternatives suggested by certain parties. In terms of other potential benchmarks proposed by the parties, the USDOC first considered "whether prices from New Brunswick satisfy the criteria to be used as tier-one benchmarks."[301] The USDOC examined prices submitted by New Brunswick in the form of "a study containing prices paid for private stumpage in [New Brunswick] for use as tier-one benchmarks."[302] However, the USDOC ultimately found "aspects of the stumpage systems in New Brunswick that lead us to conclude that there are no useable tier-one prices within the province."[303]

216. The USDOC also explained why it could not rely on information from a New Brunswick private stumpage price survey.[304] In particular, the USDOC discovered "significant concerns about the accuracy of the New Brunswick private stumpage price survey."[305] The USDOC explained that "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."[306] The omission is significant because, according to New Brunswick,

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[299] Lumber Preliminary Decision Memorandum, pp. 21-22 (citing *SC Paper from Canada – Expedited Review*) (Exhibit CAN-008).

[300] Lumber Preliminary Decision Memorandum, pp. 21-22 (citing *SC Paper from Canada – Expedited Review*) (Exhibit CAN-008).

[301] Lumber Preliminary Decision Memorandum, pp. 21-22 (Exhibit CAN-008).

[302] Lumber Preliminary Decision Memorandum, pp. 21-22 (Exhibit CAN-008).

[303] Lumber Preliminary Decision Memorandum, pp. 21-22 (Exhibit CAN-008).

[304] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[305] Lumber Final I&D Memo, Comment 28 (citing GNB Primary QNR Response at Exhibit NB-STUMP-11, p. 9) (Exhibit CAN-010).

[306] Lumber Final I&D Memo, Comment 28 (citing GNB Primary QNR Response at Exhibit NB-STUMP-11, p. 9) (Exhibit CAN-010).

this "represent[s] approximately 50 percent of the total (private) harvest in the province."[307] As a result, the USDOC concluded that:

> 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.[308]

217. Ultimately, the USDOC concluded that "that private stumpage prices in New Brunswick are distorted, and are not suitable for use as tier-one benchmarks."[309] The USDOC explained that it "found that private prices for standing timber in New Brunswick are not market-based, and, accordingly, we did not use these private prices as tier-one benchmarks in calculating the respondents' benefit from the provision of New Brunswick stumpage."[310] The USDOC instead relied on JDIL's own "purchases of standing timber from private lands in Nova Scotia as a benchmark for evaluating whether Crown-origin standing timber in New Brunswick was provided for [less than adequate remuneration]."[311]

(3) Canada Has Failed to Demonstrate that Rejecting New Brunswick Stumpage Prices Is Inconsistent with Article 14(d) of the SCM Agreement

218. Canada argues that prices in New Brunswick are not distorted by government influence in the lumber sector.[312] Canada's arguments lack merit. Canada argues that, in addition to the requirements of Article 14(d), a higher standard of evidence applies to the USDOC's benchmark determination because the Appellate Body has said that there are only "limited circumstances" in which it is appropriate to use benchmarks from a country other than the country of provision.[313] As discussed above, neither Article 14(d) nor the Appellate Body have suggested that a higher

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[307] Lumber Final I&D Memo, Comment 28 (citing GNB Primary QNR Response at Exhibit NB-STUMP-11, p. 9) (Exhibit CAN-010).

[308] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[309] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[310] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[311] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010).

[312] *See* Canada's First Written Submission, para. 529.

[313] *See* Canada's First Written Submission, para. 540.

standard should be applied when using benchmarks from within the country of provision, as the USDOC did here. Canada's formulation of the legal standard is incorrect.

219. Further, Canada misunderstands the USDOC's reasoning. The explanation of the price distortion in New Brunswick begins with an understanding of the administrative pricing mechanism and its interaction with the private prices observed in the province. Yet Canada's argument regarding New Brunswick overlooks that core element of the determination.[314] As noted above, the USDOC addressed New Brunswick's pricing mechanism in great detail. The USDOC explained that the price for Crown-origin timber is set administratively based on a formula set out in provincial law that is indexed to private prices. The USDOC also explained that the underlying private prices do not reflect freely determined independent transactions. Because the mills rely on the government as their primary source of stumpage, they can afford to make their private purchases on the basis of how those prices will impact the government pricing mechanism, rather than making private purchases as a matter of satisfying further demand. This mechanism serves as a lever for industry to ensure that the province continues setting low prices for the bulk of the remaining stumpage.

220. Canada further argues that, as a matter of law, the industry's involvement in the pricing mechanism is not relevant to the distortion analysis.[315] Canada argues instead that the USDOC's finding "that private sawmills dominated the consumption of standing timber in New Brunswick" is simply "a prevailing market condition" that, "by definition, cannot distort [the market price] for the purpose of an analysis under Article 14(d) of the SCM Agreement."[316] Canada's argument misses the point and misunderstands the relevant finding. In doing so, Canada misconstrues Article 14(d), stating, for example, that "[t]here are simply no grounds, whether in Article 14(d), or in economic theory, to consider the actions of private sawmills when determining whether the government presence in the market has distorted private market prices."[317] But Canada's assertion is contradicted by prior Appellate Body findings. For example, in *US – Carbon Steel (India)* the Appellate Body explained that the "examination may involve an assessment of the structure of the relevant market, including, the type of entities operating in that market, their respective market share, and any entry barriers."[318] The requisite analysis "will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority

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[314] *See* Canada's First Written Submission, paras. 569-573.

[315] *See* Canada's First Written Submission, paras. 567-569.

[316] Canada's First Written Submission, paras. 567, 569.

[317] Canada's First Written Submission, para. 573.

[318] *US – Carbon Steel (India) (AB)*, para. 4.157, footnote 754.

seeks so that it may base its determination on positive evidence on the record."[319] The USDOC's determination in this case evaluated the appropriate range of evidence.

221. Canada argues that the USDOC may only reject distorted prices when those prices are distorted due to the government's involvement in the market, and not when private forces distort the market.[320] Canada is wrong. The record demonstrates that, in the circumstances at issue, the USDOC had an objective basis to reject actual transaction prices as significantly distorted because of market dominance by a few consumers in conjunction with the government's price-setting approach in the market. Here, the USDOC determined that the combination of government presence in the market with the dominance of a few large customers significantly distorted private stumpage purchase prices in New Brunswick.[321] Canada grossly errs when it suggests that the USDOC exclusively considered the market distorted based on private forces. The USDOC was faced with a market in which the government constitutes a majority of the supply of the good and in which other circumstances contributed to the significant distortion of stumpage prices – including the significant market power exercised by three dominant consumers. In other words, the dominance of a few consumers in conjunction with government market share significantly distorted those prices. An actual transaction price that is significantly distorted due to private market forces in conjunction with government market share is no more market-determined than an actual transaction price that is significantly distorted purely due to government involvement in the market. Here, the distortion resulted from the government's majority market share in conjunction with the dominance of a few consumers.

222. Canada argues further that the evidence does not support the USDOC's explanation of the predominant role that mills played in the New Brunswick pricing mechanism.[322] Canada argues that there is no link between the mills' behavior, the Crown prices, and the private transactions. The USDOC's final determination, however, explains the link quite clearly. The USDOC found that the significant percentage of allocated Crown timber left un-harvested provided a fallback supply for tenure-holding mills when private prices exceeded Crown stumpage prices.[323] Because these mills were the predominant consumers of private-origin timber, by not purchasing sawlogs harvested from private woodlots by middlemen when those sawlog prices were more expensive than harvesting additional allocated Crown timber, those mills could exert downward pressure on the stumpage prices paid by those middlemen. It was reasonable, therefore, for the USDOC to conclude that these dominant mills could suppress

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[319] *US – Carbon Steel (India) (AB)*, para. 4.157.

[320] *See* Canada's First Written Submission, paras. 568-569.

[321] *See* Lumber Final I&D Memo, p. 83 (noting that it "considered the share of GNB production as one factor in evaluating whether the New Brunswick market is distorted") (Exhibit CAN-010).

[322] *See* Canada's First Written Submission, para. 573.

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

stumpage prices through both their direct purchases of stumpage from private woodlots and their indirect purchases of stumpage.

223. 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 47 percent "overhang" in the market, the ability of private parties including JDIL to import sawlogs, and the percentages of market share controlled by the three largest customers in the province by volume. These observations are also consistent with the *2012 Private Forest Task Force Report* and the reports by the Auditor General that support the USDOC's conclusion that a few dominant consumers suppress private prices.

224. Canada argues, however, that the reports only assumed that mills in New Brunswick had market power by virtue of being large purchasers.[324] The role of the private mills, however, is not merely an assumption. Rather, the reports that New Brunswick commissioned itself "provide[d] reliable analyses of facts pertaining to private stumpage prices in the province" and were prepared by "individuals who were familiar with the stumpage market in New Brunswick."[325] The analysis in the reports speaks for itself and directly demonstrates that the conclusions reached by the Auditor General (and the forest task force) are not simply assumptions.

225. Canada's characterization of the 2008 Auditor General report, in particular, is not credible and is contradicted on several grounds.[326] Indeed, the Auditor General stated in the "Conclusions" section of its report that "the flaws in the [timber royalty] system mean that the royalties do not reflect fair market value."[327] The report's conclusion that "the royalties do not reflect fair market value" took into account the fact that timber royalty rates in the province are set based on private prices in the province and thus is directly relevant to the USDOC's analysis. For example, the Auditor General stated that "[t]he fact that the mills directly or indirectly control so much of the source of timber supply in New Brunswick means that the market is not truly an open market."[328] This language is, plainly, stating facts (the mills control of the source of timber supply) and drawing conclusions (that the market is not truly open). Further, that this statement draws conclusions from facts is unsurprising, because this statement, and others upon which the USDOC relied were "in the 'Analysis' section of the report," and "were provided following a presentation of key facts (in the 'Understanding Royalty Timbers' section of the report) about the New Brunswick market. These key facts included details regarding the

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[324] *See* Canada's First Written Submission, para. 566. *See also ibid.*, paras. 567-573, 575, 581, and 582-587.

[325] Lumber Final I&D Memo, pp. 81-82 (Exhibit CAN-010).

[326] *See* Canada's First Written Submission, para. 566. *See also ibid.*, paras. 567-573, 575, 581, and 582-587.

[327] *Report of the Auditor General – 2008*, para. 5.14 (Exhibit CAN-282).

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

percentage of land holdings, the total harvest volume, the royalty fees paid, as well as a discussion of the process to set royalty rates."[329]

226. Paragraphs 5.35. 5.36, and 5.37 of the 2008 Auditor General report, read together, further demonstrate that Canada's assertion is wrong. In paragraph 5.35 of the report, the Auditor General states:

> As we have already described, timber royalties are based on a survey of the stumpage prices received by private landowners – a segment of the market that supplied 11.6% of the timber consumed by mills in New Brunswick in the fiscal year ended 31 March 2007. The price that is paid to the private landowners determines the price the mills will pay to the Province for timber harvested from Crown land which represents 41.5% of their source of supply. This would provide an incentive for the mills to keep the prices paid to private landowners as low as possible since those prices affect the royalties that would have to be paid in the future.[330]

227. This paragraph illustrates that, in the "Analysis" section of the report, the Auditor General is taking facts (the setting of timber royalties and mills' percentage of Crown supply) and drawing conclusions (that the timber royalty system, in conjunction with the percentage of timber that mills sourced from Crown land, would incentivize mills to keep prices for private timber low).

228. In paragraph 5.36, the Auditor General concludes that, because "the mills directly or indirectly control so much of the source of timber supply in New Brunswick . . . it is not possible to be confident that the prices paid in the market are in fact fair market value."[331]

229. Paragraph 5.37 then reads:

> This flaw in the design of the system for establishing timber royalties could create a second problem. Under subsection 3(2) of the *Crown Lands and Forests Act*, "The Minister shall encourage the management of private forest lands as the primary source of timber for wood processing facilities in the Province..." If however the royalty system provides an incentive for processing facilities to keep prices paid to private land owners low, the result may be fewer private land owners who are willing to supply timber

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

[330] *Report of the Auditor General – 2008*, para. 5.35 (underline added) (Exhibit CAN-282).

[331] *Report of the Auditor General – 2008*, para. 5.36 (underline added) (Exhibit CAN-282).

> to New Brunswick mills. Crown land would then become a greater source of supply thereby creating an obstacle to the Minister in attempting to encourage private sources as the primary source of supply.[332]

230. Thus, this paragraph takes two conclusions already reached by the Auditor General – that "it is not possible to be confident that the prices paid in the market are in fact fair market value,"[333] and that "the royalty system provides for an incentive for processing facilities to keep prices paid to private landowners low," discussed at paragraph 5.35 – and further concludes that, because of those two market dynamics, "Crown land would [in the future] . . . become a greater source of supply," thereby impeding the provincial authority in executing its statutory directive to encourage private stumpage as the primary source of timber.[334]

231. When the USDOC quoted the report's conclusion in paragraph 5.37 that "the royalty system provides an incentive for processing facilities to keep prices paid to private land owners low," the USDOC was quoting a conclusion that mirrors the very same conclusion reached only two paragraphs earlier in paragraph 5.35.[335] The USDOC reasoned, accordingly, that the *Report of the Auditor General – 2008* reached conclusions that stumpage prices paid in the province could not be "confident[ly]" deemed to be fair market value, and that "[t]he royalty system provides an incentive for processing facilities to keep prices paid to private landowners low."[336] This analysis by the USDOC and the analysis contained in the Auditor General's report go far beyond mere assumption.

232. In addition to the pricing mechanism and the mills' role as the dominant consumer, the evidence of supply overhang further supports these findings. Canada's characterization of oversupply as insufficient to meet demand is not correct.[337] Canada argues, in particular, that the USDOC should have focused on the connection between market demand and Crown supply, because without non-Crown sources, Crown timber could not replace the quantity of lost non-Crown timber.[338] However, Canada does not dispute the existence of the overhang. Rather, Canada argues that the overhang was not relevant because lumber producers make their purchasing decisions based on whether they can purchase enough to meet all or a majority of

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[332] *Report of the Auditor General – 2008*, para. 5.37 (Exhibit CAN-282) (underline added).

[333] *Report of the Auditor General – 2008*, para. 5.36 (Exhibit CAN-282).

[334] *Report of the Auditor General – 2008*, para. 5.37 (Exhibit CAN-282).

[335] *See* Lumber Final I&D Memo, p. 81 (quoting *Report of the Auditor General – 2008*, para. 5.37) (Exhibit CAN-010).

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

[337] *See* Canada's First Written Submission, paras. 541-542.

[338] *See* Canada's First Written Submission, paras. 541-542.

their demand needs.[339] But Canada misunderstands the point. The USDOC found the "overhang" percentage to be relevant because "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."[340] Accordingly, "private woodlot owners mainly served as a supplemental source to large mills and, thus, could not expect to charge more than Crown stumpage prices."[341]

233. Canada further argues that the volume of logs imported into New Brunswick demonstrates "openness" in the market for timber in the province and therefore suggests that prices are not distorted.[342] But Canada's argument overlooks the USDOC's finding that, in this regard, "a significant volume of the imports was comprised of JDIL's imports from its own privately held land in Maine [meaning that] these imports did not represent arm's-length transactions."[343] As a result, the USDOC found that, rather than demonstrating the "openness" of the market, the percentage of log imports into the province was "another indication that the large mills can obtain timber from several sources other than private woodlot owners in New Brunswick (including, in JDIL's case, from its own private holdings in other jurisdictions) if private woodlot owners in New Brunswick do not price their timber at sufficiently low prices."[344]

234. Canada also makes a number of arguments relating to stumpage as a residual value.[345] These arguments, however, do not contradict the USDOC's findings. For example, Canada argues that the geographical composition of the province's stumpage market undercut the ability of Crown rates to influence private prices to the mills because, for instance, many private woodlots are located within 70 kilometers of two or more mills.[346] But these observations are irrelevant in light of the USDOC's findings regarding the dominant consumers. Specifically, the USDOC (and the New Brunswick Auditor General) determined that dominant consumers can source cheaper timber from Crown lands, and have an incentive to source only cheap timber –

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[339] *See* Canada's First Written Submission, paras. 541-542.

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

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

[342] *See* Canada's First Written Submission, paras. 562-564.

[343] Lumber Final I&D Memo, p. 84 (also noting that, "in *SC Paper from Canada – Expedited Review*, the Department found that JDIL is the largest landowner in Maine.") (Exhibit CAN-010).

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

[345] *See* Canada's First Written Submission, paras. 542-543.

[346] *See* Canada's First Written Submission, para. 547.

not close-by timber – from private woodlots.[347] In other words, the USDOC found that the availability of additional supply is indeed sufficient to influence the relative demand.

235. Canada argues separately that the Panel should find error with the USDOC's determination to reject the prices in the New Brunswick Private Stumpage Survey as a potential benchmark for Crown stumpage purchases in the province.[348] However, as the USDOC explained, the survey omits "the volume of timber harvested from primary forest produced by woodlot owners/operators [and] the volume of stumpage sold through lump-sum transactions," which, together, the Government of New Brunswick estimated to represent "approximately 50 percent of the total (private) harvest in the province."[349] The USDOC concluded that the survey was "incomplete," its results "skewed by the survey's exclusion of these transactions," and, thus, "not an accurate source against which to compare the Crown stumpage prices."[350]

236. Canada attempts to justify the omission of the transactions, but fails to demonstrate that the survey was meaningful without them.[351] The USDOC had a sufficient evidentiary basis to conclude that the survey was "not an accurate source against which to compare the Crown stumpage prices."[352] The USDOC explained that it had "significant concerns about the accuracy of the New Brunswick private stumpage price survey" which the Canadian parties failed to resolve.[353] In particular, the USDOC emphasized that 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."[354] When the USDOC asked New Brunswick about the excluded transactions, the government explained that "these two types of transactions represent approximately 50 percent of the total (private) harvest in the province."[355] The USDOC took this response into account and concluded that "the survey is incomplete, and the results of the survey are skewed by the survey's exclusion of [a significant volume] of transactions."[356]

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

[348] *See* Canada's First Written Submission, paras. 588-594.

[349] Lumber Final I&D Memo, p. 84 (Exhibit CAN-010). *See also* Lumber Final I&D Memo, pp. 86-87 (determination that the New Brunswick private stumpage market is distorted) (Exhibit CAN-010).

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

[351] *See* Canada's First Written Submission, paras. 588-594.

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

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

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

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

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

237. For all of these reasons, an unbiased and objective investigating authority could have reached the conclusion – as the USDOC did – that there were no market-determined private prices for stumpage in New Brunswick that could be used for benchmarking purposes.

b. Stumpage Provided by Quebec: Private Market Stumpage Prices in Canada Are an Appropriate Benchmark under Article 14(d) of the SCM Agreement

(1) Investigative Process for Quebec

238. The investigative process for Quebec stumpage proceeded as follows. On January 19, 2017, the USDOC issued its CVD investigation questionnaire to the provincial government in Quebec requesting information regarding the alleged subsidies under investigation.[357] The USDOC also issued an addendum to the Initial Questionnaire regarding stumpage for Quebec on January 31, 2017.[358] As part of its standard CVD questionnaire, the USDOC solicits information regarding the government entities responsible for administering the alleged subsidy programs, the nature of the programs, and the history of distributions under each of the programs at issue. For each specific type of subsidy, the government CVD questionnaire instructs respondents to complete a standard annex form tailored to the relevant subsidy type.

239. The USDOC received Quebec's response to the Initial Questionnaire and its addendum on March 15, 2017.[359] On March 16, 2017, the USDOC received responses to the Standard Questionnaire Appendix concerning Quebec's stumpage program.[360]

240. The USDOC subsequently sent supplemental questionnaires to Quebec on March 21, 2017.[361] Quebec provided its response to the supplemental questionnaires on April 3, 2017.[362]

241. The questionnaire responses provided several key pieces of evidence, including evidence of Quebec's timber supply guarantee program and the more recently developed government auction program. Quebec reported that 73 percent of the stumpage harvest during the relevant period was provided by the provincial government.[363] The provincial government reported that,

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[357] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[358] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[359] *See* GOQ QR (Exhibit CAN-170).

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

[361] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing Supplemental Questionnaire – GBC; Supplemental Questionnaire – GOC-I) (Exhibit CAN-008).

[362] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing GOQ – Refile Stumpage Report I and GOQ – Refile Stumpage Report II) (Exhibit CAN-008).

[363] GQRGOQ at Table 7 (Exhibit CAN-170).

for the relevant period, the breakdown of the stumpage harvest was as follows: 51 percent directly provided by the government via timber supply guarantees ("TSGs"), 22 percent provided by the government via auction of government-owned standing timber, 15 percent purchased from private parties, and 11 percent was accounted for by logs imported from the United States and other Canadian Provinces.[364]

242. Quebec sets prices administratively through two mechanisms.[365] The first mechanism takes the form of directly administered prices set by the provincial government.[366] The second mechanism takes the form of a public auction.[367] Historically, Quebec's stumpage system relied on a comparative pricing system based on annual surveys and a tri-annual census of standing timber sales in private forests to determine the value of timber on Crown land.[368] Prior to a policy change in 2010, stumpage rates were based on the prices collected in those surveys and censuses after making adjustments to account for the species and quality of the standing timber, operating costs, and harvesting costs (*e.g.*, slope and soil conditions).[369] Tenure-holding mills paid stumpage fees for the standing timber they harvested and were responsible for forest planning and silviculture work.[370] When the new policy plan was implemented, Quebec provided for tenure-holding mills to apply for a TSG through which they could secure up to 75 percent of the standing timber volume granted under their old tenure.[371] The remaining 25 percent of the volume of standing timber that was held back from TSGs was used to establish the volume of standing timber sold via public auction in Quebec.[372]

243. Quebec submitted pre-preliminary comments on April 13, 2017.[373]

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[364] GQRGOQ at Table 7 (Exhibit CAN-170).

[365] *See* Lumber Preliminary Decision Memorandum, pp. 23-24 and 39-40 (citing GQRGOQ, pp. QC-S-2 and QC-S-30) (Exhibit CAN-008).

[366] *See* Lumber Preliminary Decision Memorandum, pp. 23-24 and 39-40 (citing GQRGOQ, pp. QC-S-2 and QC-S-30) (Exhibit CAN-008).

[367] *See* Lumber Preliminary Decision Memorandum, pp. 23-24 and 39-40 (citing GQRGOQ, pp. QC-S-2 and QC-S-30) (Exhibit CAN-008).

[368] Lumber Preliminary Decision Memorandum, pp. 23-24 (citing GQRGOQ, p. QC-S-1) (Exhibit CAN-008).

[369] Lumber Preliminary Decision Memorandum, pp. 23-24 (citing GQRGOQ, p. QC-S-2) (Exhibit CAN-008).

[370] Lumber Preliminary Decision Memorandum, pp. 23-24 (citing GQRGOQ, p. QC-S-30) (Exhibit CAN-008).

[371] Lumber Preliminary Decision Memorandum, pp. 23-24 (citing GQRGOQ, p. QC-S-30) (Exhibit CAN-008).

[372] Lumber Preliminary Decision Memorandum, pp. 23-24 (citing GQRGOQ, p. QC-S-30) (Exhibit CAN-008).

[373] *See* Lumber Preliminary Decision Memorandum, p. 2 (citing Quebec – Pre-Preliminary Determination Comments (April 13, 2017)) (Exhibit CAN-008).

244. After disclosing its preliminary findings, the USDOC officials conducted an on-site verification of Quebec from June 19, 2017, through June 22, 2017.[374] Among findings of note, the USDOC found that TSG-holding corporations in Quebec may shift timber amongst themselves, reducing their need to purchase timber from non-Crown sources. Quebec officials explained that, pursuant to sections 92 and 93 of the *Sustainable Forest Development Act*, TSG-holders in Quebec are permitted to shift TSG-allocated Crown timber among affiliated sawmills and between unaffiliated corporations.[375] According to Quebec, the *Sustainable Forest Development Act* allows TSG-holders are permitted to transfer, annually, up to 10 percent of the total volume harvested under their TSGs without government approval, and recipient mills may receive up to 10 percent of their total TSG-allocated volume annually without government approval. The verification also helped clarify the volume of stumpage Quebec seeks to supply through auction sales.[376] In particular, the USDOC learned that the first 100,000 cubic meters of a mill's residual need is exempt from the amount of timber (generally, 25 percent) withheld by the provincial authority for auction.[377] Furthermore, USDOC officials conducted an onsite verification of Resolute, including its purchases of stumpage in Quebec, from June 26, 2017 through June 29, 2017.[378] As explained above, the information examined at verification became an integral part of the administrative record, as reported in these Quebec verification reports.[379]

(2) Findings for Quebec

245. The USDOC determined, as a result of its investigation, to measure the adequacy of remuneration for stumpage provided by Quebec using market-determined prices from Nova Scotia as a benchmark. The USDOC found that it could not use Quebec prices as a benchmark because the provincial government's predominance in the market, combined with the factors discussed below, resulted in price distortions that would generate a circular comparison and, therefore, would not serve as a meaningful benchmark.

246. In reaching this conclusion, the USDOC considered a number of factors. These included the government's market share, the structure of the relevant market, the types of entities operating in that market (and their behavior), as well as any entry barriers or other impediments or price-influencing factors. The USDOC considered these factors using the approach outlined in its three-tiered hierarchy for analyzing potential benchmarks.

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

[375] GOQ Verification Report (Exhibit CAN-184).

[376] GOQ Verification Report (Exhibit CAN-184).

[377] GOQ Verification Report (Exhibit CAN-184).

[378] *See* Resolute Verification Report (Exhibit CAN-174 (BCI)).

[379] *See* GOQ Verification Report (Exhibit CAN-184); Resolute Verification Report (Exhibit CAN-174 (BCI)).

247. In terms of government market share, 73 percent of the stumpage harvest during the relevant period came from stumpage provided by the government.[380] The USDOC found that the breakdown of the stumpage harvest was as follows: 51 percent directly provided by the government via timber supply guarantees, 22 percent provided by the government via auction of government-owned standing timber, 15 percent purchased from private parties, and 11 percent was accounted for by logs imported from the United States and other Canadian Provinces.[381]

248. As noted by the Appellate Body, the focus of the analysis is not on the source of the price, but rather on determining whether there is price distortion.[382] In parallel fashion, the USDOC explained that, according to its hierarchy, it would further consider government prices to assess whether market principles nevertheless determined the relevant prices.

(a) Government Auction Prices

249. In considering Quebec's auction prices, the USDOC emphasized that, under its regulations, the USDOC "will only use actual sales prices from competitively run government auctions as a tier-one benchmark."[383] However, the USDOC "verified that timber purchased at the auctions must be milled within Quebec," which serves as "a substantial restriction that demonstrates that the Quebec auction is not an open, competitively run auction."[384] The USDOC explained further that:

> This restriction effectively excludes potential bidders that would mill the timber outside of Quebec, and would exclude bidders that would want to sell the timber (either harvested, or the harvested logs) for milling outside of the province. Furthermore, limiting bidders suppresses auction bids, because bidders understand that there are fewer parties against which their bid will compete. Thus, instead of implementing an auction based solely on an open, market-based competitive process, the [government of Quebec ("GOQ")] created an auction based upon a government-implemented policy to ensure that the timber is milled within the province. Therefore, even if the Quebec stumpage market was not

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[380] Lumber Preliminary Decision Memorandum, p. 39 (Exhibit CAN-008); Lumber Final I&D Memo, p. 99 and footnote 593 (citing Quebec Final Market Memorandum at Table 7.1 and Table 7.2) (Exhibit CAN-010).

[381] Lumber Preliminary Decision Memorandum, p. 40 (GQRGOQ at Table 7) (Exhibit CAN-008).

[382] *See generally US – Carbon Steel (India) (AB)*, paras. 4.151-159 and 4.167; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

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

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

> distorted, the Quebec auction prices would not meet the regulatory criteria as an appropriate benchmark . . . .[385]

250. Thus, under these circumstances, the USDOC ultimately concluded that Quebec's auction was not "based solely on an open, market-based competitive process."[386]

251. With regard to the entities operating in the market and their behavior, the USDOC observed that a few major players accounted for the majority of purchase and consumption volumes.[387] The USDOC confirmed in the final determination that the "largest TSG-holding corporations are not only active in the auction system, but are the predominant buyers of auctioned Crown timber and, therefore, are influencing the auction prices.[388]

252. The USDOC "additionally verified that TSG holders are not required to purchase all of their annual TSG allocation volumes, and are not required to harvest all the Crown-origin timber that they purchase in a given year."[389] Indeed, the USDOC noted that a significant percentage of the softwood sawlog volume that was put up for auction in 2015 did not sell.[390] The USDOC likewise took into account the fact that "TSG-holders in Quebec are permitted to shift allocated Crown standing timber volumes among affiliated sawmills and between corporations," and that "that the ability of corporations to shift tenure allocations among sawmills reduces the need of TSG-holding corporations to source from non-Crown sources such as the auction and private market."[391] The USDOC considered that this market configuration tended to indicate that prices are not freely determined. The USDOC explained that "under a TSG [timber supply guarantee], a sawmill can source up to75 percent of its supply need at a government-set price,"[392] and thus "there is strong motivation for a sawmill to treat its TSG-guaranteed volume as its primary

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

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

[387] Lumber Preliminary Decision Memorandum, pp. 40-41 (Exhibit CAN-008).

[388] Lumber Final I&D Memo, p. 101 (citing Quebec Final Market Memorandum at Table 20.2) (Exhibit CAN-010).

[389] Lumber Final I&D Memo, p. 101 (citing Quebec Final Market Memorandum at Table 20.2) (Exhibit CAN-010).

[390] Lumber Preliminary Decision Memorandum, p. 41 (Exhibit CAN-008). Following verification, the USDOC confirmed that the "verified unsold volume of timber offered at auction was approximately 15 percent, and not 32.3 percent." Lumber Final I&D Memo, Comment 35, pp. 101-102 (Exhibit CAN-010). The USDOC nevertheless found "that 15 percent is a significant amount of unsold timber" and that the "unsold timber is an additional sign that TSG-holding corporations and non-sawmills may not be making aggressive bids above TSG prices." Lumber Final I&D Memo, pp. 101-102 (Exhibit CAN-010).

[391] Lumber Preliminary Decision Memorandum, p. 41 (Exhibit CAN-008).

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

source of supply and its auction volume as an additional or residual supply source."[393] The USDOC found that:

> Evidence on the record shows that approximately 94 percent of TSG-holders purchased all of their allocated Crown timber in FY 2015-2016. These data indicate that sawmills consider their TSGs to be their primary source of wood and not a source for their residual needs . . . . Further, in contrast to the roughly 75 percent of a TSG-holding mill's supply need that it may purchase through TSGs, the same mills source comparatively little Crown-origin timber through [Timber Marketing Board (BMMB)] auctions. Record evidence for processed wood during FY 2015-2016 indicates that, in aggregate, TSG-holding sawmills sourced just 20.6 percent of their Crown supply from the auction.[394]

253. Based on the foregoing, the USDOC "determine[d] that the prices paid for Crown-origin standing timber allocated directly to TSG-holding corporations affects the prices paid in the auction system, such that . . . the GOQ's auction prices are not market-based, and therefore, are not suitable as a tier-one benchmark."[395]

(b) Market Structure and Behavior of Participants

254. With regard to the implications of the market structure and the behavior of the major participants, the USDOC explained that "the consumption of TSG-allocated Crown timber is concentrated among a small number of corporations" and "thus [the USDOC] evaluated whether the auction system operates independently of the Crown timber allocation system."[396] The USDOC analyzed this question "by examining the extent to which the TSG-holding sawmills are not also active in the auction system" – in other words, by examining whether the same companies dominated both modes of purchase.[397] The USDOC found, after undertaking this

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

[394] Lumber Final I&D Memo, pp. 99-100 (citing GOQ Primary QNR Response at Exhibit QC-STUMP-9 (Table 18); GOQ Primary QNR Response, pp. 44-45, and Exhibits QC-Stump 19 and 20; and Quebec Final Market Memorandum at Table 20.3) (Exhibit CAN-010).

[395] Lumber Preliminary Decision Memorandum, p. 42 (Exhibit CAN-008).

[396] Lumber Final I&D Memo, p. 100 (citing Quebec Final Market Memorandum at Table 20.2) (Exhibit CAN-010). *See also* Lumber Preliminary Decision Memorandum, p. 41 (Exhibit CAN-008).

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

analysis, that the "data indicate that the same corporations dominate both the consumption of TSG-allocated Crown timber and the purchase of auctioned Crown timber."[398]

255. The USDOC confirmed that:

> Notwithstanding the clarifications obtained at verification, the observations made at the Preliminary Determination remain significant and informative. When taken in totality, those observations continue to illustrate that the auction prices are not market-based and, thus, cannot serve as a tier-one benchmark.[399]

256. The USDOC explained further that "information on this record shows that the Quebec stumpage market is distorted because the majority of the market is controlled by the government, which provides long-term timber supply rights at administratively set prices to only firms that process the logs within the province," and "because other circumstances (including the provincial mandate that logs harvested in the province be processed in the province) serve to decrease firms' incentive to pay above that administratively-set price for private timber or to bid above that administratively-set price at auction."[400]

257. The USDOC reasoned that "there is little incentive for the TSG-holding corporations to bid for Crown timber above the TSG administered price when those corporations do participate in an auction."[401] Rather, "[a]s noted . . . under a TSG, a sawmill can source up to 75 percent of its supply need at a government-set price."[402] The USDOC's examination of the evidence at verification confirmed this observation. In particular, the USDOC emphasized that it "verified that the first 100,000 m^3 of a mill's residual need is exempt from the . . . 25 percent auction ratio" and, "[a]s a result, certain mills are sourcing more than 75 percent of their supply needs via TSGs."[403] Additionally, "a sawmill can obtain additional wood at the government-set price via transfers from other sawmills and the sale of unharvested timber" obtained from the government.[404]

258. Ultimately, the USDOC found that "[t]his evidence indicates that, given the large supply of Crown timber in the stumpage market, Crown timber is the price maker" and "there is little

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[398] Lumber Final I&D Memo, p. 100 (citing Quebec Final Market Memorandum at Table 20.2) (Exhibit CAN-010).

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

[400] Lumber Final I&D Memo, p. 98 (Exhibit CAN-010).

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

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

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

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

reason for non-sawmills (*i.e.*, independent bidders) to bid for timber in the auctions above the TSG administered price."[405] The USDOC also took into account the fact that "the timber purchased at the auctions must be milled in Quebec"[406] and reasoned that "the non-sawmills must be selling the timber they purchase at the auctions to the TSG-holding sawmills."[407] In turn, because "the sale of timber by the non-sawmills is competing with the timber available to sawmills at the guaranteed government price via the TSGs," the USDOC observed that "the non-sawmills have little motivation to bid for timber at a price above which they can sell the wood to the sawmills."[408] The USDOC found that "[t]hese circumstances indicate that the TSG-holding corporations wield considerable market power in the auction system and, consequently, the reference market (here, the auction) does not operate independently of the administered market."[409]

(c) Private Sales

259. The USDOC also explained why it could not use the alternatives suggested by certain parties. First, with respect to purely private sales, the USDOC explained that:

> the GOQ did not provide pricing information for timber sales from the private forest for use as a possible benchmark in this investigation. We thus lack the necessary pricing data and cannot address whether private sales could serve as a possible benchmark for sales of Crown timber in Quebec. Further, even if prices for private-origin standing timber in Quebec were available, our finding that the stumpage market in Quebec is distorted would disqualify such private prices from use as a tier-one benchmark.[410]

260. The USDOC explained that "where it is reasonable to conclude that prices in that market are significantly distorted as a result of the government's involvement in that market, the Department will not use the prices within that market."[411] Accordingly, "when information on the record indicates that the government is involved in the market, before determining whether it is appropriate to use prices from within that market, the Department must determine whether that

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

[406] Lumber Final I&D Memo, p. 101 (citing GOQ Verification Report, p. 18) (Exhibit CAN-010).

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

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

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

[410] Lumber Final I&D Memo, p. 105 (Exhibit CAN-010). *See also* Lumber Preliminary Decision Memorandum, p. 42, footnote 286 (Exhibit CAN-008).

[411] Lumber Final I&D Memo, p. 98 (Exhibit CAN-010).

market is distorted due to the presence of the government."[412] If, under the circumstances, "it is determined that the market is distorted by the presence of the government," then "prices between private parties, import prices, or government auction prices are no longer viable benchmark prices."[413]

261. Thus, with respect to the circumstances in Quebec, the USDOC explained that:

> evidence on the record leads us to conclude that the Quebec stumpage market is distorted because the auction prices for Crown timber track the prices charged for Crown timber allocated to TSG-holding sawmills. Importantly, in reaching our distortion finding, we are not determining that the prices of auctioned, or private-origin, timber are the same as the prices for TSG-sourced standing timber. Rather, in making the distortion finding, we conclude that the prices for standing timber in the auction and private forest track the prices charged for TSG-sourced timber. Although firms, such as Resolute, may ultimately purchase auction or private timber at prices that are higher than those charged for TSG-sourced timber, the evidence on the record indicates that the auctioned or private timber prices are not independent of the prices charged in the public forest.[414]

262. The USDOC concluded that, ultimately, "the totality of the evidence on the record leads us to conclude that the auction prices for Crown timber track the prices charged for Crown timber allocated to TSG-holding sawmills and, thus, the auction prices for Crown timber are not viable tier-one benchmarks."[415] Based on its determination that the market is distorted by the presence of the government, the USDOC determined that prices between private parties, import prices, and government auction prices were no longer viable benchmark prices.[416]

(d) Information from Canadian Consultants

263. Second, the USDOC also rejected the arguments of Quebec and the Canadian producers with respect to the so-called expert reports on which they sought to rely. The USDOC explained:

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[412] Lumber Final I&D Memo, p. 98 (Exhibit CAN-010).

[413] Lumber Final I&D Memo, p. 98 (Exhibit CAN-010).

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

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

[416] Lumber Final I&D Memo, p. 98 (Exhibit CAN-010).

> Under the CVD regulations, while we recognize that some government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government constitutes a majority or, in certain circumstances, a substantial portion of the market. Neither the Kalt Report nor the Stoner & Mercurio Report provide any analysis of actual prices within the Quebec stumpage market, nor do these reports provide any analysis of the actual government presence and involvement within the Quebec market as required as part of any distortion analysis.[417]

264. The USDOC explained further that:

> The Marshall Report does not reference the language and requirements of the statute and the CVD regulations, but rather provides an analysis of auction prices in Quebec. However, under [the USDOC's regulation], government auction prices can only be used as a benchmark if the auction is based solely on an open, competitively run process. As noted above, the GOQ auction does not meet the regulatory requirements of an open, competitively run auction because the GOQ requires that all timber sold at auction must be milled within Quebec. Therefore, the Marshall Report is also not relevant with respect to whether the Quebec auction can serve as a benchmark.
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> Furthermore, the Marshall Report did not provide any analysis of Quebec auction prices to stumpage prices from markets that have previously been found not to be distorted such as private prices from the Atlantic Provinces in Canada and stumpage prices in the United States to support a statement that the auction prices are not distorted by the government presence within the Quebec market.
>
> Nor did the Marshall Report analyze all of the bid prices submitted in the auction, both losing and winning bids, with a comparison between TSG-holders and non-TSG-holders. The Marshall Report at paragraph 69 and footnote 72 states that the auctions are open to bidders from all regions and does not exclude or otherwise discriminate against potential exporters. However, as discussed above, the Department verified that harvested timber from the

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

> auction must be processed in Quebec; this restriction necessarily limits bidders.[418]

265. The USDOC concluded that "[a]lthough Quebec's auction system displays several competitive features, the observations outlined above lead us to conclude that the prices paid for Crown timber allocated directly to TSG-holding corporations affects the prices paid in the auction system, such that the auction does not yield prices free of distortion."[419] The USDOC explained, therefore, that the reports of Canada's consultants did not warrant a different conclusion.

(3) Canada Has Failed to Demonstrate that Rejecting Quebec Stumpage Prices Is Inconsistent with Article 14(d) of the SCM Agreement

266. In its first written submission, Canada argues that prices in Quebec are not distorted by government influence in the lumber sector and that the USDOC should have used prices from Quebec's timber auctions as the benchmark for stumpage provided by Quebec.[420] Canada's arguments lack merit. Canada argues that the USDOC found "*per se*" distortion because of the government's presence in the market with respect to TSG tenures.[421] But as discussed above in section II.B, Canada's argument is based on an incorrect legal standard. Even aside from this basis, which is sufficient in itself to reject Canada's claim, that claim would fail for the additional reason that the USDOC's determination satisfied all of the purported requirements for a finding of price distortion. Canada has failed to demonstrate that an unbiased and objective investigating authority could not have concluded, as the USDOC did, that there were no market-determined private prices for stumpage in Quebec that could be used for benchmarking purposes.

(a) Government Auction Prices and Canadian Consultants' Reports

267. Canada argues that the government auction prices should have been selected as a market-determined benchmark, but Canada's argument is based on several invalid premises.[422] In particular, Canada repeatedly describes the government's market share as if it were comprised only of TSG stumpage when, in reality, the government's market share also includes the stumpage it sells at auction. Canada relies on a false distinction between the two types of government stumpage – auction prices and TSG tenures. That is, Canada's arguments assume as their starting point that government auction prices are market-determined and thus somehow free

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[418] Lumber Final I&D Memo, p. 104 and footnote 629 (citing GOQ Verification Report at 18) (Exhibit CAN-010).

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

[420] *See* Canada's First Written Submission, paras. 407, 417-427.

[421] *See* Canada's First Written Submission, paras. 410-420.

[422] *See* Canada's First Written Submission, paras. 407, 409, 414-15.

from government influence. However, as the USDOC explained, the auction pricing mechanism is distorted by the influence of the predominant consumers which in turn distorts the resulting TSG price which is based on the prices generated at auction. When Canada argues that Quebec has no market power because the TSG prices are linked to the auction prices, Canada misses the point of the inquiry. The manner in which government predominance may distort prices is not limited to the exercise of market power. Likewise, Canada's argument that TSG stumpage does not account for 100 percent of the mills' needs does not speak to whether prices are distorted through the combination of TSG and auction pricing policies.

268. Canada also disputes the relevance of the USDOC's finding that a significant volume of timber offered at auction did not sell during the period of investigation.[423] Canada suggests that the unsold stumpage does not represent oversupply, but rather is the intended result of the auction design.[424] In the first place, Canada does not identify any evidence to support its argument. In the second place, Canada has mischaracterized the USDOC's finding with respect to this issue by overstating the importance the USDOC placed on the apparent oversupply. The USDOC found that the evidence of oversupply was consistent with its overall assessment of the government's pricing policies, but did not, as Canada suggests, find that unsold stumpage itself demonstrated the price distortion.

269. Canada relies heavily on the consultant report it produced for this proceeding to argue that the Quebec stumpage auction is competitively-run.[425] In the first place, the report has little probative value in light of the several important flaws the USDOC identified in the report during the underlying investigation. As the USDOC noted, Canada's consultant was commissioned to produce this report for the purpose of opposing the USDOC's analysis.[426] The USDOC took this fact into account when weighing the report against other similarly-commissioned reports (including those submitted by the U.S. domestic industry) and competing record evidence maintained in the ordinary course of business.[427] Further, as a technical matter, the report failed to conduct certain comparative analyses which would have readily shown why the report's assertions are not probative. For example, the Marshall Report failed to "provide any analysis of Québec auction prices to stumpage prices from markets that have previously been found not to be distorted … to support a statement that the auction prices are not distorted by the government presence within the Québec market."[428] Neither did the report "analyze all of the bid prices

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[423] *See* Canada's First Written Submission, paras. 448-449.

[424] *See* Canada's First Written Submission, paras. 448-449.

[425] *See, e.g.,* Canada's First Written Submission, paras. 415 and 420.

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

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

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

submitted in the auction, both losing and winning bids, with a comparison between TSG-holders and non-TSG-holders."[429]

270. The report instead focused largely on the auction system itself. However, in this regard, the report was misleading in its statements regarding the open and competitive nature of Quebec's auction system. The consultant contends that auctions are "open to bidders from any region or jurisdiction" because, "as a matter of law, any potential exporter may submit a bid in the auctions."[430] However, the USDOC verified that, while a potential exporter may, legally, bid on an auctioned block of timber, it may not export that timber for processing, thus lowering its incentive to participate – and thereby undermining the report's contention that the auction system does not limit bidders.[431] The USDOC found, rather, that "because the GOQ requires that all timber sold at auction must be milled within Québec," these government auctions do not achieve "an open, competitively run process" and the prices they yield cannot serve as an appropriate benchmark.[432]

271. Second, the report's comparison of the auction system to itself is circular. That is, to opine on whether the Quebec timber auction yields competitive, market-based prices, the report essentially compared the auction bids to each other. For example, "to evaluate whether holders of supply guarantees depress their bids," the report "compare[d] their winning bids to the winning bids of bidders that do not hold supply guarantees."[433] However, as the USDOC discussed (and found), non-TSG-holders do not have an incentive to bid above TSG-administered prices because non-sawmill harvesters of auctioned timber must sell the timber purchased at auction to TSG-holding sawmills.[434] The USDOC, thus, reasonably determined that the winning bids made by non-TSG-holders, as presented in the consultant's analysis, were not a useful comparator for whether Quebec, through its TSG system, distorted the stumpage market.[435] Indeed, if non-TSG-holders expect to sell timber won at auction to TSG-holders, and expect to make a small profit, the report's conclusion that non-TSG-holders winning bids are slightly lower (but not statistically significantly lower) than TSG-holders' winning bids is

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

[430] Quebec, "Report of Robert C. Marshall" (Exhibit QCSTUMP-78) ("Marshall Report"), para. 69 & footnote 72 (Exhibit CAN-171 (BCI)).

[431] *See* Lumber Final I&D Memo, pp. 101, 103-104 (Exhibit CAN-010).

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

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

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

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

unsurprising. Non-TSG-holders know what TSG-holders are willing to pay at auction, and bid below that with the expectation of making a small profit off of timber won.[436]

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

273. Third, the USDOC found that the report failed to "analyze all of the bid prices submitted in the auction, both losing and winning bids, with a comparison between TSG-holders and non-TSG holders."[437] 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.

274. Fourth, and finally, it is uncontested that, by law, harvested Crown timber may not be exported from Quebec for milling outside of the province.[438] As a result of the export restriction, Quebec's timber auctions were not open to all bidders.

(b) Market Structure and Participants

275. Canada also disputes the relevance of the USDOC's findings that a small number of TSG-holding corporations dominate the consumption of Crown timber.[439] Canada argues that the concentration of and competition between private firms is outside the bounds of a distortion analysis.[440] In particular, Canada disagrees with the USDOC's decision to use data from the ten largest TSG-holders by log processing volume as a tool to evaluate the extent to which timber customers operate in both the TSG and auction markets for Crown timber.[441] However, the fact that the USDOC used the 10 largest TSG-holders as a proxy to understand the dynamics of the Quebec stumpage market is unremarkable and does not provide a basis for the Panel to find any inconsistency in the USDOC's determination.

276. Canada disputes the relevance of the ability of TSG-holding corporations to shift their allocations of Crown timber.[442] Canada argues that transfers between TSG-holders were relatively limited. However, the evidence the USDOC relied on contradicts Canada's assertion.

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

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

[438] *See* Quebec Verification Report at 18 (Exhibit CAN-184).

[439] *See* Canada's First Written Submission, paras. 429-440.

[440] *See* Canada's First Written Submission, paras. 429-440.

[441] *See* Canada's First Written Submission, paras. 429-440.

[442] *See* Canada's First Written Submission, paras. 451-456.

Specifically, the USDOC's final determination relied on evidence from section 92 of the *Sustainable Forest Development Act*, which permits a TSG-holder to transfer or receive up to 10 percent of the volume harvested under its TSG.[443]

(c) Export Restraints

277. Finally, Canada argues that the export restraints do not impact pricing in Quebec.[444] In particular, Canada points to its consultant's assessment of the quantity of imports and exports of private-origin logs to argue that there was a lack of export demand for Quebec-origin logs during the period of investigation. However, as addressed above, the USDOC reasonably determined to give the consultant's conclusions limited weight because Canada commissioned the report to oppose the USDOC's analysis, unlike other reports produced by independent parties or in the ordinary course of business.[445] It is also true that relatively little timber was harvested from private lands compared to Crown lands in Quebec during the period of investigation. Only 16.94 percent of timber harvested was from private woodlots, while 83.06 percent was from Crown-origin land and thus not eligible to export.[446] Given how little of the Quebec timber harvest was of private origin eligible to export, it would be difficult for the USDOC to conclude that minimal exports of private-origin timber should be extrapolated to conclude that there was minimal export demand for Quebec timber. Furthermore, although the consultant's report concludes there is a lack of demand for Quebec timber in the United States (on the basis of low volumes of private-origin log exports), the log export restriction also prevents the export of Crown-origin auctioned logs to other Canadian provinces, including the neighboring provinces of Ontario and New Brunswick, for processing.[447] Although log processors from these provinces would be, effectively, barred from participating in the Quebec auction system, the report does not address inter-province export demand.[448]

278. For all of these reasons, an unbiased and objective investigating authority could have reached the conclusion – as the USDOC did – that there were no market-determined private prices for stumpage in Quebec that could be used for benchmarking purposes.

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[443] *See* GOQ Verification Report, p. 15 (Exhibit CAN-184). *See also* Lumber Final I&D Memo, p. 102 (Exhibit CAN-010).

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

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

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

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

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

c. Stumpage Provided by Ontario: Private Market Stumpage Prices in Canada Are an Appropriate Benchmark under Article 14(d) of the SCM Agreement

(1) Investigative Process for Ontario

279. The investigative process for Ontario stumpage proceeded as follows. On January 19, 2017, the USDOC sent a CVD questionnaire to the provincial government in Ontario requesting information regarding the alleged subsidies under investigation.[449] As part of its standard CVD questionnaire, the USDOC solicits information regarding the government entities responsible for administering the alleged subsidy programs, the nature of the programs, and the history of distributions under each of the programs at issue. For each specific type of subsidy, the government CVD questionnaire instructs respondents to complete a standard annex form tailored to the relevant subsidy type. In this case, the USDOC also issued an addendum to the Initial Questionnaire regarding stumpage for Ontario on January 31, 2017.[450]

280. The USDOC received the response to the Initial Questionnaire and its addendum from Ontario on March 15, 2017.[451] On March 17, 2017, the USDOC received responses to the Standard Questionnaire Appendix concerning Ontario's stumpage program.[452]

281. The questionnaire responses provided several key pieces of evidence. First, during 2015-2016, Crown forest in Ontario accounted for 96.5 percent of the harvest volume in the province, while the harvest volume from non-Crown lands accounted for the remaining 3.5 percent.[453]

282. With respect to the pricing policies of the provincial government, Ontario's questionnaire responses reported, and the USDOC later confirmed at verification, that the province sets prices administratively through stumpage charge for Crown-origin timber composed of four components, none of which incorporates meaningful market-based considerations.[454] The four components are as follows. The first is a minimum charge, which is administratively set by the government and is intended to provide a secure level of revenue for the province "regardless of market conditions."[455] The second component is a residual value (or "RV") charge. The RV

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[449] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[450] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[451] *See* GOO QR (Exhibit CAN-155).

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

[453] *See* Lumber Preliminary Decision Memorandum, p. 30 (citing GQRGOO at Exhibit ON-STATS-2) (Exhibit CAN-008).

[454] *See* Lumber Final I&D Memo, p. 92 (citing GOO Verification Report, pp. 9-12; GOO Primary QNR Response at 79-84) (Exhibit CAN-010).

[455] *See* Lumber Final I&D Memo, p. 92 (citing GOO Verification Report, p. 9) (Exhibit CAN-010).

charge was not levied on Crown-origin timber during the relevant period, however, because lumber prices were low enough during that time.[456] The two other stumpage charge components include a forest renewal charge and a forestry futures charge.[457] These are levied every year to cover the cost of renewing harvested areas and protecting Crown timber land.[458] The forest renewal charge is "based on estimated forest renewal costs and the projected harvest volume for each species"[459] and the "forestry futures charge is uniform across all [Forest Management Units (or 'FMUs')] and tree species groups."[460] These questionnaire responses indicated that Ontario does not engage in market-determined pricing when it administers the stumpage fee system described above.

283. Ontario subsequently submitted pre-preliminary comments on April 11, 2017.[461]

284. After disclosing its preliminary findings, the USDOC officials conducted an on-site verification of Ontario from June 6, 2017, through June 8, 2017[462] and an on-site verification of Resolute, including its purchases of stumpage in Ontario, from June 26, 2017 through June 29, 2017.[463] The information examined at verification became an integral part of the administrative record, as reported in the Ontario verification reports.[464]

(2) Findings for Ontario

285. The USDOC determined, as a result of its investigation, to measure the adequacy of remuneration for stumpage provided by Ontario using market-determined prices from Nova Scotia as a benchmark. The USDOC found that it could not use Ontario prices as a benchmark because the provincial government predominance in the market, combined with the other factors discussed below, resulted in price distortions that would generate a circular comparison and, therefore, would not serve as a meaningful benchmark.

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[456] *See* Lumber Final I&D Memo, p. 93 (citing GOO Verification Report, pp. 9-10) (Exhibit CAN-010).

[457] *See* Lumber Final I&D Memo, p. 93 (citing GOO Verification Report, p. 12) (Exhibit CAN-010).

[458] *See* Lumber Final I&D Memo, p. 93 (citing GOO Verification Report, p. 12) (Exhibit CAN-010).

[459] *See* Lumber Final I&D Memo, p. 93 (citing GOO Verification Report, p. 10; GOO Primary QNR Response, pp. 79-84) (Exhibit CAN-010).

[460] *See* Lumber Final I&D Memo, p. 93 (citing GOO Primary QNR Response at 79-80) (Exhibit CAN-010).

[461] *See* Lumber Preliminary Decision Memorandum, p. 2 (citing Ontario – Pre-Preliminary Determination Comments (April 11, 2017)) (Exhibit CAN-008).

[462] *See* GOO Verification Report (Exhibit CAN-160).

[463] *See* Resolute Verification Report (Exhibit CAN-174 (BCI)).

[464] *See* GOO Verification Report (Exhibit CAN-160); Resolute Verification Report (Exhibit CAN-174 (BCI)).

286. In reaching this conclusion, the USDOC considered a number of factors. These included the government's market share, the structure of the relevant market, the types of entities operating in that market (and their behavior), as well as any entry barriers or other impediments or price-influencing factors. The USDOC considered these factors using the approach outlined in its three-tiered hierarchy for analyzing potential benchmarks.

(a) Government Market Share and Pricing Practices

287. In terms of government market share, the USDOC found that, "[a]ccording to information from the GOO, for FY 2015-2016, the Crown forest accounted for 96.5 percent of the harvest volume in the province, while the harvest volume from non-Crown lands . . . accounted for the remaining 3.5 percent."[465] On this basis, the USDOC found that "the volume of Crown-origin standing timber in the Ontario harvest constitutes a 'significant portion of the good sold' as discussed in the *CVD Preamble*. Information from the [Government of Ontario] also indicates that the allocation and consumption of Crown-origin standing timber is heavily concentrated among a small number of tenure-holding companies."[466]

288. Taking this information into account, the USDOC found that the "one dominant price setter in the Ontario timber market," *i.e.*, the government, "set administered prices that do not fully consider market conditions."[467] The USDOC explained that, according to its hierarchy, it would further consider government prices in any case. As noted by the Appellate Body, the focus of the analysis is not on the source of the price, but rather on price distortion itself.[468] The USDOC explained "that where a government constitutes a majority of the market, and 'where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy.' Thus, to determine whether there are private transactions for standing timber in Ontario that are suitable as a benchmark, we must first determine whether it is reasonable to conclude that those private transactions are distorted by the government's involvement in the market."[469]

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[465] Lumber Preliminary Decision Memorandum, p. 30 (citing GQRGOO at Exhibit ON-STATS-2) (Exhibit CAN-008).

[466] Lumber Preliminary Decision Memorandum, p. 30 (Exhibit CAN-008).

[467] Lumber Final I&D Memo, Comment 31, p. 94 (Exhibit CAN-010).

[468] *See generally US – Carbon Steel (India) (AB)*, paras. 4.151-4.159 and 4.167; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

[469] Lumber Final I&D Memo, Comment 31, p. 92 (quoting *CVD Preamble*, 63 FR at 65,377) (Exhibit CAN-010).

(b) Market Structure and Participants

289. In this regard, and in considering the structure of the market, the USDOC observed in the final determination, that "the Crown's administered stumpage rates and the Crown's overwhelming share of the market, as well as the flexible supply of Crown timber that is available to tenure holders, influences the prices for private standing timber such that private prices in Ontario cannot be used as a benchmark."[470]

290. With regard to the entities operating in the market and their behavior, the USDOC observed that a few major players accounted for the majority of purchase and consumption volumes. In particular, "the five largest tenure-holding corporations accounted for approximately 92.6 percent of the allocated Crown-origin standing timber volume in FY 2015-2016," and "the five largest tenure-holding corporations accounted for 86.11 percent of the Crown-origin standing timber harvested during FY 2015-2016"[471] "The concentration of the Crown harvest among a small number of companies gives these companies substantial market power over sellers of non-Crown-origin standing timber."[472]

291. "In addition . . . companies were permitted to purchase Crown-origin standing timber in excess of their allocated volume."[473] This "ability of the majority of tenure-holders in Ontario to purchase significant amounts of standing timber in excess of their allocated volume reduces the need of those tenure-holders to source from non-Crown sources, such as the private market," and "private woodlot owners would be forced to price their standing timber at or below the Crown stumpage price."[474]

292. The USDOC found that this market configuration tended to indicate that prices are not freely determined.

(c) Private Prices

293. With respect to the impact on private prices, the USDOC explained:

> We next examined the supply of standing timber in Ontario from the Crown and private sources. The GOO does not allocate harvest volumes to tenure holders; rather, it allocates harvest areas (the AHA) to a tenure holder over the ten-year term of [a forest

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

[471] Lumber Preliminary Decision Memorandum, p. 30 (citing GQRGOO at Table 2 and Table 12) (Exhibit CAN-008).

[472] Lumber Preliminary Decision Memorandum, p. 30 (Exhibit CAN-008).

[473] Lumber Preliminary Decision Memorandum, pp. 30-31 (Exhibit CAN-008).

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

> management plan ("FMP")]. The volume of standing timber that a tenure holder can harvest in a given year is flexible. Each year a tenure holder develops an [annual work schedule ("AWS")] in which it sets a target for the area to be harvested, but that target is not binding; the only effective harvest limit is the [allowable harvest amount ("AHA")] over a ten-year period. This arrangement ensures that the Crown supply of timber is flexible on a yearly basis, such that in years when the demand for lumber products is high, tenure holders can consume more than their annual target of public timber at an administered price before turning to the private market for additional supply. In addition, the GOO does not regulate the transfer or sale of timber between sawmills or to third parties. The ability to trade Crown timber between mills makes the Crown timber market more flexible and allows tenure holders to harvest more extensively from Crown land before turning to the private market. We find that the ability to harvest at levels greater than the short-term targets set in the AWSs and the option to transfer timber between mills expands the market for Crown timber, which has the effect of depressing demand, and, therefore, prices in the private market.[475]

294. The USDOC concluded: "The fact that a majority of private origin standing timber is sold to a small number of customers, who are dominant consumers of both private and Crown timber, demonstrates that the private market in Ontario is not as independent and free of influence from the Crown timber market as" Canada suggests.[476]

295. The USDOC also explained why it could not use the alternatives suggested by certain parties. In particular, Ontario "submitted survey prices for standing timber purchased on private lands, along with a study suggesting that these prices may serve as a tier-one benchmark price."[477] But the USDOC found that the "private prices in Ontario would largely track the prices the [government] charges for stumpage on Crown lands."[478] The USDOC reached this conclusion based on its findings that "the volume of private-origin standing timber is extremely small relative to the volume of standing timber harvested from Crown lands, the fact that the market for standing timber in Ontario is dominated by a small number of Crown tenure-holding

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

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

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

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

companies, and evidence indicating that tenure-holding companies may harvest Crown-origin standing timber in excess of their allocated volumes."[479]

296. On this basis, the USDOC found "that it is reasonable to conclude that private timber prices in Ontario are distorted as a result of the government's involvement in the market and, therefore, there are no market-based tier-one stumpage prices available within Ontario that can be used as a benchmark."[480]

(3) Canada Has Failed to Demonstrate that Rejecting Ontario Stumpage and Log Prices Is Inconsistent with Article 14(d) of the SCM Agreement

297. Canada argues that prices are not distorted, but its arguments fail for a number of reasons.[481] Canada relies on the wrong legal standard and instead asks the Panel to apply an approach that the Appellate Body has only applied to the question of benchmarks from a country other than the country of provision.[482] Even aside from this basis, which is sufficient in itself to reject Canada's claim, that claim would fail for the additional reason that the USDOC's determination satisfied all of the purported requirements for a finding of price distortion. Canada has failed to demonstrate that an unbiased and objective investigating authority could not have concluded, as the USDOC did, that there were no market-determined private prices for stumpage in Ontario that could be used for benchmarking purposes.

(a) Government Price Distortion

298. Canada mischaracterizes the USDOC's finding as a "*per se*" finding of distortion based on the government's presence in the market.[483] However, as discussed above, the USDOC did not rely solely on the percentage of Ontario's ownership or control of the stumpage market in determining that the stumpage market in the province is distorted. In addition to the fact that, during fiscal year 2015-2016, Crown-origin timber accounted for 96.5 percent of the harvest volume in Ontario,[484] the USDOC relied upon: (1) the method of setting the price for Crown stumpage, including that "of the three stumpage components that Ontario charged during the POI, only the forest renewal charge took into account market conditions (*e.g.*, estimated forest

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

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

[481] *See* Canada's First Written Submission, paras. 324-325.

[482] *See* Canada's First Written Submission, para. 327.

[483] *See* Canada's First Written Submission, paras. 327-328.

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

renewal costs),"[485] (2) that Crown timber tenure-holders had flexible amounts of annual timber supply during the period of investigation;[486] (3) that mills in Ontario may trade Crown timber, thereby "allow[ing] tenure holders to harvest more extensively from Crown land before turning to the private market;"[487] and (4) that "the universe of firms consuming timber from private sources in Ontario is heavily concentrated and is dominated by tenure holders," in particular tenure holders consuming the largest amounts of Crown timber.[488] Canada's contention that the USDOC did not conduct the necessary analysis of market distortion is incorrect.

299. The USDOC explained its analytical approach in detail, noting first that the "*CVD Preamble* provides that where a government constitutes a majority of the market, and 'where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy'" in choosing a benchmark.[489] As a result, "to determine whether there are private transactions for standing timber in Ontario that are suitable as a benchmark," the USDOC "first determine[d] whether it is reasonable to conclude that those private transactions are distorted by the government's involvement in the market."[490] This was the analytical path followed by the USDOC in evaluating whether the Ontario stumpage market was distorted by Ontario's involvement in the market. The USDOC determined that Ontario owned or controlled a majority of the market for timber in the province, then evaluated additional evidence to determine whether "it [was] reasonable to conclude that actual transaction prices [for stumpage in Ontario] are significantly distorted as a result of the [GOO]'s involvement in the market."[491]

300. As discussed above, in addition to the verified fact that, for FY 2015-2016, Crown-origin timber accounted for 96.5 percent of the harvest volume in Ontario, the USDOC considered additional verified record evidence in its distortion analysis, including the minimum charge in Ontario's stumpage fee, which the USDOC "learned at verification … was administratively set at C$2.84/$m^3$ in FY 1997-1998 and has been inflated annually," and "data from the [government's electronic] system, which indicates that the universe of firms consuming timber from private sources in Ontario is heavily concentrated and is dominated by tenure holders."[492] Thus, the USDOC did not simply presume that private prices are unusable if there are significant government sales, as Canada contends. Rather, the USDOC evaluated record evidence provided

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

[486] Lumber Final I&D Memo, pp. 93-94 (Exhibit CAN-010).

[487] Lumber Final I&D Memo, p. 93-94 (Exhibit CAN-010).

[488] Lumber Final I&D Memo, p. 94 (Exhibit CAN-010); Ontario Market Memorandum, pp. 1-2 (Exhibit USA-003).

[489] Lumber Final I&D Memo, p. 92 (citing *CVD Preamble*, 63 Fed. Reg. at 65,377) (Exhibit CAN-010).

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

[491] *CVD Preamble*, 63 Fed. Reg. at 65,377 (Exhibit CAN-021).

[492] Lumber Final I&D Memo, pp. 93-94 (Exhibit CAN-010).

by Ontario and concluded that it was reasonable to find that actual transaction prices for private purchases of stumpage in Ontario were significantly distorted as a result of the provincial government's involvement in the stumpage market.

301. Canada's additional arguments do not undermine the USDOC's finding. As discussed above, Crown-origin timber accounted for 96.5 percent of the harvest volume in Ontario during the fiscal year 2015-2016.[493] As noted, where the government has a predominant role as a supplier in the market, this fact makes it "likely" that private prices for the good in question will be distorted.[494] Although there is no market share threshold above which an investigating authority may conclude *per se* that price distortion exists, the more predominant a government's role in the market, the more likely that role results in the distortion of private prices.[495] For example, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that China's predominant role in the input market shows that it is "likely that the government as the predominant supplier has the market power to affect through its own pricing strategy the pricing by private providers for the same goods, and induce them to align with government prices."[496] Further, the Appellate Body has explained that "[t]here may be cases . . . where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight."[497] The evidence evaluated by the USDOC demonstrates that this is such a case.

302. Here, Ontario constitutes the overwhelming majority of the market and Canada's assertions neither dispute nor detract from that fact. Canada's assertions are not sufficient to call into question the evidence on which the USDOC concluded that actual transaction prices were significantly distorted as a result of Ontario's overwhelming involvement in the market. For example, although Canada contends that the value of standing timber is determined by the value of products that can be made from that timber,[498] the USDOC concluded that the price for standing timber in the province was administratively set and failed to take into account market conditions, such as the current market value of products that can be made from that timber.[499] Moreover, none of Canada's assertions address, or undermine, the USDOC's conclusions that

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

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

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

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

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

[498] *See* Canada's First Written Submission, paras. 332-334.

[499] Lumber Final I&D Memo, pp. 92-93 (Exhibit CAN-010).

the market for private timber in Ontario was dominated by relatively few companies, or that the flexible supply of Crown timber available to Crown timber tenure-holders diminished those tenure-holders' need for non-Crown timber.

(b) Canadian Consultants' Reports

303. Canada argues that the 3.5 percent of stumpage sold by private parties is independent from the effects of the government's pricing policies, and rather reflects robust private competition.[500] But Canada's arguments lack merit. Canada's arguments largely rely on the Hendricks Report and declarations from harvesters of private timber.[501] The Hendricks Report analyzed data on private timber transactions in the MNP Ontario Survey and, based on evidence that private stumpage prices are driven by prices for lumber end-products, market participants are well-informed, and private timber owners have multiple buyers, concluded that the MNP Ontario Survey data are "consistent with private timber prices being the outcome of a competitive process."[502] Additionally, certain harvesters of private timber in Ontario declared that their individual decisions to "harvest and/or purchase timber from private lands" were affected by factors including accessibility, price, and weather.[503]

304. However, the USDOC evaluated the evidence and concluded that private stumpage prices in Ontario were not market determined. In particular, the USDOC concluded that the Hendricks Report ignored several key facts regarding the Ontario stumpage market, including that the market contained "one dominant price setter, the GOO."[504] Because Ontario controlled 96.5 percent of the Ontario timber market during the period of investigation, and set administered prices that did not fully consider market conditions, as discussed above, the USDOC gave limited weight to the Hendricks Report's conclusion that conditions in the Ontario Crown stumpage market did not influence the private stumpage market.[505]

305. The USDOC also found the Hendricks Report warranted limited weight because assumptions on which it was based were inconsistent with evidence on the record of the proceeding.[506] The Hendricks Report assumed that stumpage prices in southern Ontario would be higher than prices in northern Ontario, because northern sawmills must travel farther to reach

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[500] *See* Canada's First Written Submission, para. 327.

[501] *See* Canada's First Written Submission, paras. 330-331.

[502] Ontario, "An Economic Analysis of the Ontario Timber Market and an Examination of Private Market Prices in that Competitive Market by Dr. Ken Hendricks" (Exhibit ON-PRIV-2) ("Hendricks Report"), pp. 39-42 (Exhibit CAN-019 (BCI)).

[503] GOO QR at Exhibit ON-PRIV-2 (Exhibit CAN-019 (BCI)).

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

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

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

timber than southern sawmills, thereby depressing northern prices (or so the Hendricks Report assumed).[507] However, the MNP Ontario Survey upon which the Hendricks Report relies found that SPF stumpage prices in 2015-2016 were, in fact, lower in southern Ontario than in northern Ontario.[508] As a result, the USDOC reasonably concluded that "the theory of a competitive market for private origin timber in Ontario in the Hendricks Report does not fit the data underlying the MNP Ontario Survey upon which that report purportedly relied."[509] The USDOC therefore accorded the Hendricks Report limited weight.[510]

(c) Market Structure and Participants

306. Canada challenges additional aspects of the distortion finding, particularly with respect to the availability of surplus Crown stumpage, the ability to transfer stumpage among licensees, and the relevance of firm concentration in the market.

307. With respect to the availability of additional Crown stumpage, Canada argues that this factor does not demonstrate that prices are not market-determined. However, when the USDOC took into account the flexible supply of Crown timber available to Crown timber tenure-holders, it did so against the backdrop of the Crown's overwhelming share of the market during the period of investigation. In this context, the additional supply of Crown timber available to Crown timber tenure-holders diminished those tenure-holders' need for non-Crown timber. The availability of additional supply therefore supported the USDOC's conclusion that the private prices in Ontario were distorted, and thus could not be used as a tier one benchmark.[511]

308. With respect to the ability to transfer stumpage among licensees, the USDOC explained that "the ability to harvest at levels greater than the short-term targets set in the [annual work schedules] and the option to transfer timber between mills expands the market for Crown timber, which has the effect of depressing demand—and, therefore, prices—in the private market."[512] As with the availability of additional supply, these observations serve to further support the USDOC's overall determination. Canada is wrong to characterize these observations as if the USDOC relied only on these additional considerations to the exclusion of its primary analysis of Ontario's administrative pricing policies.

309. With respect to the relevance of firm concentration in the market, Canada applies the wrong standard. The concentration of firms in the market may be a relevant consideration

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[507] Lumber Final I&D Memo, p. 94 (citing Hendricks Report, pp. 13 and 38) (Exhibit CAN-010).

[508] Lumber Final I&D Memo, p. 94 (citing MNP Ontario Survey, p. 7) (Exhibit CAN-010).

[509] Lumber Final I&D Memo, p. 94 (citing MNP Ontario Survey, p. 7) (Exhibit CAN-010).

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

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

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

depending on the various circumstances of a case. The Appellate Body has said as much when it explained that the "examination may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers" and could also require assessing "the behaviour of the entities operating in that market."[513] Here, the USDOC concluded that evidence from Ontario demonstrated that the private prices are not as independent and free of influence from the Crown timber market as Canada's consultant suggested.[514]

310. In this regard, the USDOC considered that "the universe of firms consuming timber from private sources in Ontario is heavily concentrated and is dominated by [Crown timber] tenure holders."[515] Indeed, Ontario's data revealed that only a small number of firms consumed from sources other than Crown land during the period of investigation.[516] Further, the USDOC found that the same firms dominated both timber markets. Of the 15 largest harvesters of timber from Crown and other sources during the period of investigation, including those harvesters that were dual-source firms, relatively few firms dominated the purchase of all timber consumed from other, non-Crown sources.[517] Moreover, those dual-source firms consumed much more timber from Crown sources than from other, non-Crown sources and the USDOC reasonably found, on the basis of these data, that "dual source firms are the most important customers of private timberland owners and that private timber sellers must compete against the much larger Crown timber market when selling timber to their largest customers in Ontario."[518]

311. Moreover, Canada's argument that the concentration of firms is a "prevailing market condition" does not speak to whether that arrangement is distortive in this case. As the USDOC explained, the "analysis of whether a proposed benchmark is market-determined must precede any analysis of how to account for prevailing market conditions in a benchmark comparison."[519] Reversing the order of that analysis "would lead to the absurd result that the Department could never rely on anything other than [an in-country benchmark], regardless of the level of distortion, because such benchmarks would always reflect 'prevailing market conditions' in the country of

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[513] *US – Carbon Steel (India) (AB)*, para. 4.157, footnote 754.

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

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

[516] Ontario Market Memorandum, p. 1 (Exhibit USA-003).

[517] Ontario Market Memorandum, p. 2 (Exhibit USA-003).

[518] Ontario Market Memorandum, p. 2 (Exhibit USA-003).

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

provision."[520] That result "would effectively nullify" the language in Article 14(d) that guides the determination of adequate remuneration.[521]

312. Finally, the comments by Ontario's consultant are irrelevant and controverted by the record of the investigation. As the USDOC explained, the data it analyzed "demonstrate[d] that the private [timber] market in Ontario is not as independent and free of influence from the Crown timber market as the Hendricks Report suggests."[522]

(d) Log Prices

313. Canada argues that, alternatively, the USDOC should have used an Ontario log price benchmark rather than the Nova Scotia stumpage benchmark.[523] However, the log prices proposed as a benchmark by the Canadian parties are not prices for the good in question – that is, stumpage – but rather are prices for logs.[524] As such, the log price benchmark is not a market-determined price for the good in question (stumpage) and, given the availability of a stumpage benchmark within Canada, using an alternative approach is not called for in this instance. The USDOC evaluated the provision of stumpage for less than adequate remuneration; as stated, logs are not standing timber, and thus log prices are not stumpage prices.[525] As discussed above, the USDOC appropriately found that the Nova Scotia stumpage prices constituted market-determined prices for stumpage resulting from actual transactions in Canada, the country under investigation. Having determined that the Nova Scotia stumpage prices served as a suitable benchmark, the USDOC was not obligated to determine the suitability of lesser alternatives such as constructing a benchmark from private log prices in Ontario.

314. For all of these reasons, an unbiased and objective investigating authority could have reached the conclusion – as the USDOC did – that there were no market-determined private prices in Ontario that could be used for benchmarking purposes.

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

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

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

[523] *See* Canada's First Written Submission, paras. 350-357.

[524] Lumber Final I&D Memo, p. 96 (Exhibit CAN-010).

[525] Lumber Final I&D Memo, pp. 48-49 (Exhibit CAN-010).

d. Stumpage Provided by Alberta: Private Market Stumpage Prices in Canada Are an Appropriate Benchmark under Article 14(d) of the SCM Agreement

(1) Investigative Process for Alberta

315. The investigative process for Alberta stumpage proceeded as follows. On January 19, 2017, the USDOC sent a CVD questionnaire to the provincial government in Alberta requesting information regarding the alleged subsidies under investigation.[526] As part of its standard CVD questionnaire, the USDOC solicits information regarding the government entities responsible for administering the alleged subsidy programs, the nature of the programs, and the history of distributions under each of the programs at issue. For each specific type of subsidy, the government CVD questionnaire instructs respondents to complete a standard annex form tailored to the relevant subsidy type. In this case, the USDOC also issued an addendum to the Initial Questionnaire regarding stumpage for Alberta on January 31, 2017.[527]

316. The USDOC received the response to the Initial Questionnaire and its addendum from Alberta on March 15, 2017.[528] On March 20, 2017, the USDOC received responses to the Standard Questionnaire Appendix concerning Alberta's stumpage program.[529] The USDOC also sent a supplemental questionnaire on March 30, 2017.[530] Alberta provided its response to the supplemental questionnaires on April 14, 2017.[531]

317. In its responses to the various questionnaires, Alberta reported that nearly 100 percent of harvested stumpage is provided by the government.[532] The provision of stumpage is administered by the provincial authority, Alberta Ministry of Agriculture and Forestry ("AMAF"). The AMAF is "responsible for the administration and management of provincial standing timber including all matters of tenure allocation (*i.e.*, the amount of Crown-origin standing timber that a mill with a permit to harvest Crown-origin standing timber is permitted to harvest), establishment of timber dues rates, and the collection of revenue."[533]

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[526] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[527] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[528] *See* GOA QR (Exhibit CAN-097).

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

[530] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing Supplemental Questionnaire – GBC; Supplemental Questionnaire – GOC-I) (Exhibit CAN-008).

[531] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing GOASQR and GBC/GOASQR) (Exhibit CAN-008).

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

[533] Lumber Preliminary Decision Memorandum, p. 19 (citing GQRGOA, Volume IV at 19) (Exhibit CAN-008).

318. The harvest of standing timber from provincial Crown land is primarily regulated under the *Alberta Forests Act*.[534] Under the *Alberta Forests Act*, Crown forests are divided into forest management units, each of which has an annual allowable cut of timber.[535] The right to harvest Crown-origin standing timber within forest management units is governed by Alberta's forest tenure system, which provides stumpage to lumber producers through a number of different commercial tenure arrangements. The three relevant arrangements are: (1) Forest Management Agreements ("FMAs"); (2) Timber Quotas; and (3) Commercial Timber Permits.[536] FMAs are 20-year renewable agreements that grant tenure-holders the right to establish, grow, harvest, and remove standing timber in a designated area, and the tenure holder is responsible for managing the land in a manner that is consistent with an approved forest management plan and sustaining the yield of timber on the land.[537] Each term for a FMA is divided into four five-year cut control periods with an annual allowable cut.[538] No FMA holder has opted not to renew and no renewal requests have been denied.[539] Nearly all the timber harvested from provincial Crown land was harvested pursuant to a FMA.[540]

319. Timber Quotas are also generally granted for 20-year renewable periods and allow the holder to harvest a share of the annual allowable cut in a specific forest management unit.[541] Timber Quota holders work together with the FMA holder to fulfill land management obligations, but the FMA holder is ultimately responsible.[542] Commercial Timber Permits are

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[534] *See* GOA Verification Report at Verification Exhibit 2, pp. 6-8 (Exhibit CAN-110 (BCI)); GOA QR at Exhibit AB-S-14 (Exhibit CAN-112).

[535] *See* GOA Verification Report at Verification Exhibit 2, pp. 6-8 (Exhibit CAN-110 (BCI)); GOA QR at Exhibit AB-S-14 (Exhibit CAN-112). The annual allowable cut is defined as the amount of timber that may be harvested in any one forest management operating year as stipulated in the pertinent forest management plan approved by the Minister. Lumber Final I&D Memo, p. 53 (citing GOA Mar. 14, 2017 QR at Exhibit AB-S-36) (definition of annual allowable cut) (Exhibit CAN-010). Alberta further reported that the annual allowable cut "is the maximum volume of timber that can be sustainably harvested." *See* GOA QR, p. ABIV-38 (Exhibit CAN-097).

[536] *See* GOA QR, p. ABIV-38 (Exhibit CAN-097); GOA Verification Report, p. 4 (Exhibit CAN-110 (BCI)).

[537] *See* GOA QR, p. ABIV-39-40 (Exhibit CAN-097). According to Alberta, "FMA holders have many responsibilities, including but not limited to, consulting with the public and indigenous peoples relating to the tenure, road construction and maintenance, annual holding and protection charges, and are required to reforest at their own cost per provincial standards." GOA Verification Report, p. 4 (Exhibit CAN-110 (BCI)).

[538] *See* Tolko QR, pp. 41-42. A FMA holder may harvest beyond the amount allowable for a given year, so long as the total volume harvested does not exceed the amount allowed for the five-year control period. *See* Lumber Final I&D Memo, p. 53 (citing GOA QR at Exhibit AB-S-36) (ANC Timber, Ltd.'s FMA - definition of periodic allowable cut) (Exhibit CAN-010).

[539] *See* GOA Verification Report, pp. 4-5 (Exhibit CAN-110 (BCI)).

[540] *See* GOA QR at Exhibit AB-S-20, pp. 3-5 (Exhibit CAN-128).

[541] *See* GOA QR, p. ABIV-41 (Exhibit CAN-097); GOA Verification Report, p. 5 (Exhibit CAN-110 (BCI)).

[542] *See* GOA Verification Report, p. 5 (Exhibit CAN-110 (BCI)).

short-term arrangements, typically two to three years, that are sold by auction or otherwise awarded and that authorize the permit holder to harvest relatively small volumes of standing timber.[543] Holders of all three forms of tenures pay timber dues as well as other fees in exchange for the right to harvest Crown-origin stumpage.[544]

320. Alberta reported almost no private stumpage transactions. However, Alberta did provide a survey of private prices for Alberta logs – the TDA survey.[545] The pricing data from the TDA survey are collected annually and are used to determine compensation owed to tenure-holding firms when energy and utility companies operate on Crown lands managed by the tenure-holding firms.[546] The TDA survey represents a starting point from which the tenure holder and the energy or utility company negotiate compensation for the removal of land and timber from the tenure holder's designated area.[547] The TDA values are determined based upon, among other information, data collected from tenure-holding firms concerning the volume and value of timber purchases, as well as harvesting and hauling costs.[548] Additional factors include "the extent to which the land base is removed from timber production, whether it will be reforested and returned to timber production, and to account for whether the standing timber is being salvaged."[549] When standing timber is salvaged from land removed from the tenure holder's designated area, the tenure holder's loss is partially mitigated by the value of the damaged timber and the TDA value is adjusted accordingly.[550]

321. Alberta submitted pre-preliminary comments on April 14, 2017.[551]

322. After disclosing its preliminary findings, the USDOC officials conducted an on-site verification of Alberta on June 19, 2017, and June 20, 2017.[552] USDOC officials also conducted on-site verifications of Canfor, Tolko, and West Fraser, including their purchases of stumpage in

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[543] *See* GOA QR, p. ABIV-42-43 (Exhibit CAN-097) (Mar. 15, 2017); GOA Verification Report, p. 5 (Exhibit CAN-110 (BCI)).

[544] *See* GOA QR, pp. ABIV-39-43 (Exhibit CAN-097). *See also* GOA QR at Exhibit AB-S-15 (Timber Management Regulation) (Exhibit CAN-115).

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

[546] *See* GOA Verification Report, p. 10 (Exhibit CAN-110 (BCI)).

[547] *See* GOA QR, p. ABIV-119 (Exhibit CAN-097).

[548] *See* GOA QR, p. ABIV-119 (Exhibit CAN-097).

[549] GOA Verification Report, p. 10 (Exhibit CAN-110 (BCI)).

[550] *See* GOA QR at Exhibit AB-S-42, p. 7 (Exhibit CAN-102).

[551] *See* Lumber Preliminary Decision Memorandum, p. 2 (citing Alberta – Pre-Preliminary Determination Comments (April 14, 2017)) (Exhibit CAN-008).

[552] *See* GOA Verification Report (Exhibit CAN-110 (BCI)).

Alberta, between June 12, 2017, and June 16, 2017.[553] The information examined at verification became an integral part of the administrative record, as reported in the Alberta verification reports.[554]

(2) Findings for Alberta

323. The USDOC determined, as a result of its investigation, to measure the adequacy of remuneration for stumpage provided by Alberta using market-determined prices from Nova Scotia as a benchmark. The USDOC observed that Alberta "did not place private stumpage prices on the record of the investigation,"[555] but noted that the "TDA survey data do contain a very small volume of private stumpage transactions (0.3 percent of the total volume)."[556] However, the USDOC found these stumpage prices to be "relatively inconsequential as compared to the total volume of sales" and not reflective of freely determined prices between buyers and sellers.[557]

(a) Government Market Share and Pricing Practices

324. In determining that the insignificant volume of private stumpage prices in Alberta from the TDA survey could not be considered as market-determined benchmarks, the USDOC found that "the volume of the Crown-origin harvest accounts for nearly all of the standing timber harvest" in Alberta.[558] The USDOC explained specifically that "Crown-origin timber accounted for 98.48 percent of the harvest volume, while the harvest volume of non-Crown-origin timber accounted for the remaining 1.52 percent" which is "reflective of near complete Crown dominance of the market for standing timber in Alberta."[559] 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.

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[553] *See* Canfor Verification Report (Exhibit CAN-357 (BCI)); Tolko Verification Report (Exhibit CAN-316 (BCI)); West Fraser Verification Report (Exhibit CAN-362 (BCI)).

[554] *See* GOA Verification Report (Exhibit CAN-110 (BCI)); Canfor Verification Report (Exhibit CAN-357 (BCI)); Tolko Verification Report (Exhibit CAN-316 (BCI)); West Fraser Verification Report (Exhibit CAN-362 (BCI)).

[555] Lumber Preliminary Decision Memorandum, p. 29 (citing GQRGOA at 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).

[556] Lumber Preliminary Decision Memorandum, p. 29 (citing GQRGOA at 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).

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

[558] Lumber Preliminary Decision Memorandum, p. 28 (Exhibit CAN-008).

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

Consequently, the analysis would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect."[560]

325. The USDOC explained that, as a result of these circumstances, "prices for standing timber from non-Crown sources would mirror the administratively-set prices charged by the GOA on Crown lands."[561] The USDOC specifically pointed to (1) the overwhelming predominance of the government; (2) the fact that "a small number of tenure-holding companies dominate both the Crown-origin and private-origin standing timber harvests in Alberta, which further ensures that the prices of private-origin standing timber track the prices of Crown-origin timber prices;"[562] and (3) that "a supply overhang exists in Alberta such that allocations of Crown stumpage volume are not fully consumed," which "indicates that the willingness of tenure-holding sawmills to pay for private-origin standing timber will be limited by their costs for obtaining standing timber from their own tenures" and "is further evidence that prices for standing timber from non-Crown sources would mirror the administratively-set prices charged by the GOA on Crown lands."[563]

326. As noted by the Appellate Body, and explained above, the focus of the analysis is not on the source of the price, but rather on price distortion itself.[564] Moreover, the USDOC explained that, according to its hierarchy, it would further consider government prices in any case.

(b) Market Structure and Participants

327. In considering the structure of the market, the USDOC observed that, with respect to softwood timber provided by the provincial government in Alberta, the provincial government "continues to administratively-set prices to companies that have been granted multi-year tenure rights" by the provincial authority, as indicated in Alberta's questionnaire responses.[565] In

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[560] 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).

[561] Lumber Preliminary Decision Memorandum, p. 29 (Exhibit CAN-008).

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

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

[564] *See generally US – Carbon Steel (India) (AB)*, paras. 4.151-4.159 and 4.167; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

[565] Lumber Preliminary Decision Memorandum, p. 28 (citing GQRGOA at Volume IV at 39 (FMA); at 41 (Quota); GQRGOA at Volume IV, p. 61; for FMA, Exhibit AB-S-14 (AFoA at section 16(3)); and for Quota, Exhibit AB-S-15 (TMR at section 15); and GQRGOA at Exhibit AB-S-15 (ATMR at sections 80, 81, and Schedule 3)) (Exhibit CAN-008).

addition, the USDOC also found that the government-allocated timber volumes exceeded demand by nearly 20 percent during the relevant period based on "[d]ata from the GOA . . . indicat[ing] that an 'overhang' exists between the volume of Crown-origin standing timber allocated and the volume harvested. For example, aggregate data from the GOA indicates that in FY 2015-2016, firms harvested 83.58 percent of their Crown-origin standing timber allocations."[566]

328. With regard to the entities operating in the market and their behavior, the USDOC observed that a few major players accounted for the majority of purchase and consumption volumes. The USDOC explained that "record evidence indicates that a small number of tenure holding companies dominate both the Crown-origin and private-origin standing timber harvests, which further ensures that the prices of private-origin standing timber track the prices of Crown-origin timber prices."[567] Specifically, the USDOC found that "the ten largest corporations accounted for approximately 79.11 percent of the allocated Crown-origin standing timber volume in FY 2015-2016, while . . . the ten largest corporations accounted for 80.42 percent of the Crown-origin standing timber harvest."[568] The provincial government provided "information . . . indicat[ing] that the tenure-holding corporations that dominate the consumption of Crown-origin standing timber also dominate the relatively small volumes of standing timber harvested from private land."[569] Likewise, "the consumption of private-origin standing timber is dominated by a small number of tenure-holding companies. For example, five tenure-holding companies account for approximately 71 percent of the harvest of private-origin standing timber."[570]

329. Taking into account the small volume of private sales (1.52 percent of total harvest)[571] and the dominance of the few major consumers, the USDOC reasoned that "private-origin standing timber is a minor, residual source of supply, and therefore, that sellers of private-origin standing timber would not be in a position to exert market power in their dealings with these companies."[572]

330. The USDOC also rejected Alberta's argument that "the existing level of concentration or competitiveness in the Alberta market is a 'prevailing market condition,' such that the

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[566] Lumber Preliminary Decision Memorandum, p. 28 (citing GQRGOA at Exhibit AB-S-1) (Exhibit CAN-008).

[567] Lumber Preliminary Decision Memorandum, p. 28 (Exhibit CAN-008).

[568] Lumber Preliminary Decision Memorandum, p. 28 (citing GQRGOA at Exhibit AB-S-1) (Exhibit CAN-008).

[569] Lumber Preliminary Decision Memorandum, p. 29 (citing GQRGOA at Exhibits AB-S-1 and S-2) (Exhibit CAN-008).

[570] Lumber Preliminary Decision Memorandum, p. 29 (citing GQRGOA at Exhibits AB-S-1 and S-2) (Exhibit CAN-008).

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

[572] Lumber Preliminary Decision Memorandum, p. 29 (Exhibit CAN-008).

Department cannot rely on this measure to find distortion in [the] market."[573] The USDOC explained that:

> An analysis of whether a proposed benchmark is market-determined must precede any analysis of how to account for prevailing market conditions in a benchmark comparison. Any other interpretation would lead to the absurd result that the Department could never rely on anything other than a tier-one benchmark, regardless of the level of distortion, because such benchmarks would always reflect "prevailing market conditions" in the country of provision. This result would effectively nullify 19 CFR 351.511(a)(2)(ii)-(iii), and is not supported by the language of section 771(5)(E) of the Act.[574]

331. The USDOC elaborated further that, while U.S. law, like Article 14(d) of the SCM Agreement, "identifies relevant 'prevailing market conditions' as including 'price, quality, availability, marketability, transportation, and other conditions of purchase or sale,'" other factors, "such as 'marketability' and 'transportation,' though constituting 'prevailing market conditions,' are typically not relevant to evaluating whether a particular benchmark is, or is not, market determined."[575]

(c) Log Prices

332. The USDOC also explained why it could not use TDA log prices as an alternative to a stumpage benchmark.[576] The USDOC explained that the TDA log prices are not prices "for the good or service" provided by Alberta, *i.e.*, stumpage.[577] Thus, the TDA log prices are not actual prices for stumpage, the good alleged to have been provided by the provincial government for less than adequate remuneration. Because an in-country stumpage benchmark was available from Nova Scotia, the USDOC rejected the log prices as stumpage benchmarks.

333. The USDOC also explained in its final analysis that, even if the TDA log prices were considered as the good in question, the TDA log prices could not be used as a benchmark

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

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

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

[576] Lumber Preliminary Decision Memorandum, p. 29 (citing GQRGOA at 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).

[577] *See* Lumber Final I&D Memo, pp. 48-49 (Exhibit CAN-010).

because those prices were not consistent with market principles.[578] The USDOC provided the following four reasons for its conclusion in this regard:

> first, the salvage timber is cut without regard to the tenure holder's approved cutting plan, and therefore the prices are not a fair representation of the price of mature standing timber;
>
> second, TDA transaction data contain "salvage" transactions of logs that were not offered for sale on the open market – the tenure holder is required to take part in salvage transactions at the direction of the non-timber concession holder;
>
> third, 60 percent of the transactions by volume are sales of Crown-origin logs, for which Crown stumpage was paid – and thus these transactions are unreliable insofar as they would yield a circular comparison of Crown stumpage prices with a benchmark that also included Crown stumpage; and
>
> fourth, timber in Alberta is subject to an export prohibition under Section 31 of the *Alberta Forests Act*, which prevents log sellers from seeking the highest prices in all markets and, thus, artificially creates downward pressure on log prices throughout the province.[579]

334. Taken together, the USDOC concluded that these factors indicate that the TDA prices for logs do not represent prices that are consistent with market principles.

335. Based on the foregoing, the USDOC concluded that the conditions of the stumpage market in Alberta demonstrated that private-origin standing timber prices mirror the administratively-set prices charged by Alberta for Crown-origin standing timber and that the private stumpage prices in Alberta are distorted and cannot be used as an appropriate benchmark.[580] The USDOC also determined that, with respect to log distortion (and in addition to its analysis of Alberta's stumpage distortion), even if no in-country stumpage prices were on the record, the log prices from the TDA data could not be used as a benchmark because the observed prices are not consistent with market principles.[581] As a result, the USDOC determined

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[578] *See* Lumber Final I&D Memo, pp. 50-51 (Exhibit CAN-010).

[579] Lumber Final I&D Memo, pp. 50-51 (citations omitted) (Exhibit CAN-010).

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

[581] *See* Lumber Final I&D Memo, pp. 49-54 (Exhibit CAN-010).

that it was appropriate to use a stumpage benchmark from Nova Scotia in lieu of resorting to a derived-log benchmark from Alberta.[582]

(3) Canada Has Failed to Demonstrate that Rejecting Alberta Log Prices Is Inconsistent with Article 14(d) of the SCM Agreement

336. In its first written submission, Canada argues that the USDOC was unjustified in rejecting derived log-price benchmarks in Alberta.[583] Canada's arguments lack merit. The USDOC provided a detailed explanation of the reasons for its determinations with respect to the log prices Canada put on the record; the USDOC addressed all relevant issues raised by Canada and the respondents in this regard; and the USDOC found that the balance of evidence in this investigation supported its determination to reject the TDA log prices because market-determined, in-country private stumpage prices from Nova Scotia were available in this case and the TDA log prices were not consistent with market principles.

337. First, Canada is wrong that the USDOC was unjustified in rejecting derived log-price benchmarks in Alberta on the basis that the record provided evidence of prices for the specific good in question, that is, stumpage.[584] Canada argues that, because it would be permissible to rely on a benchmark for the "same or similar" good,[585] it should therefore be impermissible to reject log prices as a benchmark because logs are comparable to stumpage.[586] But the USDOC explained that "[b]ecause the good at issue in this investigation is stumpage, a market-determined stumpage price is the preferred benchmark."[587] Given the existence of an in-country stumpage benchmark from Nova Scotia, the USDOC determined that the log prices from the TDA data were not viable as a benchmark for stumpage provided by Alberta.[588]

338. While the use of a log-derived benchmark for stumpage may be permissible in certain contexts, the record in this case already contained a benchmark for the good in question in the country of provision. By way of contrast, the determination to use a log-derived benchmark for British Columbia only followed from the fact that the record did not contain a benchmark that could be used for the good in question (*i.e.*, the larger variety of SPF found in British Columbia). Here, given the availability of a valid in-country benchmark for market-determined stumpage

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

[583] *See* Canada's First Written Submission, paras. 263-265.

[584] *See* Canada's First Written Submission, paras. 266 and 274-295.

[585] *See* Canada's First Written Submission, para. 267; *ibid.*, paras. 267-269 and 272.

[586] *See* Canada's First Written Submission, para. 272.

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

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

prices in Nova Scotia, the USDOC's rejection of the TDA log prices is consistent with the Article 14(d) guidelines for selecting a benchmark.

339. Second, the log prices themselves were not usable as market-determined prices. The USDOC explained that the log transactions from the TDA data are not consistent with market principles because, among other things, the transactions involve salvage timber that "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."[589] Canada suggests that whether the timber is cut in accordance with the tenure holder's cutting plan is irrelevant because there is relatively little variation in the size and species of Alberta timber, which makes salvage timber indistinguishable from other Alberta timber.[590] However, Alberta explained during verification that the trees in Alberta may take from 90 to 120 years to reach full growth.[591] "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."[592] 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)."[593] Damaged timber that is prematurely cut cannot form the benchmark for standing timber cleared for commercial purposes. Thus, the USDOC reasonably found that these salvage transactions take place in non-commercial circumstances.

340. The USDOC also found that the salvage log transactions from the TDA data "were not offered for sale on the open market," given that "the tenure holder is required to take part in salvage transactions at the direction of the non-timber concession holder."[594] Canada argues that the salvage log transactions do not involve "required" purchases or sales.[595] However, the USDOC observed that "[t]he Timber Management Regulations require FMA holders and Timber Quota holders to salvage timber under threat of having the volume charged against its [annual allowable cut] for refusal to do so."[596] The result is that tenure holders are pressured to purchase

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

[590] *See* Canada's First Written Submission, paras. 285-286.

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

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

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

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

[595] Canada's First Written Submission, paras. 281 and 287-289.

[596] Lumber Final I&D Memo, p. 49 (Exhibit CAN-010). The relevant provision under the Timber Management Regulation reads as follows:

> Where the holder of a forest management agreement or a timber quota neglects or refuses a request from the director to salvage timber in a management unit in

salvage timber to mitigate losses. Canada also argues that the salvage log transactions are "only a small percentage of the timber volume reported in the TDA survey," and the USDOC could have excluded those transactions if the USDOC believed that the salvage transactions should not be included in the benchmark.[597] Even if the salvage transactions could be excluded from the TDA data, this does not address the USDOC's other reasons for finding that the TDA log prices are not consistent with market principles.

341. The USDOC explained that using the TDA log prices as a benchmark "would yield a circular comparison of Crown stumpage prices with a benchmark that also included Crown stumpage," because "60 percent of the transactions by volume are sales of Crown-origin logs, for which Crown stumpage was paid."[598] Relying on the Brattle Report,[599] Canada argues that the origin of the logs is irrelevant because the government is not the seller and the seller will seek to maximize profits.[600] The USDOC, however, disagreed that the origin of the logs is irrelevant. According to the record, the transactions of Crown-origin logs "are encumbered by a Crown lien which has priority over all other encumbrances, until Crown stumpage is paid; thus, title to harvested logs does not pass to the buyer until Alberta Timber Dues are paid in full."[601] The USDOC explained that "[t]his encumbrance creates risks for both the tenure holder and the buyer which would not exist in an open market situation."[602] Further, Alberta may not be the seller of these Crown-origin logs, but the Crown stumpage fees linked to Crown-origin stumpage is a cost that factors into the pricing of Crown-origin logs. Thus, the origin of the logs is not "irrelevant."

342. Finally, the USDOC found that Alberta timber "is subject to an export prohibition under Section 31 of the *Alberta Forests Act*, which prevents log sellers from seeking the highest prices in all markets and, thus, artificially creates downward pressure on log prices throughout the province."[603] Canada acknowledges that Alberta timber is subject to an export prohibition, but

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> which he has a forest management agreement or timber quota, the volume of unsalvaged timber may be charged as production against the timber quota or forest management agreement.

GOA QR at Exhibit AB-S-15 (Timber Management Regulation, section 153(1)) (Exhibit CAN-115).

[597] *See* Canada's First Written Submission, paras. 283-284.

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

[599] *See* Alberta, "Brattle Assessment of an Internal Benchmark for Alberta Crown Timber" (Exhibit AB-S-24) ("Brattle Report") (Exhibit CAN-093).

[600] *See* Canada's First Written Submission, paras. 291-292.

[601] Lumber Final I&D Memo, p. 50, footnote 308 (citing GOA Mar. 14, 2017 QR at Exhibit AB-S-14) (Exhibit CAN-010).

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

[603] Lumber Final I&D Memo, p. 50 (Exhibit CAN-010). Under Section 31(1) of the *Alberta Forests Act*, "[n]o person shall transport or cause to be transported logs, trees or wood chips, except dry pulpwood or Christmas trees, to any destination outside Alberta from any forest land." GOA QR at Exhibit AB-S-14 (Exhibit CAN-112).

argues that Alberta did not invoke this prohibition during the period of investigation and granted all twelve export authorization applications received in 2015.[604] This argument is without merit and does not demonstrate that the export prohibition did not impact the TDA log prices. The *Alberta Forests Act* contains two limited exceptions to the export prohibition: one exception is for logs that are used for research or experimental purposes, and the other is an exemption for a period not to exceed a year.[605] Presumably, the twelve export authorization applications received by Alberta met the requirements of one of these limited exceptions.[606] The fact that Alberta had no need to enforce the prohibition during the period of investigation[607] suggests that the log sellers are aware that they are not authorized to sell logs in the export market, absent the exceptional circumstances described above.

343. For all of these reasons, an unbiased and objective investigating authority could have reached the conclusion – as the USDOC did – that there were no market-determined private stumpage prices in Alberta that could be used for benchmarking purposes.

D. The USDOC's Determination to Use an Out-of-Country Benchmark for British Columbia Stumpage Is Not Inconsistent with Article 14(d) of the SCM Agreement

344. This section addresses the USDOC's determination to use an out-of-country benchmark for British Columbia stumpage. First, section II.D.1 demonstrates that the USDOC's distortion finding is not inconsistent with Article 14(d) of the SCM Agreement because the provincial government's predominance in the market, combined with the flaws in its auction system, resulted in price distortions that would generate a circular comparison and, therefore, would not serve as a meaningful benchmark. Second, section II.D.2 demonstrates that the selected benchmark – a stumpage benchmark constructed from private log prices in the U.S. state of Washington – is not inconsistent with Article 14(d) of the SCM Agreement because the U.S. log prices reflected private prices for comparable goods consistent with market principles and were properly adjusted to ensure the prices relate to prevailing market conditions for British Columbia stumpage.

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[604] *See* Canada's First Written Submission, paras. 293-295.

[605] *See* GOA QR at Exhibit AB-S-14 (Exhibit CAN-112).

[606] *See* Canada's First Written Submission, para. 295.

[607] *See* Canada's First Written Submission, paras. 293-295.

1. The USDOC's Distortion Finding Is Not Inconsistent with Article 14(d) of the SCM Agreement Because an Objective and Unbiased Investigating Authority Could Have Reached the Conclusion that BC's Predominant Role as Supplier of Stumpage Distorted Prices and Rendered BC Prices Not Reflective of Market Conditions

345. The discussion in this section begins with a review of the investigative process followed by a summary of the USDOC's findings with respect to price distortion for British Columbia stumpage. The discussion below also demonstrates that the USDOC's analysis and explanation in response to the arguments Canada and Canadian interested parties raised confirms that the USDOC provided a reasoned and adequate explanation of its determination. Canada has failed to demonstrate that the USDOC's determination is inconsistent with Article 14(d) of the SCM Agreement because an objective and unbiased investigating authority could have determined – as the USDOC did – that there were no market-determined in-country private prices for British Columbia stumpage that could be used for benchmarking purposes.

a. Investigative Process for British Columbia

346. The investigative process for British Columbia stumpage proceeded as follows. On January 19, 2017, the USDOC sent a CVD questionnaire to Canadian provincial authorities in British Columbia responsible for providing the subsidies under investigation.[608] As part of its standard CVD questionnaire, the USDOC solicits information regarding the government entities responsible for administering the alleged subsidy programs, the nature of the programs, and the history of distributions under each of the programs at issue. For each specific type of subsidy, the government CVD questionnaire instructs respondents to complete a standard annex form tailored to the relevant subsidy type. In this case, the USDOC also issued an addendum to the Initial Questionnaire regarding stumpage for British Columbia on January 31, 2017.[609]

347. The USDOC received the response to the Initial Questionnaire and its addendum from British Columbia on March 15, 2017.[610] On March 17, 2017, the USDOC received responses to the Standard Questionnaire Appendix concerning provincial stumpage program.[611]

348. The USDOC sent a supplemental questionnaire on March 21, 2017.[612] Around the same time, on March 30, 2017, the USDOC met with certain interested parties concerning the

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[608] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[609] *See* Lumber Preliminary Decision Memorandum, p. 3 (Exhibit CAN-008).

[610] *See* GBC QR (Exhibit CAN-018 (BCI)).

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

[612] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing Supplemental Questionnaire – GBC; Supplemental Questionnaire – GOC-I) (Exhibit CAN-008).

stumpage system in British Columbia.[613] British Columbia provided its response to the supplemental questionnaires on April 3, 2017.[614]

349. In its responses, British Columbia reported that, within "the province, the harvest of public standing timber from provincial Crown land is regulated under the *Forest Act*," and the "right to harvest Crown-origin standing timber from the province is provided by the GBC under twelve types of agreements - nine in the form of licenses, and three in the form of stand-alone permits."[615] The "three main types of harvesting licenses in the province that account for the majority of standing timber harvested on Crown lands" are Tree Farm Licenses ("TFLs"), Forest Licenses, and Timber Supply Licenses ("TSLs").[616]

350. British Columbia explained in its questionnaire response that, "before harvesting standing timber from the license area, license holders are required to apply for cutting permits, which provide specific details regarding the amounts to be harvested within the license area, whereas stand-alone permits allow the permit-holder to harvest without further authorization."[617]

351. Of the "three main types" of licenses (or tenures), the type that accounts for the majority of the harvest is the Tree Farm License. "TFLs are area-based tenures, which allow tenure holders to occupy and manage forests within a specific area for a 25-year period."[618] The next most frequently used type of license is a Forest License. Forest Licenses are "volume-based tenures, which provide the right to harvest a specified amount of standing timber annually within a particular area for up-to a 20-year period."[619] British Columbia explained that, "[i]n order to harvest under either of these licenses, the licensees must first apply for, and be issued, a cutting permit," and that "under both license agreements, the holder is responsible for costs associated with forest development planning, road-building, harvesting, silviculture and payment of stumpage fees and annual rent."[620]

352. A third type of license, the Timber Supply License, may be purchased through government auctions. This type of license "specifies the area within which standing timber may

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[613] *See* Lumber Preliminary Decision Memorandum, p. 2 (citing Ex-Parte Meeting – BC Stumpage).

[614] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing GBCSQR and GBC/GOASQR) (Exhibit CAN-008).

[615] *See* Lumber Preliminary Decision Memorandum, p. 20 (citing GQRGBC at BC I-65-67) (Exhibit CAN-008).

[616] Lumber Preliminary Decision Memorandum, p. 20-21 (citing GQRGBC at BC I-69-77) (Exhibit CAN-008).

[617] *See* Lumber Preliminary Decision Memorandum, p. 20 (citing GQRGBC at BC I-65) (Exhibit CAN-008).

[618] Lumber Preliminary Decision Memorandum, p. 21 (citing GQRGBC at BC I-69) (Exhibit CAN-008).

[619] Lumber Preliminary Decision Memorandum, p. 21 (citing GQRGBC at BC I-72-75) (Exhibit CAN-008).

[620] *See* Lumber Preliminary Decision Memorandum, p. 21 (citing GQRGBC at BC I-71 and 74-75) (Exhibit CAN-008).

be harvested and the fees that must be paid," and "grant[s] the right to harvest standing timber within a specific forest area for no more than four years."[621] A TSL holder "is not required to apply for an additional cutting permit to begin harvesting operations."[622]

353. 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."[623] 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.[624]

354. 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.[625]

355. British Columbia submitted pre-preliminary comments on April 11, 2017.[626]

356. After disclosing its preliminary findings, the USDOC officials conducted an on-site verification of British Columbia from June 19, 2017, through June 22, 2017.[627] British Columbia initially reported that the government auction process accounts for "[a]pproximately 20 percent of the Crown harvest [that] is sold."[628] The USDOC confirmed at verification, however, "that the auction harvest accounted for only 15.4 percent of the total unrestricted softwood BCTS

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[621] Lumber Preliminary Decision Memorandum, p. 21 (citing GQRGBC at BC I-75-77) (Exhibit CAN-008).

[622] Lumber Preliminary Decision Memorandum, p. 21 (citing GQRGBC at BC I-76) (Exhibit CAN-008).

[623] Lumber Preliminary Decision Memorandum, p. 20 (citing GQRGBC at BC I-34 and Exhibit BC-S-2) (Exhibit CAN-008).

[624] Lumber Preliminary Decision Memorandum, p. 21 (citing GQRGBC at BC I-137) (Exhibit CAN-008). "BCTS" refers to "British Columbia Timber Sales." "MPS" refers to BC's "Market Pricing System."

[625] *See* Lumber Preliminary Decision Memorandum, p. 21 (citing GQRGBC at BC I-139) (Exhibit CAN-008); Lumber Final I&D Memo, Comment 18, p. 54 (citing GBC Primary QNR Response, Part 1 at BC1-138) (Exhibit CAN-010).

[626] *See* Lumber Preliminary Decision Memorandum, p. 2 (citing British Columbia – Pre-Preliminary Determination Comments (April 11, 2017)) (Exhibit CAN-008).

[627] *See* GBC Verification Report (Exhibit CAN-088).

[628] Lumber Preliminary Decision Memorandum, p. 21 (citing GQRGBC at BC I-138) (Exhibit CAN-008).

harvest in the province."[629] The information examined at verification became an integral part of the administrative record, as reported in the British Columbia Verification Report.[630]

b. Findings for British Columbia

357. The USDOC determined, as a result of its investigation, to measure the adequacy of remuneration for stumpage provided by British Columbia using constructed stumpage prices for the species-specific stumpage found in British Columbia.[631] The USDOC found that it could not use British Columbia prices as a benchmark because the provincial government's predominance in the market, combined with the flaws in its auction system, resulted in price distortions that would generate a circular comparison and, therefore, would not serve as a meaningful benchmark. In reaching this conclusion, the USDOC considered a number of factors. These included the government's market share, the structure of the relevant market, and the types of entities operating in that market (as well as their behavior). The USDOC considered these factors using the approach outlined in its three-tiered hierarchy for analyzing potential benchmarks.

358. In this context, the USDOC explained that:

> where the Department has found that the government provides the majority or, in certain circumstance, a substantial portion of the market for a good or service, it has considered prices for such goods and services in the country to be significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit. This is because where the government's role as provider of the good or service is so predominant, it in effect determines the prices for private sales of the same or similar goods or services such that comparing the government prices to private prices would amount to comparing the financial contribution to itself.[632]

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[629] Lumber Final I&D Memo, Comment 18, p. 54 (citing GBC Verification Exhibits at VE-6 at 117) (1,827,087 m^3 (coast) + 7,421,341 m^3 (interior) / 60,177,713 m^3 (total)) (Exhibit CAN-010).

[630] *Ibid.*

[631] *See* Lumber Preliminary Decision Memorandum, pp. 46-53 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 63-65 (Exhibit CAN-010).

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

359. The USDOC explained that, according to its hierarchy, it would further consider government prices, so as to focus the analysis not on the source of the price, but rather on price distortion itself.[633] In this regard, the USDOC explained:

> we 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.[634]

360. The USDOC explained its framework for analysis as follows:

> [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.[635]

361. The USDOC further explained:

> where it is reasonable to conclude that prices in that market are significantly distorted as a result of the government's involvement in that market, the Department will not use the prices within that market. Therefore, when information on the record indicates that the government is involved in the market, before determining whether it is appropriate to use prices from within that market, the Department must determine whether that market is distorted due to the presence of the government. Once it is determined that the market is distorted by the presence of the government, prices

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[633] *See generally US – Carbon Steel (India) (AB)*, paras. 4.151-4.159 and 4.167; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

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

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

> between private parties, import prices, or government auction prices are no longer viable benchmark prices.[636]

362. Here, the USDOC "found that the prices for standing timber generated by the BCTS auctions were not market-determined, and thus, were not appropriate to use as a tier-one benchmark."[637] The USDOC reasoned that (1) "a small number of companies dominated the allocation and harvest of standing timber from BC Crown lands;" and (2) "export restraints created a downward pressure on the price of logs sold in BC, and thus, by extension, the prices in BCTS auctions."[638] The USDOC also recalled a number of observations from its experience investigating the British Columbia auction system in past cases:

> (1) that the auctions included sawmills but primarily consisted of loggers who then sold the standing timber to Crown-holding sawmills;
>
> (2) the price that Crown-holding sawmills were willing to pay at auction or, more frequently, to loggers was determined by the price they pay for Crown stumpage because the volume of allocated Crown-origin standing timber exceeded the volume of the Crown-origin standing timber harvest; and
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> (3) the price loggers bid at the auctions was limited by the price they received from their customers, the largest of whom were tenure-holding sawmills.[639]

363. In this regard, and in considering the structure of the market, the USDOC found that "price distortion continued to exist during the [period] of this investigation" based on observing "several distortive characteristics" in the British Columbia system.[640]

364. First, "a handful of companies continue to dominate the direct allocation and harvest of standing timber from Crown lands."[641] In particular, the "five largest companies account for 58.7 percent of standing timber allocations on Crown lands, while the ten largest companies

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

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

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

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

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

[641] Lumber Preliminary Decision Memorandum, p. 37 (citing GQRGBC at Exhibit BC-S-6; GQRGBC at Exhibit BC-S-9) (Exhibit CAN-008).

account for 72.45 percent."[642] The same five companies "are the largest harvesters of Crown-origin standing timber, accounting for 65.23 percent of the Crown harvest, while the ten largest companies account for 71.55 percent."[643] The USDOC also found that, with respect to the auctions themselves, "the record evidence supports a conclusion that the auction markets are likewise concentrated among a small number of companies"[644] and that "a handful of tenure-holding sawmills account for the majority of Crown-origin standing timber acquired via the BCTS auctions."[645] In particular, the same "five companies referenced above as dominating the direct allocation and harvest of standing timber from Crown lands account for [as much as] 64.8 percent" of the auctioned volume,[646] and these "tenure-holding sawmills continue to be the largest source of BCTS consumption volume."[647]

365. Second, the USDOC observed that the provincial and federal governments "impose restraints on the exportation of BC-origin logs, and these restraints contribute to an overabundance of log supply that, in turn, depresses the prices that auction participants are willing to pay, as well as the log prices that loggers can charge tenure-holding companies in the province. This further supports a finding that auction prices under the BCTS are distorted."[648] These "export restraints imposed by the GBC create downward pressure on the prices of logs sold in the provinces and on the prices paid in the BCTS auctions."[649]

366. Based on the foregoing, the USDOC concluded "that the prices generated from the BCTS auctions (and, in turn, the MPS stumpage rates that are calculated using these auction prices for the remainder of the province) do not produce valid market-determined prices"[650] because the auction "prices are effectively limited by the prices that large tenure-holders paid for Crown stumpage under their own tenures."[651] Thus, the USDOC reasoned that "these prices cannot serve as benchmarks to measure the adequacy of remuneration for Crown-origin standing timber,

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[642] Lumber Preliminary Decision Memorandum, p. 37 (citing GQRGBC at Exhibit BC-S-6; GQRGBC at Exhibit BC-S-9) (Exhibit CAN-008).

[643] Lumber Preliminary Decision Memorandum, p. 37 (citing GQRGBC at Exhibit BC-S-6; GQRGBC at Exhibit BC-S-9) (Exhibit CAN-008).

[644] Lumber Preliminary Decision Memorandum, pp. 37-38 (Exhibit CAN-008).

[645] Lumber Preliminary Decision Memorandum, p. 38 (Exhibit CAN-008).

[646] Lumber Preliminary Decision Memorandum, p. 38 (Exhibit CAN-008).

[647] Lumber Preliminary Decision Memorandum, p. 38 (citing GQRGBC at Exhibits BC-S-14 and BC-S-15).

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

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

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

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

because they do not reflect market-determined prices from competitively run government auctions."[652]

367. The USDOC also took into account the so-called "three-sale limit."[653] Under the three-sale limit, the number of active TSLs a company can harvest at one time is limited to three.[654] As a result, the universe of companies that can participate in the BCTS auctions is limited to companies that have not met the three-sale limit.[655] The USDOC found that "while the three-sale rule has, in practice, failed to deliver the intended policy result of broadening participation in the TSL harvest, it has, at the same time, introduced an additional source of market distortion, in the form of cutting rights fees necessitated by 'straw purchases' or proxy bidding."[656] The USDOC explained in the final determination that the three-sale limit was independently sufficient to find that winning BCTS auction bids were not market-determined.[657] Addressing the three-sale limit, the USDOC explained that, "[f]or 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."[658]

368. Canada argued that the limit contradicted the USDOC's finding that "a small number of large lumber companies dominate the BCTS auction market, thereby inhibiting competition."[659] The USDOC acknowledged the limit was created "ostensibly to encourage competition by imposing a cap on the extent of participation by any one company and thus preventing the large companies from dominating all the auctions," but found that "by so doing, the GBC imposes an artificial barrier to participation in the BCTS auctions."[660] The USDOC found, specifically, that "record information indicates that the three-sale limit has failed to significantly diversify the entities harvesting from TSLs won on the auction in the manner intended," because "dominant firms have managed to get around the three-sale rule by making 'straw purchases' through proxy bidders, thus maintaining effective dominance in these auctions."[661]

369. After taking this information into account, the USDOC observed further that:

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

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

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

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

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

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

> while the three-sale rule has, in practice, failed to deliver the intended policy result of broadening participation in the TSL harvest, it has, at the same time, introduced an additional source of market distortion, in the form of cutting rights fees necessitated by "straw purchases" or proxy bidding.[662]

370. In addition, the USDOC concluded that log export restraints further distorted prices in the BC market:

> 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 government auctions …, and therefore are not suitable for use as a tier-one benchmark ….[663]

371. Ultimately, the USDOC "found that these prices were not market-determined and, thus, were not appropriate to use as a tier-one benchmark."[664] 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.

372. 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."[665] Accordingly, the USDOC

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

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

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

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

determined that, "prices within British Columbia, including prices from the BCTS auctions, cannot serve as a benchmark under" the appropriate standard.[666]

373. In examining the other possible benchmark sources within Canada, the USDOC explained that "the standing timber that grows in Nova Scotia is not sufficiently comparable to the standing timber that grows on Crown lands in British Columbia."[667] The USDOC likewise explained that the species of timber in British Columbia was not comparable to the species in nearby provinces such as Alberta.[668] Ultimately, the USDOC determined that "the species that grow in British Columbia, and more particularly the species harvested by the B.C.-based respondent firms, continue to match the species that grow in the U.S. [Pacific Northwest]."[669] The USDOC therefore relied on "U.S. log prices . . . from private transactions between log sellers and buyers for logs harvested from private lands."[670] The USDOC found that "the U.S. log prices are market-determined prices and, therefore, may serve as a benchmark" under the appropriate standard.[671]

c. Canada Has Failed to Demonstrate that Rejecting British Columbia Prices Is Inconsistent with Article 14(d) of the SCM Agreement

374. Canada's argument regarding the USDOC's rejection of BCTS auction prices overlooks the USDOC's reasoned analysis in the final determination.[672] Canada argues (1) that the USDOC's distortion finding was based on mere government presence;[673] (2) that the USDOC's analysis of market structure and participants was not relevant to price distortion;[674] (3) that the USDOC should have reached a different conclusion based on the opinions of Canada's consultant, Dr. Athey;[675] and (4) that Canada's and British Columbia's log export restraints were

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

[667] Lumber Preliminary Decision Memorandum, p. 44 (Exhibit CAN-008). *See generally* Lumber Preliminary Decision Memorandum, pp. 47-51 (Exhibit CAN-008).

[668] *See* Lumber Preliminary Decision Memorandum, p. 46 (Exhibit CAN-008).

[669] Lumber Preliminary Decision Memorandum, p. 49 (Exhibit CAN-008); Lumber Final I&D Memo, Comment 21, pp. 63-65 (Exhibit CAN-010).

[670] Lumber Preliminary Decision Memorandum, p. 49 (Exhibit CAN-008).

[671] Lumber Preliminary Decision Memorandum, pp. 49-50 (Exhibit CAN-008).

[672] *See* Canada's First Written Submission, para. 138.

[673] *See* Canada's First Written Submission, paras. 139 and 144-49.

[674] *See* Canada's First Written Submission, paras. 142 and 162-191.

[675] *See* Canada's First Written Submission, paras. 140, 150, and 159-160.

not relevant to the price distortion analysis.[676] Canada's arguments are unavailing because the USDOC adequately addressed and rejected each of these contentions in the underlying investigation. The final determination demonstrates that, notwithstanding Canada's arguments, an objective and unbiased investigating authority could have reached the conclusion – as the USDOC did here – that purchases of standing timber in British Columbia should be compared to an out-of-country benchmark in order to assess the adequacy of the remuneration.

(1) The USDOC's Distortion Finding Was Not Based on Mere Government Presence

375. Canada argues that the USDOC applied a "*per se*" test based on government presence in the market and that the USDOC's finding of distortion is otherwise unjustified.[677] But the USDOC's distortion finding was not based on mere government presence. 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. Canada's assertion that the USDOC applied a "*per se* test," pursuant to which it "summarily concluded" that the BC stumpage market is distorted because of the government of British Columbia's market share,[678] ignores each of these findings.

376. Canada's argument relating to the purported application of a "*per se* test" cites a single sentence of the final determination, wherein the USDOC states: "As we found in the *Preliminary Determination,* information on this record indicates that the British Columbia stumpage market is distorted because the majority of the market is controlled by the government."[679] Canada misinterprets the USDOC's analysis, as the quoted sentence highlights that the USDOC's final determination relies upon the analysis from the preliminary determination, because it expressly incorporates the preliminary determination and specifically references that decision's analysis of "information on the record." Thus, the USDOC's statement that the BC stumpage market is distorted because it is majority-controlled by the government draws upon, rather than replaces, its preliminary analysis that the BCTS auction prices are not a viable tier-one benchmark. The USDOC further developed this analysis in the final determination.[680] Canada's attempt to characterize the USDOC's distortion analysis as a

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[676] *See* Canada's First Written Submission, paras. 143 and 192-224.

[677] *See* Canada's First Written Submission, paras. 139 and 144-149.

[678] *See* Canada's First Written Submission, paras. 144-49.

[679] *See* Canada's First Written Submission, para. 144 (quoting Lumber Final I&D Memo, p. 55 (Exhibit CAN-010)).

[680] Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

per se finding with additional reasoning merely in the alternative misrepresents the USDOC's decision.

(2) The USDOC's Analysis of BC's Market Structure and Participants Confirmed That Prices Are Distorted

377. With respect to Canada's additional argument that the USDOC erred by "rejecting BCTS auction prices on the basis of inadequate competition," Canada again misinterprets the USDOC's findings.[681] Canada is wrong that the state of competition between private actors in British Columbia must be treated as a prevailing market condition and therefore cannot be considered in the distortion analysis.[682] In this regard, the Appellate Body has explained further that the "examination may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers," or "the behaviour of the entities operating in that market."[683] Indeed, it would be illogical for the USDOC's distortion analysis to disregard market concentration in all circumstances, and particularly where the government is a predominant seller and there is only a single or small handful of predominant buyers. Contrary to Canada's arguments,[684] the allocation of market power among buyers in such a situation is relevant to the question of the ultimate impact of the government's actions in the market, *i.e.*, its provision of stumpage.[685]

378. The common identity of the dominant firms consuming TSL-harvested timber and harvesting timber from TFLs and FLs informed the USDOC's analysis of whether the BCTS auction prices were competitive and open and independent, particularly in a market where the government is virtually the only seller of significance. The USDOC explained that, although the participants in BCTS auctions are primarily independent loggers, the prices paid by these loggers key off prices that the dominant tenure-holding sawmills are willing to pay, and BCTS prices are effectively limited by what those tenure holders pay for timber harvested from their tenures.[686] Thus, Canada's assertion that the USDOC's analysis is based merely upon "the level of competition" misses key distinctions.[687]

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[681] *See* Canada's First Written Submission, para. 161.

[682] *See* Canada's First Written Submission, paras. 142 and 162-191.

[683] *US – Carbon Steel (India) (AB)*, para. 4.157, footnote 754.

[684] *See* Canada's First Written Submission, paras. 163-67.

[685] *See* Lumber Final I&D Memo, p. 55 (USDOC's preference is to compare government price to a market-determined price) (Exhibit CAN-010).

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

[687] *See* Canada's First Written Submission, paras. 163-167.

379. The USDOC's determination that BCTS auction prices were not market-determined did not rely merely on the fact that five firms consumed the majority of the harvest from BCTS-auctioned TSLs; it relied on the fact that those same five firms also had the majority of the comparatively much larger harvest from TFLs and FLs with prices derived from BCTS-winning bids.[688]

380. Furthermore, Canada is mistaken that the USDOC failed to explain how large-firm dominance of the BCTS consumption volume distorted BCTS auction prices.[689] As indicated above, the USDOC cited record data that showed that five firms harvested 65.2 percent of Crown timber, and that these same five firms purchased the predominant amount of timber harvested from TSLs sold at BCTS auctions – 43.6 percent of the scale-based amount, and 64.8 percent of the cruise-based amount.[690] British Columbia aims to sell only 20 percent of the overall harvest through BCTS auctions, and the USDOC verified that 15.4 percent of the volume during the period of investigation was harvested under licenses won at unrestricted BCTS auctions.[691] The USDOC relied upon a study from BCTLC submitted during *Lumber IV*, indicating that bids by independent loggers in BCTS auctions will "take into account the mill's valuation for the logs, since the loggers anticipate being able to sell the harvested logs directly to the mill or through the log market (where log market prices will reflect the valuations of all local mills)."[692] The USDOC explained that the structure of the timber market provides leverage to the tenure-holding sawmills and the prices paid in BCTS auctions are limited to the prices that such sawmills are willing to pay.[693]

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

[689] *See* Canada's First Written Submission, paras. 168-181.

[690] Lumber Preliminary Decision Memorandum, pp. 37-38 (Exhibit CAN-008); Lumber Final I&D Memo, p. 57, footnote 341 (Exhibit CAN-010).

[691] Lumber Final I&D Memo, p. 54 & footnote 330 (Exhibit CAN-010). Because 90 percent of the timber harvest during the period of investigation was on provincial Crown land, Lumber Preliminary Decision Memorandum, p. 20, the 15.4 percent sold through unrestricted auctions represents about one-sixth of the overall harvest.

[692] Lumber Preliminary Decision Memorandum, p. 36 (quoting Certain Softwood Lumber Products from Canada, 70 Fed. Reg. 33,088, 33,101 (USDOC June 7, 2005) (prelim. results second admin. review)) (Exhibit CAN-008); Lumber Final I&D Memo, p. 58 (Exhibit CAN-010).

[693] Lumber Preliminary Decision Memorandum, p. 39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 57-58 (Exhibit CAN-010). There is an apparent typographical error in the final determination, in which the USDOC stated that "a small number of large lumber companies dominate the BCTS auction market." Lumber Final I&D Memo, p. 57 (Exhibit CAN-010). The USDOC cited data supporting the conclusion that a small number of companies dominate the BCTS consumption volume, where it referred to companies dominating the auctions at bidders. Lumber Final I&D Memo, p. 57, footnote 341 (Exhibit CAN-010). This is consistent with the USDOC's explanation in the preliminary determination that independent loggers win the majority of BCTS purchases. Lumber Preliminary Decision Memorandum, pp. 38-39 (Exhibit CAN-008). That portion of the USDOC's analysis in the

381. Given this market structure, the USDOC found that BCTS prices do not reflect market-determined prices from competitively-run auctions.[694]

382. Canada also argues that the USDOC should not have concluded that the three-sale limit, *i.e.*, the limitation that bidders may hold a maximum of three active TSLs at a time, distorts BCTS auction prices.[695] The USDOC explained, however, that although BCTS auctions are technically open to all bidders, "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."[696] The USDOC concluded that this reason alone was sufficient to exclude BCTS auction prices as a tier-one benchmark, because by excluding such potential bidders, the BCTS auction design was not a "competitively run" government auction envisioned under the USDOC's regulatory hierarchy.[697]

383. Canada argues that the USDOC did not "demonstrate that the three-sale limit *in fact* affected the number of bidders" in a given auction.[698] But how BCTS auctions would function without the three-sale limit is likely unknowable, and the USDOC's failure to cite such evidence does not indicate that its decision is unsupported. The relevant "fact" is that the design of the BCTS auction is inconsistent with an open, competitive auction because it introduces an artificial limit on the number of bidders.[699]

384. Canada also argues that the number of bidders supports a finding that the auction was competitively run.[700] However, the three-sale limit applies to all TSLs currently being harvested. Firms have up to four years to complete the harvest, and data provided by British Columbia indicate that the average time to harvest a TSL during the period of investigation was 1.72 years.[701] Far from demonstrating Canada's claim that BCTS auctions feature "robust competition,"[702] the data show that for the 358 unrestricted TSLs awarded in the BC Interior,

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preliminary determination was unchanged in the final determination. *See* Lumber Final I&D Memo, pp. 55-56 (Exhibit CAN-010).

[694] Lumber Preliminary Decision Memorandum, p. 39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 55-58.

[695] Canada's First Written Submission, paras. 182-191.

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

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

[698] Canada's First Written Submission, para. 182 (italics in original).

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

[700] Canada's First Written Submission, paras. 183-185.

[701] GBC QR at I-171, 178 (Exhibit CAN-018 (BCI)).

[702] Canada's First Written Submission, para. 155.

there were only 539 eligible, unsuccessful bids – *i.e.*, an average of 2.5 bids per auction.[703] In addition, 11 percent of TSLs failed to sell in their first listing.[704] 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 the winning bid. Data indicate, however, that the winning bid increases at a decreasing rate relative to the number of bidders."[705] 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."[706] 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."[707] Thus, Canada's arguments ignore British Columbia's own statements on the record linking price to the number of auction bids.

385. The USDOC's analysis further indicates that certain larger companies, including the three mandatory respondents with operations in British Columbia, employed intermediaries or contractors to bid on their behalf, and to that extent the auction bidders have been diversified in name only.[708] While this suggests that the three-sale limit is not blocking competition in BCTS auctions to the extent that it would if fully enforced, the USDOC concluded that the three-sale limit would nevertheless introduce another form of market distortion by cutting rights fees paid to intermediaries.[709] Specifically, the USDOC cited record evidence that Tolko reported costs associated with "third-party won BCTS auction purchases," and West Fraser costs for stumpage purchased by its employees.[710]

386. The USDOC reasonably concluded that part of the market value of the timber that would otherwise be offered at auction was instead being diverted into cutting rights fees, resulting in

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[703] GBC QR at I-174 (Exhibit CAN-018 (BCI)).

[704] GBC QR at I-179 (Exhibit CAN-018 (BCI)).

[705] GBC QR at I-178 (Exhibit CAN-018 (BCI)).

[706] GBC QR at I-143 (Exhibit CAN-018 (BCI)).

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

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

[709] Lumber Final I&D Memo, p. 10 (Exhibit CAN-010).

[710] Lumber Final I&D Memo, p. 57 (citing Tolko May 30, 2017 QR, Part 1 at 25; West Fraser Mar. 14, 2017 QR, Part 1 at 158) (Exhibit CAN-010). Notably, the USDOC granted an adjustment for cutting rights fees paid by the three mandatory respondents with operations in British Columbia in measuring whether the province provided stumpage for less than adequate remuneration. The USDOC explained: "By charging a cutting rights fee, the tenure holder or licensee is capturing some of the benefit of the subsidized input. Therefore, the Department must adjust for the amount that the respondents must pay to the third-party tenure holder or licensee to best capture the amount of the benefit that is actually conferred upon the respondents." Lumber Final I&D Memo, p. 74 (Exhibit CAN-010).

BCTS winning prices that do not reflect the full value of the timber.[711] The USDOC's conclusion reasonably interprets the record evidence. That evidence demonstrates that the respondents incurred additional costs to acquire the same goods from third-party tenure holders as opposed to bidding directly in the BCTS auction.[712] Thus, the relevant third-parties would likely submit bids that undervalue the actual market price of the stumpage. Therefore, the USDOC concluded that the stumpage rates resulting from the BCTS auction, on top of which the respondents also pay cutting rights fees, do not reflect market prices.[713]

387. In sum, notwithstanding Canada's criticisms that the USDOC's conclusion would be better supported with additional or different evidence, the USDOC amply supported its finding that the three-sale limit distorts BCTS auction prices, and its finding should be sustained. The USDOC's determination is one that an objective and unbiased investigating authority could have made in light of the facts and circumstances presented.

(3) The USDOC Considered Canada's Consultant Reports

388. Canada argues that the USDOC ignored the report prepared by Canada's consultant, Dr. Athey.[714] The fact that the USDOC did not reference Dr. Athey's report by name does not indicate that the USDOC failed to consider the report. The USDOC explained why it disagreed with the comments of the interested parties who relied on Dr. Athey's report in their administrative case briefs and rebuttals. Dr. Athey's report was one of the numerous expert reports that the interested parties commissioned specifically for the purposes of this investigation.[715] As discussed in the USDOC's rebuttal regarding the use of expert reports, the USDOC appropriately provided such reports limited weight given their potential for self-serving conclusions. The USDOC sought, and British Columbia refused to provide, its correspondence with Dr. Athey and other paid experts "with respect to the purpose, parameter, and/or conclusions of the study."[716] As such, British Columbia declined to submit evidence that would have supported Dr. Athey's objectivity.

389. Here, the record indicates that Dr. Athey is not disinterested, because she has long consulted for British Columbia regarding the management of its stumpage market. Indeed, Dr. Athey was asked to opine on whether the BCTS generates valid market-determined prices, notwithstanding the fact, noted in the USDOC's verification report for British Columbia, that

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

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

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

[714] Canada's First Written Submission, paras. 140 and 150-159.

[715] *See* GBC SQR at BC-Supp3-2-3 (Exhibit CAN-082) (addressing nine expert reports commissioned by British Columbia alone).

[716] *See* GBC SQR at BC-Supp3-1 (Exhibit CAN-082).

British Columbia retained Dr. Athey to design and implement the auction system.[717] Thus, Dr. Athey was essentially asked to grade her own work. The "References" section of Dr. Athey's report largely cites her prior work and that of another paid expert of British Columbia, Dr. Kalt.[718] Throughout the report, Dr. Athey directly responds to petitioners' arguments from this investigation.[719] Accordingly, it was reasonable for the USDOC to assign Dr. Athey's report, among other reports, less weight because of potential bias. As detailed above, there was extensive evidence that contradicted Dr. Athey's report and on which the USDOC based its findings.

390. Moreover, Canada cites Dr. Athey's report for propositions that do not undermine the USDOC's determination that BCTS prices are not independent or market-determined.[720] Canada notes Dr. Athey's opinion that market concentration "is not itself" an indicator of anti-competitive behavior.[721] But the USDOC's analysis of the British Columbia stumpage market does not rely on the proposition that market concentration is, *per se*, distortive. Similarly, Canada highlights Dr. Athey's opinion that few, if any, markets meet a perfectively competitive ideal.[722] Again, this opinion is non-controversial and does not mean that the USDOC should have disregarded the market effects of a small number of companies dominating both the allocation and harvest of standing timber from Crown land. Finally, Dr. Athey's opinion that large sawmills have a "distinctly limited" ability to lower prices is likewise of no moment.[723] Indeed, Dr. Athey did not conclude that they have "no ability" to lower prices because, although she deemed it unrealistic, Dr. Athey's own research showed that mills could incrementally impact prices if they acted in unison over a sustained period of time.[724]

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[717] *See* GBC Verification Report, p. 12 ("Ministry officials noted that the BCTS auction system was designed by 'world-leading experts in auction design,' including Dr. Susan Athey, to address the concerns outlined in the 2003 Policy Bulletin") (citing Verification Ex., VE-12 at 6-8) (Exhibit CAN-088).

[718] Athey Report, p. 59 (Exhibit CAN-023).

[719] *See generally* Athey Report (Exhibit CAN-023).

[720] *See, e.g.,* Canada's First Written Submission, paras. 164, 171-178.

[721] Canada's First Written Submission, para. 171.

[722] Canada's First Written Submission, para. 164. *See also* Lumber Preliminary Decision Memorandum, p. 35 (Exhibit CAN-008).

[723] Canada's First Written Submission, para. 175.

[724] *See* GBC QR at Ex. BC-S-182 at 49-50, footnote 34 (Athey Report) (Exhibit CAN-023).

(4) Log Export Restraints Contributed to Distortion in British Columbia

391. Canada argues that British Columbia's log export restraints were not relevant to the price distortion analysis.[725] The USDOC explained in the final determination, however, that "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."[726]

392. Finally, Canada's assertion that there was no support in the record for the USDOC's finding that the government of Canada's and government of British Columbia's log export restraints distort the BC stumpage market is incorrect. As described in detail in section IV of this submission (addressing the countervailability of Canada's and British Columbia's log export restraints), these laws explicitly instruct private log suppliers to sell to certain consumers (BC consumers) and not to sell to other consumers (in export markets) except in certain narrow circumstances. Specifically, the log export restraints require in-province processing of wood fiber, subject to exemption only if British Columbian timber processing facilities do not need or cannot economically use the input material, or if the material would otherwise be wasted.[727]

393. Canada states that the USDOC failed to draw a causal link between the presence of log export restraints and BCTS auction prices.[728] However, the USDOC explained that the governments of Canada and British Columbia "impose restraints on the exportation of BC-origin logs and that these restraints contribute to an overabundance of log supply that, in turn, depresses the prices that auction participants are willing to pay, as well as the log prices that loggers can charge tenure-holding companies in the province."[729] Furthermore, the log and stumpage markets are closely linked, and the log export policy "prevents log sellers from seeking the highest prices in all markets, and thus creates additional downward pressure on the log prices in the province."[730] The USDOC found that the in-province use requirements and related surplus tests, in-lieu of manufacturing fees, and potentially lengthy exception process, in their totality, restrain log exports from British Columbia.[731] The USDOC explained that log suppliers are

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[725] *See* Canada's First Written Submission, paras. 143 and 192-224.

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

[727] *See* Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[728] *See* Canada's First Written Submission, para. 199.

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

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

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

unable to enter into long-term supply contracts with foreign purchasers and must ensure that demand for logs in British Columbia is met before seeking purchasers overseas.[732]

394. Canada concedes that the log export restraints in British Columbia inhibit log exports – consistent with their purpose and plain language – but argues that the resulting restraint is not "meaningful" because virtually all applications for export during the period of investigation were approved.[733] However, as the USDOC explained, the fact that "logs in British Columbia are by default not allowed to be exported from the province" restrains exports.[734] Furthermore, the record evidence demonstrates that log suppliers are forced to negotiate with other domestic processors to lower their export volumes or their prices, under the threat that the purchaser would otherwise "block" the suppliers' export sales in the surplus test process.[735]

395. Canada mischaracterizes the USDOC's analysis of "blocking" as relying upon speculation.[736] On the contrary, the USDOC identified positive evidence in the record indicating that blocking is widespread, and that the high approval rate of export applications reflects that log suppliers have made agreements with processors in advance of applying for export approval, to ensure that those processors do not bid on their logs when offered in connection with the export authorization surplus test.[737] One independent report that the USDOC cited was based upon interviews with industry participants, and concluded that blocking forces some harvesters to sell logs "at or below their cost of production to the domestic processors," and that "the net effect of B.C. policy is to force timber harvesters to make next to nothing (or worse) on the domestic side of their business in order to safeguard their profitable export operations."[738] In addition, the record included an affidavit from a logging company, Merrill & Ring, stating that, "Although the GOC and GBC stated in their response to the Questionnaire that approximately 98 percent of log export applications in Canada are granted, Merrill's applications are only granted because Merrill has been forced to pre-arrange or negotiate agreements with domestic processors in order to prevent its export product from being blocked."[739] Thus, Canada's focus on the application approval rate is misleading, as the record evidence indicates that log suppliers negotiate side agreements with mills before they initiate an application for export.

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

[733] *See* Canada's First Written Submission, paras. 200-201.

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

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

[736] *See* Canada's First Written Submission, para. 203.

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

[738] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 11 at 8 (Exhibit USA-019).

[739] Petitioners' Comments on Canada's Initial Questionnaire Responses, Exhibit 32 at 3 (Exhibit USA-019). *See also ibid.*, Exhibits 12 and 13 (Exhibit USA-019).

396. In addition, Canada attempts to minimize the burden of the potentially lengthy export application process and the government of British Columbia's fees "in-lieu of manufacturing" imposed on log exports.[740] However, the USDOC assessed these factors in analyzing the totality of the circumstances surrounding Canada's measures, and appropriately found that multiple week application timeframe and sometimes substantial fees contributed to the its finding that the log export restraints inhibit exports.[741] The USDOC found that fees for log exports from the BC Coast are especially high, *i.e.*, up to 15 percent of the log and in some instances subject to a multiplication factor of 1.1 and 1.3 of the fee, and that even the lower C$1 per cubic meter fee imposed on logs exports from the Interior raise the cost of exporting compared to domestic sales.[742]

397. Canada argues that the USDOC did not establish a clear link between the log export restraints in British Columbia and the divergence in price between export and domestic log sales, citing its alternative explanation that "export premia" are a normal feature of log markets.[743] But the USDOC analyzed Canada's "export premia" evidence and appropriately concluded that even if log exports are likely to be of a higher quality and price than goods sold domestically, this does not establish that Canada and British Columbia's log export restraints do not suppress prices in British Columbia.[744] Indeed, the USDOC cited record evidence indicating that BC domestic prices are consistently lower than U.S. and world market prices.[745] Moreover, the evidence on which Canada relied to demonstrate the existence of "export premia" was from its commissioned expert, who self-selected three markets as the basis for his findings.[746]

398. Canada also argues that the log export restraints do not impact log prices in the BC Interior, and therefore are irrelevant to the mandatory respondents with operations in the province.[747] Notwithstanding that it is more difficult or costlier to export from the Interior, the USDOC explained that the log export permitting process applies equally to the Interior, that exports can and do emanate from the Interior, and that the log export restraints impact the Interior directly, as well as through a "ripple" effect from the Coast.[748]

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[740] *See* Canada's First Written Submission, para. 204.

[741] Lumber Final I&D Memo, pp. 139, 142 (Exhibit CAN-010).

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

[743] *See* Canada's First Written Submission, para. 208.

[744] Lumber Final I&D Memo, pp. 143-44 (Exhibit CAN-010).

[745] Lumber Final I&D Memo, p. 144, n.861 (Exhibit CAN-010).

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

[747] *See* Canada's First Written Submission, para. 208.

[748] Lumber Final I&D Memo, pp. 144-45 (Exhibit CAN-010).

399. Specifically, the record evidence demonstrates that eight percent of all exports emanate from the Tidewater section of the Interior, and two percent emanate from the Southern Interior near the border with the United States.[749] Furthermore, a number of BC Interior sawmills are within 100 miles of the United States or a coastal port.[750] Thus, Canada's argument that the log export restraints are irrelevant to the Interior is plainly incorrect.

400. In addition, the USDOC explained that "even if the log process only directly impacted logs from coastal regions, the restrictions on exports of those logs would influence the overall supply of logs available to domestic users, which would have a ripple effect on the volume and prices of logs throughout the entire province, including the interior of British Columbia."[751] Canada's asserts that there is "little log flow" between the Coast and Interior, citing transportation hurdles.[752] However, the USDOC found, based on positive record evidence, that the Tidewater portion of the Interior is easily accessible from the Coast, at least seven highways connect the Coast and Interior, and the mandatory respondents maintain mills along those highways.[753] Moreover, because the USDOC found that log prices were integrated between the two regions of British Columbia, its "finding of a "ripple" effect was not dependent on the existence or absence of transportation corridors.[754] With respect to Canada's argument that any price impact would be limited to the subset of Coastal species, the USDOC explained that some species overlapped between the Coast and Interior harvest and others were substitutable for each other and are used to produce similar products, including lumber.[755]

401. Finally, with respect to Canada's argument that log prices will not equalize across even small geographical areas, the USDOC relied upon positive evidence in the record that contradicts Canada's position.[756] Specifically, the USDOC cited independent studies that "identify areas where there is significant integration in a timber market over large areas covering multiple jurisdictions and instances where logs are following the 'law of one price.'"[757] Furthermore, the

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[749] Lumber Final I&D Memo, p. 148, footnote 885 (Exhibit CAN-010) (citing March 13, 2017 GOC GBC Primary QNR Part 1, p. LEP-5 (Exhibit CAN-049) (BCI)).

[750] Lumber Final I&D Memo, p. 148, footnote 886 (Exhibit CAN-010) (citing Petitioners' Comments on Canada's Initial Questionnaire Responses at Exhibit 19 (Exhibit USA-019)).

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

[752] *See* Canada's First Written Submission, para. 215.

[753] Lumber Final I&D Memo, p. 147 (Exhibit CAN-010) (citing GOC GBC Primary QNR Part 1, p. LEP-6 (Exhibit CAN-049) (BCI)).

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

[755] Lumber Final I&D Memo, pp. 146-47 (Exhibit CAN-010).

[756] *See* Canada's First Written Submission, para. 220.

[757] Lumber Final I&D Memo, p. 146, footnotes 869-871 (Exhibit CAN-010) (citing Exhibits 3, 4, 5, and 8 in Petitioners' Comments on Canada's Initial Questionnaire Responses). *See* Petitioners' Comments on Canada's Initial Questionnaire Responses (Exhibit USA-019) at Ex. 3 ("Spatial Integration in the Nordic Timber Market:

USDOC cited the responses of other Canadian provinces to its questionnaires, which indicated log trade among provinces and with the United States.[758] Accordingly, the USDOC's conclusions regarding the impact of the log export restraints in British Columbia on stumpage prices in the province reflected the investigating authority's objective assessment of the record evidence.

402. For all of the foregoing reasons, Canada has failed to demonstrate that the USDOC's determination is inconsistent with Article 14(d) of the SCM Agreement. An objective and unbiased investigating authority could have determined – as the USDOC did – that there were no market-determined in-country private prices for British Columbia stumpage that could be used for benchmarking purposes.

2. The Benchmark Selected for British Columbia Stumpage Is Not Inconsistent with Article 14(d) of the SCM Agreement

403. To measure the adequacy of remuneration for British Columbia's provision of stumpage, the USDOC utilized price data for delivered logs in the eastern half of the U.S. state of Washington. That area of Washington is contiguous with the interior of British Columbia, where three of the mandatory respondents based their operations, and features comparable timber species and growing conditions. The USDOC derived the benchmark it used in a manner that accounted for prevailing market conditions in British Columbia by deducting the British Columbia respondents' reported costs for accessing, harvesting, and transporting timber to their sawmills, and other costs obligated under their tenures.

404. Canada asserts that the Washington state data do not reflect prevailing market conditions in British Columbia and, more fundamentally, log prices are not susceptible to a benchmark price analysis because they vary over small distances.[759] In addition, Canada contends that the USDOC was required to make changes to reflect prevailing market conditions in British Columbia, including (i) implementing the volumetric conversion factors developed by its consultants during the investigation; (ii) accounting for the allegedly inferior quality and beetle-killed condition of some British Columbia logs; (iii) adopting British Columbia's "stand-as-a-whole" pricing for certain transactions as a condition of sale; and (iv) adjusting for British Columbia's higher transportation costs to lumber markets in the United States.[760] As explained below, each of Canada's arguments lacks merit.

Long-run Equilibria and Short-run Dynamics"), Ex. 4 ("Roundwood Market Integration in Finland: A Multivariate Cointegration Analysis"), Ex. 5 ("Timber Price Dynamics Following a Natural Catastrophe"), and Ex. 8 ("Transmission of price changes in sawnwood and saw log markets of the new and old EU member countries").

[758] Lumber Final I&D Memo, p. 146.

[759] *See* Canada's First Written Submission, paras. 617-618.

[760] *See* Canada's First Written Submission, para. 630.

a. The Washington State Log Price Data

405. The USDOC sought a benchmark to measure the adequacy of remuneration to British Columbia for its provision of stumpage under a three-tier framework.[761] As detailed in section II.D.1, the USDOC found that the British Columbia stumpage market was distorted, and thus the USDOC could not use prices internal to the province to measure the adequacy of remuneration.[762] The USDOC considered Nova Scotia stumpage prices as a tier-one, in-country benchmark, but found that standing timber in British Columbia was significantly larger in diameter and of greater value for sawmilling.[763] Furthermore, because the USDOC found that British Columbia log prices were not independent from the effects of British Columbia stumpage prices, and were impacted by the presence of log export restraints, the USDOC determined that it could not utilize internal-BC log prices as a benchmark.[764]

406. Proceeding to the second tier of the hierarchy in its regulations, the USDOC found that stumpage is not typically traded across international borders, and thus there would not be world market prices for stumpage, including from the United States, that would be available to purchasers in Canada.[765] Further, the USDOC noted that no such prices were submitted by interested parties during the course of this investigation.[766]

407. Finally, under the third tier of its hierarchy, the USDOC found that U.S. log prices provided a benchmark that is consistent with market principles. As noted above, the USDOC relied on delivered "U.S. log prices . . . from private transactions between log sellers and buyers for logs harvested from private lands" for the eastern portion of the state of Washington, as reported by the Washington Department of Natural Resources ("WDNR").[767] The USDOC found these prices to be the most appropriate benchmark data available. The USDOC explained in the preliminary determination:

> These prices are maintained by the WDNR in the ordinary course of business, and the species reflected in the dataset correspond to

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[761] *See supra* at Section II.A.1 (describing the USDOC's framework for measuring the adequacy of remuneration).

[762] Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

[763] Lumber Preliminary Decision Memorandum, pp. 46-47 (Exhibit CAN-008); Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

[764] Lumber Preliminary Decision Memorandum, p. 48 (Exhibit CAN-008); Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[765] Lumber Preliminary Decision Memorandum, p. 48 (Exhibit CAN-008); Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[766] Lumber Preliminary Decision Memorandum, p. 48 (Exhibit CAN-008); Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[767] Lumber Preliminary Decision Memorandum, p. 49 (Exhibit CAN-008).

> the Crown-origin species purchased by the B.C.-based respondents. Further, we find the data from the WDNR reflect log prices paid for private-origin logs and, therefore, reflect a market-based price . . .
>
> The WDNR survey contains species-specific U.S. log prices for the coast and interior of Washington. The harvesting operations of the B.C.-based mandatory respondents are located in the interior of British Columbia. Therefore, we have limited our U.S. log benchmark prices to those WDNR survey data corresponding to the interior of Washington, which, consistent with *Lumber IV*, we find is more comparable to the interior of British Columbia.[768]

408. Thus, the WDNR log price survey data were contemporaneous with the period of investigation, publicly available, species-specific, and prepared in the ordinary course of business by an independent government source. The USDOC explained that U.S. log prices are appropriate because there is a vast forest region that spans from the U.S. Pacific Northwest into British Columbia, with similar timber species and growing conditions in this contiguous area.[769] Furthermore, standing timber values derive from the demand for logs produced from a given tree, and the U.S. log prices on the record reflect private transactions between log sellers and buyers for logs harvested from private lands.[770]

409. The WDNR log prices are stated in U.S. dollars per thousand board feet (MBF) of lumber. As described in greater detail below, the USDOC converted the monthly prices into U.S. dollars per cubic meter using a conversion factor of 5.93.[771] The USDOC converted the monthly U.S. log prices per cubic meter into Canadian dollars per cubic meter using monthly exchange rates published by the U.S. Federal Reserve for the period of investigation.[772] Finally, the USDOC adjusted its benchmark delivered log price for the specific access, harvest, and

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[768] Lumber Preliminary Decision Memorandum, pp. 50, 53 (Exhibit CAN-008).

[769] Lumber Preliminary Decision Memorandum, p. 49 (Exhibit CAN-008) (citing *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,917 (USDOC December 20, 2004) (final results countervailing duty admin. rev.) (*Lumber IV AR1*), and accompanying I&D Memo, p. 16; *Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 73,448 (USDOC Dec. 12, 2005) (final results countervailing duty admin. rev.) (*Lumber IV AR2*), and accompanying I&D Memo at 12-13)); Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[770] Lumber Preliminary Decision Memorandum, p. 49 (Exhibit CAN-008).

[771] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[772] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

hauling costs reported by the BC-based respondents, and for certain other costs associated with the respondents' timber acquisition, including tenure obligations.[773]

b. The USDOC's Use of the Washington State Benchmark Relates to Prevailing Market Conditions in British Columbia

410. The USDOC's selection of the WDNR price data met the requirements of Article 14(d) of the SCM Agreement because the data reflected private prices for comparable goods, and the USDOC properly adjusted the data to ensure the prices relate to prevailing market conditions in British Columbia. Canada contends that the USDOC's reasoning regarding the suitability of the WDNR prices is simplistic because, according to Canada, the USDOC dismissed evidence of minor price variations in the WDNR data.[774] But Canada's argument lacks merit because the elements it describes as simplistic are rather determinative of comparability (in terms of "prevailing market conditions"), whereas the minor price variations that Canada points to are largely irrelevant.

411. The USDOC's analysis focused on the key aspects of comparability to ensure the prices relate to prevailing market conditions in British Columbia. As the USDOC explained, the WDNR data are uniquely well-suited for measuring remuneration in British Columbia because the forests of eastern Washington are contiguous with those of the BC Interior, and feature the same species and growing conditions.[775] The border separating the two jurisdictions is merely political, rather than one coinciding with specific natural features.[776] Moreover, the USDOC derived its benchmark by adjusting for the access, harvesting, and hauling costs of the respondents, as well as their costs for tenure-related obligations such as silviculture. In short, the USDOC used information specific to British Columbia and the respondents to ensure that the benchmark stumpage values it derived reflected prevailing market conditions in British Columbia.[777]

412. Canada asserts that the species in the interior of British Columbia do not match the interior of Washington, because certain species are more prevalent in British Columbia. However, as Canada concedes,[778] the same species exist in substantial quantities in both British

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[773] Lumber Final I&D Memo, p. 71 (Exhibit CAN-010).

[774] *See* Canada's First Written Submission, para. 607.

[775] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008); Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[776] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008); Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

[777] Lumber Final I&D Memo, p. 73 (Exhibit CAN-010).

[778] *See* Canada's First Written Submission, p. 253, Table 6 (indicating that sawmills in eastern Washington consume each of the principal species of sawmills in British Columbia).

Columbia and Washington, merely in different proportions. For example, eastern Washington forests include lodgepole pine and spruce that have suffered beetle-infestation, as in British Columbia.[779] The USDOC utilized species-specific prices, and therefore the relative prevalence of a given species does not detract from the suitability of the WDNR data.[780]

413. More fundamentally, nothing in Article 14(d) of the SCM Agreement requires investigating authorities to select a benchmark for identical goods. Inherently, a benchmark is an approximation, and the Appellate Body has repeatedly characterized a benchmark as prices for "the same or similar goods."[781] By picking data for timber from the same, contiguous forest area, the USDOC ensured that it identified and used similar goods to derive benchmarks.

414. Canada makes a series of irrelevant arguments that concern variation of U.S. log prices. Canada addresses prices within the state of Idaho, and makes a comparison between prices in Idaho and Montana.[782] The discussion is inapposite. The USDOC did not utilize data from either Idaho or Montana in constructing its benchmark prices. With the exception of beetle-killed timber prices, none of the Canadian interested parties argued that the USDOC should utilize data from either state, and the USDOC made no findings regarding whether or why prices vary within Idaho or between Idaho and Montana.

415. As such, Canada's hypothetical suggesting that the USDOC's benefit methodology would treat the differential in prices for lodgepole pine and Engelmann spruce in Idaho and Montana as a subsidy rests on nothing but speculation.[783] Moreover, the USDOC did not treat access, harvesting, hauling, and tenure-related expenses as a constant across geographical areas, as Canada's hypothetical does in assuming that such costs are identical in Idaho and Montana.

416. The only record data Canada cites pertaining to Washington – from the Northwest Management Inc. reporting service – indicates slight differences in prices for two sub-regions of the Pacific Northwest (Nos. 1 and 2) that include portions of eastern Washington.[784] However, the USDOC's WDNR data spanned a larger area encompassing over half of Washington, thereby including data from an area inclusive of the cited sub-regions, as well as other parts of

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[779] *See* GBC QR at Ex. BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, pp. 39-40 (Exhibit CAN-020 **(**BCI)).

[780] *See* Lumber Preliminary Decision Memorandum, pp. 49-50, 53 (Exhibit CAN-008).

[781] *See, e.g.*, *US – Softwood Lumber IV (AB)*, para. 90; *US – Carbon Steel (AB)*, para. 4.154.

[782] *See* Canada's First Written Submission, paras. 615-619.

[783] *See* Canada's First Written Submission, para. 618.

[784] *See* Canada's First Written Submission, para. 615 & Figure 55.

Washington.[785] Canada's arguments do not undermine the robust quality of the USDOC's selected dataset.

417. In addition to its arguments regarding minor price variations, Canada makes sweeping arguments concerning the ability of an investigating authority to measure adequacy of remuneration for goods like logs, which Canada asserts involve "inherently local" markets with prices varying across small geographic regions.[786] Essentially Canada suggests that no two trees are alike and, therefore, all comparisons must fail. Canada asserts that a litany of factors cause log prices to differ from one locality to another, including: physical characteristics of softwood logs such as size, log quality, and defects; local market conditions, "including log demand and supply, transportation and variation in governmental requirements"; and "variability in the contractual terms of sale, such as volume and duration."[787] Canada's arguments are completely untethered to the text of the SCM Agreement. Under Canada's implausible position, goods such as logs and stumpage are immune to a subsidy analysis because, for all practical purposes, it is unknowable whether they are provided for less than adequate remuneration.

418. Nothing in Article 14(d) requires the USDOC to account for every conceivable difference within localities of Canada or to account for the range of minutia that Canada identifies. Rather, the USDOC carried out the comparison contemplated in Article 14(d) by selecting a benchmark that relates "to prevailing market conditions for the good . . . in the country of provision."

419. Canada's suggestion that investigating authorities must assess adequacy of remuneration at a local, sub-regional level[788] would preclude the use of in-country (or even in-province) benchmarks that do not provide an exact match across a vast range of characteristics. Tellingly, Canada does not propose a method by which the USDOC could have actually undertaken such an analysis in the underlying investigation. Indeed, the Canadian parties did not propose any benchmark other than British Columbia's own auction prices to measure the adequacy of remuneration for British Columbia's provision of stumpage. The logical implication of Canada's position is that any benefit analysis is futile, because Canada contends that "log prices vary significantly 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."[789] While it is unclear whether an analysis at the level Canada contemplates is even possible, it is indisputable that nothing in the SCM Agreement obligates investigating authorities to undertake such an analysis.

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[785] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[786] Canada's First Written Submission, para. 617.

[787] Canada's First Written Submission, para. 621.

[788] *See, e.g.*, Canada's First Written Submission, paras. 49, 609, and 616-618.

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

420. Rather, the SCM Agreement provides latitude to investigating authorities to determine whether the government's financial contribution provides a benefit based on the specific facts of the proceeding. The chapeau of Article 14 contemplates that "more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[790] Moreover, the chapeau refers to the requirements of Article 14(d) as "guidelines," which "suggests that Article 14 provides the 'framework within which this calculation is to be performed', although the 'precise detailed method of calculation is not determined.'"[791] Canada's rigid, impractical approach has no support in Article 14(d).

421. Canada identifies variables potentially affecting price that are common to many if not most products, and which are typically addressed by using broad market averages such as the ones that the USDOC employed in the underlying investigation. The USDOC's calculations utilized an annual average price for each species in the eastern region of Washington.[792] By averaging prices for all survey participants for the entire year from an area encompassing over half of Washington, the USDOC mitigated the impact of variability of various conditions cited by Canada.[793] Notably, Canada does not argue that any given part of the WDNR data should be excluded from the calculation as aberrational or non-representative, nor that the data contain hidden fees or other defects.

422. In addition, although it cites a list of factors potentially impacting price, Canada fails to demonstrate that these factors affect log prices in the USDOC's benchmark data.[794] As the USDOC explained, "it would be both impracticable and superfluous to require adjustments be made to reflect the impact [of] certain differences in market conditions that do not have a manifest or demonstrated effect on the comparability of goods."[795]

423. Finally, although Canada refers to certain consultants' reports supporting its position that log markets cannot be compared, the USDOC relied upon other academic studies on the record, which provided positive evidence demonstrating price linkages across political and market borders.[796] Unlike Canada's reports, which were commissioned specifically for the USDOC countervailing duty investigation,[797] the studies on which the USDOC relied were produced independent of the investigation. As a result, the USDOC reasonably found that they were of

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[790] *US – Softwood Lumber IV (AB)*, para. 91.

[791] *US – Softwood Lumber IV (AB)*, para. 92 (citations omitted). *See also Japan – DRAMs (Korea) (AB)*, para. 191.

[792] Lumber Preliminary Decision Memorandum, pp. 50, 53 (Exhibit CAN-008).

[793] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[794] *See, e.g.*, Canada's First Written Submission, paras. 614, 621, and 630.

[795] Lumber Final I&D Memo, pp. 64-65 (Exhibit CAN-010).

[796] Lumber Final I&D Memo, pp. 64, 145-146 (Exhibit CAN-010).

[797] *See* GBC SQR at BC-Supp3-3-4 (Exhibit CAN-082).

greater probative value. In attacking the USDOC's reliance on the independent studies over the studies prepared specifically for the investigation, Canada is inviting the Panel to reweigh and undertake its own *de novo* review of the record evidence, which is not the role that the DSU assigns to WTO panels.[798]

c. The SCM Agreement Does Not Require Canada's Proposed Adjustments to the Washington Benchmark Data

424. Canada further contends that the USDOC was required to make certain adjustments to its benchmark data to reflect prevailing market conditions in British Columbia.[799] Specifically, Canada challenges the USDOC's (i) conversion factor used to convert prices from a board feet basis to cubic meters; (ii) rejection of requested adjustments for timber grade and beetle-killed condition; (iii) species-specific price comparisons, rather than comparing prices considering the "[timber] stand-as-a-whole;" and (iv) failure to adjust for the respondents' lumber transportation costs.[800] None of these arguments has any merit, however, because Canada mischaracterizes the record data on which it relies. An examination of the record demonstrates that the USDOC took into account Canada's arguments on each of these points and provided an explanation for rejecting each one, consistent with the information available on the record. Canada invites the Panel to re-weigh these considerations, but Canada has failed to demonstrate that the USDOC reached a conclusion that an objective and unbiased investigating authority could not have reached on the basis of these facts.

(1) The USDOC Properly Selected the Only Useable Volumetric Conversion Factor Available

425. Canada argues that the USDOC did not act objectively when rejecting volumetric factors in the BC Dual Scale Study, which respondents proposed the USDOC use to convert between the BC Metric Scale of British Columbia and the Scribner Decimal C Scale of Washington.[801] Canada further contends that the alternative conversion factor that the USDOC used did not reflect "conditions" in British Columbia because the conversion factor overstated the volume of logs entering the respondents' mills.[802] Canada challenges the USDOC's findings regarding the BC Dual Scale Study's methodology, the weight that may be assigned to a report that is commissioned for a specific proceeding, and the appropriateness of a conversion factor based on

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[798] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 187-190; *US – Tyres (China) (AB)*, para. 123; *United States – Cotton Yarn (AB)*, para. 74.

[799] *See* Canada's First Written Submission, para. 634.

[800] *See* Canada's First Written Submission, para. 651.

[801] *See* Canada's First Written Submission, paras. 651-99.

[802] Canada's First Written Submission, paras. 634, 680.

logs from the United States Pacific Northwest (PNW).[803] Canada asserts that the BC Dual Scale Study is superior to a 2002 publication from the U.S. Forest Service[804] for a variety of reasons.[805]

426. Canada's claim simply constitutes another disagreement with one of the USDOC's factual findings in the investigation. The USDOC selected a conversion factor after an examination of the evidence and provided a reasoned explanation for its choice, including the reasons why the USDOC preferred to use data prepared by an impartial government agency in the ordinary course of business rather than data from a study commissioned for the purpose of opposing the USDOC's benchmark calculation. Because the USDOC's explanation was grounded in evidence in the proceeding, the conclusion was one that an unbiased and objective investigating authority could have reached, and there is no basis to conclude a breach of the requirements of Article 14(d).

(a) The USDOC's Analysis of the Conversion Factors on the Record

427. The WDNR survey log prices that the USDOC utilized as its benchmark are reported in U.S. dollars per thousand board feet (MBF).[806] The number of "board feet" is determined in Washington by measuring logs applying the Scribner Decimal C scale, which quantifies the amount of dimensional lumber that can be produced from the log.

428. To compare the WDNR benchmark prices to those the respondents paid to British Columbia, it was necessary for the USDOC to find a conversion factor to translate prices per MBF to prices per cubic meter, as wood volume is measured in Canada in cubic meters pursuant to the BC Metric Scale.[807] The BC Metric Scale system involves a broader measure of wood fiber than the Scribner Decimal C scale, because it includes the entire sound wood volume of the log, regardless of whether the wood fiber can be made into lumber or is only suitable for chipping or some other application.[808] To bridge between the two systems of measurement, the

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[803] *See* Canada's First Written Submission, paras. 651-699.

[804] *See Lumber IV AR2* IDM, pp. 14, 100 (citing User's Guide for Cubic Measurement, USDA Forest Service Pacific (December 1984), and Henry Spelter, Conversion of Board Feet Scaled Logs to Cubic Meters in Washington State, USDA Forest Service (June 2002) (Exhibit CAN-287) (collectively, U.S.F.S. Study)).

[805] *See* Canada's First Written Submission, paras. 703-720.

[806] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[807] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[808] GBC QR at Ex. BC-S-183, Jendro & Hart Dual Scale Study at 19 (Dual Scale Study) (Exhibit CAN-020 (BCI)).

USDOC utilized the U.S.F.S. Study's 5.93 cubic meters per MBF conversion factor, which the USDOC applied in *Lumber IV*, and which was based on a 1984 study, as updated in 2002.[809]

429. In reviewing the available conversion factors, the USDOC determined that the BC Dual Scale Study, conducted during the pendency of the investigation by British Columbia's consultants, forestry specialists David Jendro and Neal Hart, was not useable because the authors failed to explain their methodology for selecting the limited number of scaling sites included in the study.[810] The absence of such methodology was of particular concern, because the BC Dual Scale Study was commissioned specifically for use in this investigation, and was therefore at risk of exaggeration or fabrication to attain a desired result.[811]

430. Instead, the USDOC relied upon the only viable conversion factor study on the record, the U.S.F.S. study, which was prepared by an impartial government agency in the ordinary course of business.[812] This study was performed on logs in the PNW, consistent with the USDOC's benchmark price reflecting logs in that region of the United States.[813] As discussed above, in selecting the WDNR log price survey data as its benchmark, the USDOC explained that timber in the PNW is comparable to timber in British Columbia, because both areas are part of a single, vast forest region and contain similar tree species and growing conditions.[814] Moreover, to perform its calculation measuring the adequacy of remuneration for British Columbia's provision of stumpage, the USDOC applied the conversion factor directly to the Washington prices, rather than applying the conversion factor to the prices paid by the mandatory respondents.[815]

(b) The USDOC Rejected the BC Dual Scale Study After Carefully Examining the Study's Methodology

431. The USDOC closely evaluated the underpinnings of the BC Dual Scale Study, and made an objective and unbiased determination that the study was not reliable. Specifically, the BC Dual Scale Study failed to identify any methodology for its site selection. The authors of the

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[809] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008) (citing *Lumber IV AR2* IDM, p. 14); Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010).

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

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

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

[813] Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).

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

[815] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008); Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

study, Jendro and Hart, selected only twelve scaling sites for measurement,[816] whereas evidence on the record indicates that there are well over 200 scaling sites in British Columbia.[817] As the USDOC explained, it was insufficient for Jendro and Hart to explain merely that they applied "historical knowledge" in selecting the twelve sites.[818] For the study to be reliable, the authors would need to devise and implement a valid statistical methodology.[819] The USDOC did not suggest that only a single, particular methodology was acceptable, but rather that there be some widely-accepted methodology – *e.g.*, random, stratified, or composite sampling – and not simply the authors' unfettered discretion.[820]

432. In its first written submission, Canada asserts for the first time the BC Dual Scale Study utilized "stratified random sampling."[821] Such an explanation is conspicuously absent from the study itself, and was not provided at any time during the investigation. Rather, the study presumes to provide a reliable and representative study of the entire British Columbia interior harvest because "the study team distributed study samples among the forest types represented by the BC interior harvest."[822] That statement implies an awareness that the study should aim for a representative sample of BC logs, but, from a methodological perspective, raises questions such as how the "study samples" were identified, what those "study samples" were, and how distributing the "study samples" ensured that the log population ultimately measured was relatable to the BC Interior harvest.

433. The only other statement in the BC Dual Scale Study regarding the study's methodology for selecting scaling sites is no more illuminating:

> The study selected sampling sites by reviewing the BC Interior Harvest Billing System (HBS) scale data for years 2014 and 2015 together with a map of BC Interior timber types. The scale sites selected for the study cover the range of BC Interior forest types

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[816] The final determination mistakenly refers to thirteen scaling sites, instead of twelve, as specified in the BC Dual Scale Study. Dual Scale Study at 9 (Exhibit CAN-020 **(**BCI**)**).

[817] For instance, British Columbia provided data from BCTS auction sales indicating that TSL-harvested timber was delivered to approximately 238 unique scaling sites in British Columbia. *See* GBC Mar. 14, 2017 QR (Exhibit CAN-018 (BCI) (citing Exs. BC-S-14, BC-S-15). This provides a conservative estimate of the number of scaling sites in the province, since not all scaling sites would necessarily receive timber harvested under TSLs.

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

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

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

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

[822] Lumber Final I&D Memo, p. 60 (Exhibit CAN-010) (citing Dual Scale Study at 8 (Exhibit CAN-020 **(**BCI**)**)).

> and are among the scale sites that handle the principal species and account for large volumes of the BC Interior harvest.[823]

434. Again, the authors make a bare, unsupported assertion that their selected scaling sites are representative. 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.

435. Canada erroneously suggests that the USDOC made a "positive verification" of the BC Dual Scale Study upon hearing from Jendro and Hart during the on-site verification in British Columbia.[824] First, Canada's suggestion is misleading, because the USDOC's verification report made no findings, "positive" or otherwise, regarding the BC Dual Scale Study. The report merely summarizes Jendro and Hart's presentation.[825] Second, the authors' presentation at the USDOC's verification similarly omitted the key details of their study's methodology, again stating the desired conclusion – that the study's results were representative – rather than explaining the methodology used to obtain the result:

> The authors, in conjunction with the Ministry, chose major scale sites in the different regions of the BC interior and identified the strata of the samples to be hand-scaled at each site ahead of time. The representativeness was based upon 2014 and year-to-date-2015 HBS scaling data.[826]

Furthermore, although Canada points to Jendro and Hart's evaluation during the study of "whether the scaled samples were achieving the previously identified objectives for representativeness,"[827] this statement again fails to describe the authors' methodology for ensuring that that goal was achieved.

436. Canada states that Jendro and Hart had to choose scale sites "deliberately" to "meet a predetermined set of criteria."[828] Canada does not identify these criteria, nor explain what, if any, methodology was used to examine the universe of scaling sites and determine that a given site would be included, or excluded. That the authors chose the sites "deliberately," in the

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[823] Dual Scale Study at 8-9 (Exhibit CAN-020 **(**BCI**)**).

[824] Canada's First Written Submission, para. 690.

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

[826] Verification Report of British Columbia, p. 116 (July 14, 2017) (Exhibit CAN-088).

[827] *See* Canada's First Written Submission, para. 689 (quoting GBC Verification Report, p. 16 (July 14, 2017) (Exhibit CAN-088)).

[828] Canada's First Written Submission, para. 686.

exercise of their judgment and without a recognized methodology, is precisely what the USDOC feared could skew the results of the study. Furthermore, Canada states that it was not necessary to select sample sites randomly because the "scale sites selected verifiably provided robust data."[829] But Canada's self-serving statement is based on the representativeness criteria of its own choosing and fails to address the USDOC's concerns regarding the lack of transparency in Jendro and Hart's methods.[830]

437. The USDOC explained that it exercises particular caution when considering evidence prepared for the sole purpose of submission in an adjudicatory administrative proceeding.[831] The USDOC indicated that evidence produced independent of and prior to an administrative proceeding has greater probative value, a principle that U.S. courts recognize with respect to evidence produced independent of and prior to litigation.[832] In particular, evidence that is produced independent of such proceedings "eliminates 'the risk of litigation-inspired fabrication or exaggeration' that may come from later-developed evidence, intended to corroborate the party's story."[833] Accordingly, in determining the weight to accord the BC Dual Scale Study, the USDOC considered the fact that it was prepared for the express purpose of submission in the USDOC's countervailing duty investigation, rather than in the ordinary course of business.

438. The USDOC's analysis of the BC Dual Scale Study's methodology disproves Canada's contention that it is faced with a "Catch-22" situation in which the USDOC will never allow it to provide an updated conversion factor because the only practical purpose of such a study is for submission in a countervailing duty investigation.[834] If the USDOC intended to reject the BC Dual Scale Study merely because it was prepared for the investigation, it would have been unnecessary to analyze the study's methodology.[835] Instead, the USDOC only arrived at the conclusion that it could not confirm that the study generated unbiased conversion factors after reviewing the record evidence regarding the study's sampling methodology.[836]

439. Finally, as additional support for its findings, the USDOC explained that the 5.93 cubic-meters-per-MBF conversion factor was specific to trees in Washington, which is consistent with

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[829] Canada's First Written Submission, para. 687.

[830] *See* Canada's First Written Submission, para. 688.

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

[832] Lumber Final I&D Memo, p. 60 (Exhibit CAN-010) (quoting *Transweb, LLC v. 3M Innovative Props. Co*., 812 F.3d 1295, 1301-02 (Fed. Cir. 2016)).

[833] Lumber Final I&D Memo, p. 60 (Exhibit CAN-010) (quoting *Sandt Tech., Ltd. v. Resco Metal & Plastics Corp.*, 264 F.3d 1344, 1350 (Fed. Cir. 2001)).

[834] *See* Canada's First Written Submission, para. 699.

[835] *See* Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010).

[836] *See* Lumber Final I&D Memo, p. 61 (Exhibit CAN-010).

the WDNR log price survey data that the USDOC included in the benchmark.[837] The conversion factor therefore has particular relevance because it relates to the species and growing conditions likely to appear in the WDNR log price survey data, which conditions the USDOC found to be comparable to those of British Columbia. The study produced conversion factors specific to the Washington coast (6.76) and Washington interior (5.93).[838] Furthermore, the USDOC explained that it sought in its calculations to convert the Washington-priced benchmark in board feet to cubic meters, and that price "would be based upon the cubic meters of the tree in Washington state, not BC."[839] Thus, although Canada contends that it would be more accurate to derive a conversion factor from trees in British Columbia, the U.S.F.S study provided a conversion factor with specific relevance to the USDOC's chosen benchmark.

440. Canada points to nothing in the text of Article 14(d) of the SCM Agreement that establishes a specific obligation related to the appropriate conversion factor to be used in situations involving different systems of measurement. Instead, Canada repeatedly urges the Panel to reweigh the evidence and reach Canada's preferred conclusion regarding the appropriate conversion factor. Canada once again asks the Panel to act outside its role under the DSU.[840]

441. The USDOC's conclusion that the BC Dual Scale Study conversion factors were not useable was based on an objective examination of the study's lack of methodology, and reasonable concerns that the study was tailored to generate a desired result. As summarized above, the USDOC reached a conclusion that an objective and unbiased investigating authority could have reached in this regard based on the facts before the USDOC.

(2) The USDOC's Determination Not To Provide Adjustments for Log Grade and Condition Was Supported by Record Evidence

442. Canada asserts that the USDOC was required to adjust its adequacy of remuneration calculations to take into account (i) the difference in log grading systems between British Columbia and Washington, and (ii) the incidence of Mountain Pine Beetle infestation in British Columbia.[841] Canada contends that the USDOC overstated the quality and value of the respondents' timber inputs.[842] Canada's arguments mischaracterize the record data. An

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[837] Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).

[838] *See* Henry Spelter, Conversion of Board Feet Scaled Logs to Cubic Meters in Washington State, USDA Forest Service, pp. 3-5 (June 2002) (Exhibit CAN-287).

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

[840] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-190; *US – Tyres (China) (AB)*, para. 123; *US – Cotton Yarn (AB)*, para. 74.

[841] *See* Canada's First Written Submission, paras. 703-710 and 711-720.

[842] *See* Canada's First Written Submission, paras. 703-710 and 711-720.

examination of the record demonstrates that the USDOC took into account timber grade and condition consistent with the information available on the record and reached a conclusion that an objective and unbiased investigating authority could have reached in light of the circumstances of the case and the facts before the USDOC.

(a) The USDOC's Treatment of Differences in Timber Grading between Washington State and British Columbia

443. The WDNR data the USDOC utilized as its benchmark reflect two sawlog grades, Camprun and Chip-N-Saw (CNS), and one non-sawlog grade, Utility.[843] British Columbia uses four log grades: 1, premium sawlog; 2, sawlog; 4, lumber reject; and 6, undersized log.[844] The two systems utilize disparate criteria to categorize logs.

444. In the preliminary determination, the USDOC explained the limitations in its ability to address this difference in grading systems:

> [T]he U.S. log data from the WDNR contain prices for various grades within each species category. We find that these grades do not correspond to the grades contained in the B.C. stumpage data provided by the mandatory respondents. Thus, due to the inability to match by grade and in order to calculate a benchmark that is representative of all grades, we have relied upon the overall unit price listed for each species, which we find is reflective of all grades of logs contained in the WDNR survey.[845]

This methodology was unchanged in the final determination.[846]

445. Thus, the USDOC utilized all available prices for Camprun, CNS, and Utility grade logs for the "Eastside" region, *i.e.*, the interior of Washington, in deriving the benchmark it used.[847] The monthly, species-specific unit prices reported by WDNR combine the quotes it received, although the survey included a limited number of Utility grade log quotes.[848] Because none of

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[843] *See generally* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284).

[844] Dual Scale Study at Attachment A (Exhibit CAN-020 (BCI)).

[845] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

[846] Lumber Final I&D Memo, pp. 64, 75-76 (Exhibit CAN-010).

[847] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008) (explaining the USDOC "relied upon the overall unit price listed for each species" in the WDNR data).

[848] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284). WDNR appears to have used a simple average of the quotes received for all grades to derive the species-specific

the data included corresponding volumes, the USDOC calculated annual prices by simple-averaging the monthly unit prices.[849]

446. Before the USDOC, various Canadian parties requested that the USDOC apply the ratios of logs in the BC Dual Scale Study that were found to be sawlogs, utility, and beetle-killed (also known as "blue-stained") logs.[850] For beetle-killed logs, these respondents proposed using price quotes collected by Jendro and Hart through the consultants' survey of certain U.S. sawmills during 2015, which were included in the BC Dual Scale Study.[851]

447. With respect to attributing the ratios of the BC Dual Scale Study logs to the respondents' logs, the USDOC concluded that it could not confirm the ratios' reliability because the study lacked a valid sampling methodology, as the USDOC explained in rejecting the authors' proposed conversion factors.[852]

448. As for the issue of beetle-killed timber, the USDOC explained that none of the respondents "provided evidence that blue-stained timber prices are not already included in the U.S. PNW log price benchmarks, nor have parties provided other reliable blue-stained timber prices."[853] 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.[854] Furthermore, it was unclear whether the Jendro and Hart study included only certain of the prices that were reported to the consultants.[855]

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price. However, WDNR reported the number of quotes underlying its prices in ranges rather than providing the specific number. For most species, including lodgepole pine, the Eastside data include Utility prices for two months of the year, but the price data typically reflects a smaller number of quotes. Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285). The exception is the basket category "Conifer," which contains Utility grade data for nine months of the period of investigation. *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

[849] Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

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

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

[852] *See* Lumber Final I&D Memo, p. 75 (Exhibit CAN-010). *See also supra* at section II.D.2.c.(1).ii (addressing the USDOC's concerns with the BC Dual Scale Study's methodology).

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

[854] Lumber Final I&D Memo, p. 76 (Exhibit CAN-010) (citing Dual Scale Study, p. 47 (Exhibit CAN-020 (BCI)).

[855] Lumber Final I&D Memo, p. 76 (Exhibit CAN-010) (citing Dual Scale Study, p. 47 (Exhibit CAN-020 (BCI)).

(b) The Record Provided an Insufficient Basis for Canada's Proposed Grade and Beetle-Killed Condition Adjustments

449. The USDOC considered all of the record evidence in determining not to make adjustments for log grade and beetle-killed conditions, and provided a reasoned and adequate explanation for its decision. The WDNR data included Utility grade prices, and there was no reliable basis in the record to weight-average the WDNR benchmark to correspond to the grades of the respondents' log inputs. Similarly, no adjustment for logs in beetle-killed condition was appropriate, because there was no evidence that prices for beetle-killed timber were not already present in the WDNR dataset and there was no basis in the record for a further adjustment.

450. As explained above in addressing Canada's proposed conversion factors, the USDOC found based on an objective analysis that the BC Dual Scale Study lacked a valid sampling methodology and presented a risk that the study was tailored to achieve a desired result. For the same reasons, the USDOC rejected the respondents' request to presume that the proportion of logs that Jendro and Hart found to be Utility in their study would have prevailed in the respondents' own purchases during the period of investigation.[856]

451. Canada states that, applying the BC Dual Scale Study's ratios, **[[BCI]]** of Canfor's lodgepole pine harvest during the period of investigation would have been graded utility under U.S. rules.[857] 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 **[[BCI]]** utility-grade, applying the BC Dual Scale Study ratios. Across the majority of species, each company's harvest was estimated to include **[[BCI]]** utility-grade logs.[858] 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.

452. Accordingly, there was an insufficient basis in the record for the USDOC to increase the relative weight of Utility grade pricing in its WDNR benchmark. The USDOC appropriately utilized the data as reported by WDNR, in which WDNR combined the price quotes it received for all grades, including Utility.

453. With respect to an adjustment to account for the beetle-killed condition of some of the respondents' logs, the USDOC concluded, after considering all the record evidence, that no adjustment was appropriate. There was no evidence that the WDNR benchmark did not already

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

[857] *See* Canada's First Written Submission, para. 704.

[858] *See* Canfor Case Brief at Att. 2 (Exhibit CAN-137 (BCI)); Tolko Case Brief at Att. 1 (Exhibit CAN-138 (BCI)); West Fraser Case Br. at Att. 2 (Exhibit CAN-139 (BCI)).

contain such prices. Furthermore, the additional price quotes for beetle-killed timber presented in the BC Dual Scale Study were unreliable.[859]

454. Canada emphasizes that the beetle epidemic has had a catastrophic impact in British Columbia and a relatively minor impact in the PNW.[860] Canada states that the tree species vulnerable to beetle attack, lodgepole pine and, to a lesser degree, spruce, are much more prevalent in British Columbia than in the PNW, and that 60 percent of the lodgepole pine harvest and 15 percent of the spruce harvest were beetle-killed.[861] But Canada's assertion that the WDNR data do not include beetle-killed timber prices is entirely speculative. Although the proportion of lodgepole pine and spruce, as compared to other species, is lower in the PNW than in British Columbia, it does not follow that lodgepole pine and spruce trees in the PNW have not been affected by the Mountain Pine Beetle to a similar degree. Because the WDNR data is species-specific, the data will capture log quality issues that are unique to a given species.

455. Indeed, Canada must concede that beetle-killed lodgepole pine and spruce are traded in the PNW, because Canada urges that the USDOC utilize various price quotes its own consultants obtained for beetle-killed timber in the PNW. Accordingly, it would be logical to conclude that the WDNR data include beetle-killed timber prices.[862]

456. With respect to the U.S. beetle-killed timber price quotes cited by Canada, the USDOC determined that Jendro and Hart's survey of PNW sawmills' prices for beetle-killed timber was unreliable after examining the study's methodology. The USDOC indicated that Jendro and Hart did not explain how their survey participants were selected or provide the query that they distributed.[863] Nor was it possible for the USDOC to determine, for example, whether the authors had included all of the prices reported to them.[864]

457. Additionally, 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.[865] 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 quality guidelines, *i.e.*, sawlogs. Thus, according to Canada's

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

[860] Canada's First Written Submission, para. 712.

[861] Canada's First Written Submission, para. 712.

[862] *See* Lumber Final I&D Memo, pp. 64, 76 (Exhibit CAN-010).

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

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

[865] *See* Canada's First Written Submission, paras. 714-715.

proffered evidence, beetle-killed logs are typically of higher quality and price than utility-grade, non-sawlogs.

458. Finally, Canada contends that because the USDOC declined to rely on the BC Dual Scale Study, the USDOC was required to develop alternative price adjustments for grade and log condition.[866] Canada's contention is misplaced. As demonstrated above, Canada relies on the unfounded premise that the WDNR data pertained to logs that were not comparable to those the respondents harvested in British Columbia. The USDOC provided a reasoned and adequate explanation for its decision not to make the Canadian parties' requested log grade and quality adjustments, and the USDOC's calculations considered those quality aspects to the extent the record reasonably allowed.

(3) The USDOC Appropriately Calculated the Benefit to the Respondents on a Species-Specific Basis, Rather than for the "Stand-As-A-Whole"

459. Canada argues that the USDOC was required to take into account that British Columbia sells stumpage on a "stand-as-a-whole" basis, without differentiating by species or grade.[867] Canada asserts that, although the British Columbia-based respondents provided species-specific stumpage costs to the USDOC for each stand (or "timber mark"), they derived those costs by dividing the total stumpage cost for the stand by the total volume in the stand.[868] Canada argues that "stand-as-a-whole" pricing constitutes a "condition of sale" that, pursuant to Article 14(d), the USDOC must address either (i) by comparing a single, weighted-average "all species" benchmark to a single, weighted-average "all species" stumpage rate, or (ii) by comparing individual species-specific benchmarks against individual species-specific stumpage rates and cumulating all positive and negative benefit amounts. However, nothing in the SCM Agreement or other covered agreements precludes the kind of transaction-specific analysis that the USDOC undertook in the underlying investigation.[869]

460. As explained above, the USDOC measured the adequacy of the respondents' remuneration for their standing timber purchases from British Columbia by using Washington log price data to construct a benchmark stumpage price, while adjusting for the respondents'

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[866] *See* Canada's First Written Submission, paras. 709-710.

[867] *See* Canada's First Written Submission, para. 722.

[868] Canada's First Written Submission, para. 723 & footnote 1224.

[869] Section III below responds to Canada's claims regarding "setting to zero" transaction-to-benchmark comparisons in British Columbia and New Brunswick, and demonstrates that and nothing in the SCM Agreement precludes the USDOC from declining to provide a credit for transactions in which the government's other financial contributions do not confer a benefit.

costs.[870] The premise of the USDOC's methodology was that "standing timber values are largely derived from the demand for logs produced from a given tree."[871] Thus, "'[t]he species of a tree largely determines the downstream products that can be produced from a tree; the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is in turn derived from the demand for the type of lumber produced from these logs.'"[872]

461. Under this analytical framework, the USDOC's approach to measuring adequacy of remuneration hinged upon a recognition that "the species of a tree is an integral part of the value of the tree."[873] The USDOC concluded that using a weighted-average combined species benchmark "would not accurately assess the adequacy of remuneration for stumpage" considering how the value of stumpage is evaluated according to market principles.[874] Put differently, the USDOC disagreed with the Canadian respondents that stand-as-a-whole pricing was a "prevailing market condition" that the investigating authority was required it to take into account, because selling timber by the stand may in itself be inconsistent with market principles. Accepting Canada's proposal to simply take the government's pricing unit as a "prevailing market condition" would ignore the very differences the USDOC was seeking to measure.

462. Canada does not, and cannot, dispute that the price of timber varies significantly by species. The record indicates, for instance, that a cedar log will command a significant premium over a spruce log. [875] However, under the guise of accounting for a "prevailing market condition," Canada contends that the USDOC is required to overlook this key product characteristic because of the means by which British Columbia prices and sells its stumpage. In contrast to its other arguments that the USDOC must adjust its benchmark to account for grade and condition of timber because those factors are commercially significant, here Canada proposes precisely the opposite approach. As the USDOC's "market principles" analysis suggests, British Columbia's "stand-as-a-whole" pricing may in itself be inconsistent with market principles, and, as an aspect of the government's financial contribution, may mask the very subsidization that the USDOC's analysis is meant to assess.

463. The USDOC explained that "[i]f a government chooses to set a price for a whole stand, rather than differentiating by species within a particular stand, that does not change the amount

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

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

[872] Lumber Final I&D Memo, pp. 67-68 (Exhibit CAN-010).

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

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

[875] *See, e.g.*, Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284).

of the benefit conferred for purposes of our analysis."[876] Conducting a timber mark and species-specific analysis is as close to a transaction-specific analysis as the record evidence allows.

464. Canada references a NAFTA panel decision interpreting the U.S. statute that implements Article 14(d)'s requirement to determine adequacy of remuneration in relation to prevailing market conditions.[877] In that decision, which concerned the first remand of *Lumber IV*, the NAFTA panel erroneously concluded that the USDOC must use the timber stand as the market unit merely because "the tenureholder must harvest all trees in the stand and must pay for timber cutting rights by the stand, not by individual species."[878] Nothing in Article 14(d) of the SCM Agreement supports the conclusion that an investigating authority is required to "take into account" as a "prevailing market condition" elements of the subsidy that itself is the very object of investigation.[879]

465. For these reasons, the USDOC's determination to use a transaction-specific analysis is a reasonable one in light of the facts, and one that could have been reached by an objective and unbiased investigating authority.

(4) The USDOC Properly Adjusted for the Respondents' Transportation Costs

466. Finally, Canada argues that the USDOC was obligated to make adjustments to account for the respondents' higher costs to transport lumber – *i.e.*, the finished product rather than the respondents' timber inputs – "to major lumber-consuming markets."[880] Canada's arguments lack merit.

467. Article 14(d) of the SCM Agreement provides that investigating authorities shall determine adequacy of remuneration "in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)." The obligation unambiguously refers to the government-provided input. Canada does not, and cannot, cite any

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

[877] 19 U.S.C. § 1677(5)(E).

[878] *See Certain Softwood Lumber Products from Canada*, USA-CDA-2002-1904-03, Panel Decision on Remand at 18 (June 7, 2004).

[879] Canada's statement that in *Lumber IV* the USDOC agreed with its position that a single, weighted-average benchmark for all species is more accurate is mistaken. *See* Canada's First Written Submission, para. 722. As the USDOC noted in the *Second Remand Determination*, it undertook such an analysis "to be consistent with the Panel's instructions," and nothing in that decision indicates that the USDOC reversed its earlier position. *See Second Remand Determination: In the Matter of Certain Softwood Lumber Products from Canada*, USA-CDA-2002-1904-03 at 11 (July 30, 2004).

[880] *See* Canada's First Written Submission, para. 732.

basis for an adjustment for the transportation costs of a different good downstream from the government-provided input. Here, the "good or service in question" is standing timber provided by British Columbia, and not the numerous downstream products that may be created after British Columbia has provided the standing timber.

468. If Canada's position were correct, investigating authorities would be required to consider a boundless number of adjustments for products other than the good provided in the financial contribution. There is no support in Article 14(d) for any requirement to make such adjustments.

469. In the final determination, under its derived demand methodology, the USDOC appropriately adjusted for various costs the respondents incurred where such costs would be incurred by an "independent log seller," not an independent lumber manufacturer.[881] The relevant transportation cost is that of moving a timber input to the respondent's sawmill, not the respondent's cost for shipping subject merchandise to a U.S. purchaser. Accordingly, the USDOC accounted for the cost of transporting a harvested log from the stand to the roadside, and from the roadside to the mill, and similarly accounted for road and bridge construction, maintenance, and deactivation.[882]

470. For these reasons, the USDOC's adjustment of the WDNR benchmark to account for transportation costs relating to British Columbia's provision of standing timber is not inconsistent with Article 14(d).

E. Conclusion

471. Based on the foregoing, Canada has failed to demonstrate that the USDOC's stumpage benchmark determinations are inconsistent with Article 14(d) of the SCM Agreement.

III. THE USDOC'S DECISION NOT TO PROVIDE A CREDIT IN THE BENEFIT CALCULATION FOR INSTANCES IN WHICH THE GOVERNMENTS OF NEW BRUNSWICK AND BRITISH COLUMBIA PROVIDED STUMPAGE FOR ADEQUATE REMUNERATION IS NOT INCONSISTENT WITH ARTICLES 1.1(B), 14(D), 19.3, AND 19.4 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

472. Canada claims that the USDOC's methodology for calculating the amount of the benefit conferred by New Brunswick's and British Columbia's provision of standing timber is

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[881] *See* Lumber Final I&D Memo, p. 73 (Exhibit CAN-010).

[882] *See* Lumber Final I&D Memo, p. 73 (Exhibit CAN-010) (noting the USDOC's adjustments for road and hauling costs). *See also* Canfor's Final Calculation Memorandum at 3-4 (Exhibit CAN-380 (BCI)) ("we have adjusted the benchmark for Canfor's reported access (road construction and maintenance), harvesting and hauling (harvesting, roadside to mill, harvest and haul admin, misc direct, purchase admin, water transport, camping, and the GL logging adjustment) … expenses").

inconsistent with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.[883] Canada argues that the USDOC "used benefit calculation methodologies that improperly 'set to zero' transaction-to-benchmark comparisons where the purchase price for standing timber was higher than the benchmark price"[884] when, Canada contends, "a reasonable and objective investigating authority would not have used a benefit calculation methodology that set certain comparison results to zero."[885] Canada's claims lack merit.

473. As demonstrated below, nothing in the covered agreements obligates an investigating authority, when determining the amount of the benefit conferred by a financial contribution, to provide a credit for instances in which other financial contributions do not confer a benefit. Further, nothing specific to the USDOC's examination of New Brunswick's and British Columbia's provision of standing timber obligated the USDOC to provide such credits in the countervailing duty investigation of softwood lumber products from Canada that is under review in this dispute. Canada's position is based on a misreading of the SCM Agreement and the GATT 1994, a misunderstanding of prior panel and Appellate Body reports, and factual arguments that lack any basis in logic.

A. Nothing in the Covered Agreements Obligates an Investigating Authority To Provide a Credit in the Benefit Calculation for Instances in Which Other Financial Contributions Do Not Confer a Benefit

474. In connection with its claims, Canada refers to Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.[886] None of those provisions obligates an investigating authority to provide a credit in the benefit calculation for instances in which other financial contributions do not confer a benefit. The following subsections discuss each of the provisions to which Canada refers in its first written submission.

1. Article 14(d) of the SCM Agreement Does Not Establish the Obligation that Canada Proposes

475. Article 14 of the SCM Agreement, entitled "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient," contains the obligations related to the calculation of a subsidy benefit. Subsection (d) of Article 14 concerns the calculation of a benefit when a Member provides a good for less than adequate remuneration. In relevant part, Article 14 provides:

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[883] *See* Canada's First Written Submission, paras. 919-942.

[884] Canada's First Written Submission, para. 919.

[885] Canada's First Written Submission, para. 920.

[886] *See* Canada's First Written Submission, paras. 921-926.

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
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> * * *
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> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

476. 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. Specifically, China argued that:

> [Article 14(d)] requires that the determination of whether purchases of inputs from government sources were for less than adequate remuneration must be calculated on an overall, net basis for the entire period of investigation for the good in question, using for each transaction the benchmark price identified by the investigating authority as the yardstick. In other words, 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.[887]

Similarly, in this dispute, Canada argues that the USDOC erred because it "set negative comparison results to zero instead of simply aggregating them with the positive comparison

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[887] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.46.

results."[888] The panel in *US – Anti-Dumping and Countervailing Duties (China)* rejected the argument made by China, which Canada now makes here.

477. In rejecting China's arguments, the *US – Anti-Dumping and Countervailing Duties (China)* panel noted that "the chapeau of Article 14 explicitly characterizes the rules set forth in the four subparagraphs of Article 14 as 'guidelines'."[889] The panel agreed with the findings in prior reports that the "guidelines" in Article 14 "establish the basic framework for the calculation of benefits from the kinds of financial contributions referred to in the various subparagraphs, but that they leave a considerable amount of leeway to investigating authorities as to precisely how those calculations are to be undertaken in any given case, depending on the specific facts under investigation."[890]

478. As the Appellate Body explained in *US – Softwood Lumber IV*:

> The chapeau of Article 14 requires that "*any*" method used by investigating authorities to calculate the benefit to the recipient shall be provided for in a WTO Member's legislation or regulations, and it requires that its application be transparent and adequately explained. The reference to "*any*" method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient. …
>
> [T]he term "guidelines" suggests that Article 14 provides the "framework within which this calculation is to be performed", although the "precise detailed method of calculation is not determined". Taken together, these terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus, ... the use of the term "guidelines" in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance".[891]

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[888] Canada's First Written Submission, para. 935. *See also ibid*., para. 940 ("Only by aggregating the results of its comparisons, without first zeroing negative comparison results, could this inaccuracy have been overcome.").

[889] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.55.

[890] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.55 (underline added).

[891] *US – Softwood Lumber IV (AB)*, paras. 91-92 (italics in original; citations omitted).

479. Similarly, in *Japan – DRAMs (Korea)*, the Appellate Body found that:

> The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)-(d) of Article 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations.[892]

480. In assessing China's – and now Canada's – argument, the panel in *US – Anti-Dumping and Countervailing Duties (China)* observed that "Article 14(d) of the SCM Agreement contains no reference to any notion of offsetting, or 'negative benefits' or of averaging across the period of investigation, for a particular good."[893] The panel further reasoned that:

> [T]he language of [Article 14(d)] – especially the statement that "the provision of goods or services or purchase of goods by a government *shall not be considered as conferring a benefit unless* the provision is made for *less* than adequate remuneration" – if anything suggests both a disaggregated analysis and a focus on instances where benefits are found to exist. We note in particular the negative terms in which this sentence is drafted – a benefit "shall not" be conferred "unless" – which could be restated as there being *no* benefit, i.e., a benefit of *zero*, where the remuneration is at least "adequate."
>
> The fact that the comparison required by Article 14(d) is with "prevailing market conditions," in our view, also cuts against China's argument that if on average over the period of investigation a purchaser of a good has not paid a below-market price, there is no benefit. In particular, given that "prevailing market conditions" can and do change over time, an investigating authority would need to ensure that its benchmark price was updated as necessary to reflect any such changes that might occur during the period of investigation. This suggests that rather than viewing the period of investigation monolithically, an investigating authority should be seeking to match the transactions under examination to contemporaneous benchmarks, and that the existence or absence of a benefit in respect of one transaction or

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[892] *Japan – DRAMs (Korea) (AB)*, para. 191.

[893] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.47.

> group of transactions is independent of the existence or absence of a benefit in other transactions.[894]

481. Canada itself relies on the panel report in *US – Anti-Dumping and Countervailing Duties (China)*, but Canada's reliance on that panel report is misplaced. Quoting from the *US – Anti-Dumping and Countervailing Duties (China)* panel report, Canada contends that "[b]enefit calculation methodologies used to determine the adequacy of remuneration … require a '*careful matching* of the transactions being examined with appropriate benchmarks' to ensure that the comparison is valid."[895] However, the full quotation from the panel report provides that the language of Article 14(d) of the SCM Agreement "requires a careful matching of the transactions being examined with appropriate benchmarks, and militates against an aggregated, averaged approach across different kinds of goods."[896] The panel, in that very statement, was expressly rejecting the approach for which Canada now advocates.

482. The *US – Anti-Dumping and Countervailing Duties (China)* panel also expressly rejected the argument that Canada now makes concerning a "basic reasonableness test."[897] The panel found that China failed to establish "the existence of a 'basic reasonableness test' under Article 14 that would impart particular obligations that do not appear on the face of that provision."[898] Canada's argument here fails for the same reason. Nothing in Article 14 establishes the particular obligation Canada proposes.

483. Ultimately, the panel in *US – Anti-Dumping and Countervailing Duties (China)* found that "the language of Article 14(d) suggests more a disaggregated than an aggregate approach, both temporally and in respect of a 'good' in the sense of that provision," and further concluded that "no one specific methodology (whether that put forward by China [or Canada] or any other) is required by Article 14(d) of the SCM Agreement."[899]

484. In another dispute, the Article 21.5 panel in *US – Countervailing Measures on Certain EC Products* similarly concluded that it was not inconsistent with the SCM Agreement for an investigating authority to segment a share offering into four categories of transactions in order to evaluate whether the change in ownership effected through the share offering extinguished the benefit of prior, non-recurring subsidies. In particular, the panel found that there was no legal basis to require the investigating authority to conduct its analysis on either a segmented or non-

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[894] *US – Antidumping and Countervailing Duties (China)*, paras. 11.47-11.48 (italics in original; underline added).

[895] Canada's First Written Submission, para. 925 (quoting *US – Antidumping and Countervailing Duties (China)*, para. 11.53; italics added by Canada).

[896] *US – Antidumping and Countervailing Duties (China)*, para. 11.53 (underline added).

[897] *See* Canada's First Written Submission, para. 924.

[898] *US – Antidumping and Countervailing Duties (China)*, para. 11.59, footnote 821.

[899] *US – Antidumping and Countervailing Duties (China)*, para. 11.56.

segmented basis, as long as the authority's methodology was transparent and "not unreasonable." That panel reasoned that it could not "find any legal basis to require the USDOC to conduct its analysis in a particular manner."[900]

485. The prior reports discussed above all confirm that Article 14 of the SCM Agreement, through its guidelines, leaves to Members' investigating authorities the scope to develop appropriate methodologies to calculate the benefit of a subsidy. Article 14 does not prescribe any particular level of aggregation at which the calculation of subsidy benefit must be conducted, but instead permits investigating authorities to apply methodologies that account for different factual situations and the conditions under which the subsidy was provided.

486. Furthermore, the text of Article 14 of the SCM Agreement contains no obligation to consider instances in which a government provides no benefit. Nor does Article 14 contain any obligation to provide a credit when calculating the benefit of a subsidy for instances in which other financial contributions do not confer a benefit.[901] Instead, the text of Article 14 explicitly pertains to the calculation of the "benefit" to the recipient. The Appellate Body has explained that the ordinary meaning of "benefit" includes:

> an "advantage", "good", "gift", "profit", or, more generally, "a favourable or helpful factor or circumstance". Each of these alternative words or phrases gives flavour to the term "benefit" and helps to convey some of the essence of that term. These definitions also confirm that … "the ordinary meaning of 'benefit' clearly encompasses some form of advantage."[902]

487. The concept of "benefit" relates only to situations in which a firm receives a "favourable or helpful factor or circumstance" or "an advantage," rather than a detriment or disadvantage. Thus, it is plain that the text of Article 14 of the SCM Agreement contains no obligation for Members to provide a credit (or offset) for instances in which a government does not confer a favorable circumstance or advantage (*i.e.*, instances where the government provides no benefit) when calculating a subsidy benefit.

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[900] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.121.

[901] For example, Article 14 of the SCM Agreement is entitled "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient" (underline added). There is no reference in Article 14 of the SCM Agreement to instances in which a government provides "no benefit," nor is there any reference to providing a credit to Members when they provide a good for adequate remuneration.

[902] *Canada – Aircraft (AB)*, para. 153 (citations omitted).

488. In sum, nothing in Article 14(d) of the SCM Agreement imposes an obligation on Members to conduct an aggregate analysis, nor does Article 14(d) require Members to provide credit in the benefit calculation when a government provides goods for adequate remuneration.

2. Article 1.1(b) of the SCM Agreement Does Not Establish the Obligation that Canada Proposes

489. Nor does Article 1.1(b) of the SCM Agreement, which concerns "benefit" and for which Article 14 of the SCM Agreement serves as important context, provide any support to Canada's argument. In fact, Canada refers to Article 1.1(b) of the SCM Agreement only in passing.[903] Canada offers no explanation for how the terms of Article 1.1(b) establish or contribute to the establishment of the obligation Canada proposes, nor any explanation of how the USDOC acted inconsistently with Article 1.1(b). Canada does not even suggest that a breach of Article 1.1(b) follows as a consequence of alleged breaches of the other provisions to which Canada has referred. Accordingly, with respect to its claim under Article 1.1(b), Canada has not even attempted to make a *prima facie* case to which the United States is obliged to respond.

490. That being said, the United States observes that 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 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) says nothing about how to determine whether a benefit has been conferred, nor how to measure the benefit, and (as explained above) the context for measuring a "benefit" provided by Article 14 of the SCM Agreement offers no support for Canada's argument.

491. In fact, as discussed further in the following subsection, Article 1.1 of the SCM Agreement provides support for finding that there is no obligation to provide credits for non-subsidies under the SCM Agreement. Article 1.1 defines "a subsidy" in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction-by-transaction basis. Article 1.1 of the SCM Agreement provides that a subsidy shall be deemed to exist if there is "a financial contribution by a government" and "a benefit is thereby conferred."[904] Nothing in Article 1.1 suggests that, when analyzing multiple subsidies, an investigating authority is obligated to provide a credit in that analysis for instances where a granting authority did not provide a subsidy.

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[903] *See* Canada's First Written Submission, paras. 920, 922, 935, and 942.

[904] SCM Agreement, Art. 1.1 (underline added).

3. Articles 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Do Not Establish the Obligation that Canada Proposes

492. As demonstrated above, nothing in Articles 14 or 1.1(b) of the SCM Agreement requires an investigating authority to "aggregat[e] the results" of comparisons of separate financial contributions and their corresponding benchmarks and provide credit in the benefit calculation for so-called "negative comparison results"[905] (*i.e.*, the situation where a government provides goods for adequate remuneration). Given this, Canada is forced to search elsewhere in the SCM Agreement and the GATT 1994 to find such an obligation. Specifically, Canada looks to Articles 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Canada can find no support for its position in those provisions.

493. Canada observes that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "require that an investigating authority ascertain the 'precise amount' of a subsidy."[906] As a threshold matter, the term "precise amount" does not appear in either Article 19.4 of the SCM Agreement or in Article VI:3 of the GATT 1994. Article 19.4 of the SCM Agreement provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." The terms of Article VI:3 of the GATT 1994 are similar. The term "precise amount" has been used in prior Appellate Body reports to explain the obligation in these provisions to determine the amount of the subsidy.[907]

494. Canada further observes that Article 19.3 of the SCM Agreement "requires that countervailing duties be levied 'in the appropriate amounts in each case'."[908] The terms Canada quotes, in this instance, actually do appear in Article 19.3.

495. From these observations about Articles 19.3 and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, Canada draws the conclusion that "[t]he SCM Agreement requires that an investigating authority accurately determine the amount of a subsidy."[909] While Canada's conclusion in this regard is unobjectionable as far as it goes, this conclusion does not support Canada's claim that the USDOC was obligated to apply a particular approach to the benefit calculation that is favored by Canada, namely aggregating comparison results across different financial contributions and, in reality, providing "credits" where certain financial contributions were found not to confer a benefit.

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[905] Canada's First Written Submission, para. 940. *See also ibid*., para. 935.

[906] Canada's First Written Submission, para. 921.

[907] *See US – Washing Machines (AB)*, para. 5.279; *US – Countervailing Measures on Certain EC Products (AB)*, para. 139.

[908] Canada's First Written Submission, para. 921.

[909] Canada's First Written Submission, para. 921.

496. First, there is nothing in the text of these provisions that suggests any obligation to provide "credits" for "negative" benefits. Article 19.4 of the SCM Agreement, by its terms, sets a limit on the amount of countervailing duty that may be "levied," *i.e.*, no more than the subsidization determined to exist. Article 19.4 provides no guidance, and establishes no commitment, concerning the provision of so-called "credits" in determining the "amount of subsidy found to exist." Rather, other provisions of the SCM Agreement address the substantive issue of what a subsidy is and how a benefit is found to exist.

497. Similarly, Article 19.3 of the SCM Agreement does not speak to the substantive issue of what a subsidy is and how a benefit is found to exist. Article 19.3 provides, in relevant part:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

498. Article 19.3 is essentially a non-discrimination provision. Article 19.3 first requires that a "countervailing duty" be levied "on imports of such product from all sources found to be subsidized and causing injury." That is, the countervailing duty must be levied on "all" such sources, and not just some of them.

499. Second, the text directs a Member to apply countervailing duties "on a non-discriminatory basis" on those imports. That is, when countervailing duties are levied on imports from all such sources, the Member is not to discriminate between those sources. Rather, a Member will impose a countervailing duty on all imports of a product from each Member where the importing Member finds the product to be subsidized and causing injury.[910]

500. Third, Article 19.3 sets out that countervailing duties levied on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury shall be "levied in the appropriate amounts in each case." The ordinary meaning of the term "appropriate" includes "specially suitable (for, to); proper, Fitting."[911] The term "case" is defined as "an instance of a

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[910] Any given countervailing duty investigation may involve multiple producers or exporters and multiple countries. Article 19.3 of the SCM Agreement contemplates that the importing Member may find that multiple "sources" – which can be understood as meaning multiple producers or exporters – within a subsidizing Member's territory are being subsidized.

[911] Definition of "appropriate" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 103 (Exhibit USA-004).

thing's occurrence, a circumstance, a fact, etc."[912] In this context, the "thing" that is occurring is the levying of a countervailing duty, which applies to a product for which the producer or exporter has received a subsidy. In the context of the main clause of Article 19.3 of the SCM Agreement, the term "the appropriate amounts in each case" suggests a requirement that countervailing duties be levied in the "proper" or "fitting" amounts, in each "instance" or "occurrence" of levying countervailing duties, as well as in a manner that otherwise satisfies the obligation in Article 19.3 not to discriminate between sources of a subsidized product.

501. Moreover, use of the definite article "the" before "appropriate amounts" suggests that "the appropriate amounts in each case" is not an open-ended or subjective concept. Instead, "the appropriate amounts" (rather than "in an appropriate amount" or "in appropriate amounts") is an objective concept. To be objective, the metric for "the appropriate amounts" must be known and defined. In the context of the SCM Agreement, it is the rules set out in the SCM Agreement itself that provide the basis on which it can be ascertained if the amounts are "the" appropriate ones. That amount must be determined in each "instance" or "occurrence" of levying a duty on an imported product. In other words, the amount of countervailing duties imposed should correspond to the subsidies identified for imports from a particular source, and not from any other.

502. Article 19.3 of the SCM Agreement thus contains three distinct elements that relate to the issue of discrimination. That is, where a Member has decided to impose countervailing duties, Article 19.3 of the SCM Agreement requires the Member to levy duties (i) on imports from all sources found to be subsidized and causing injury; (ii) on a non-discriminatory basis on imports from those sources; and (iii) "in the appropriate amounts," as understood under SCM Agreement rules, for each source in relation to which a levy is imposed.[913] Importing Members cannot discriminate between sources when imposing countervailing duties; and more specifically, when imposing countervailing duties on sources found to be subsidized and causing injury, the amount of countervailing duties must correspond to the amount of subsidies identified.

503. Importantly, it is other provisions in the SCM Agreement that provide the substantive rules against which "the appropriate amounts in each case" may be understood. As explained above, Article 14 of the SCM Agreement speaks directly to the notion of calculating the amount of benefit in terms of the benefit to the recipient. The text of Article 14 refers to "guidelines," which leave significant scope for an investigating authority to seek the appropriate methodology to measure benefit. Indeed, previous reports have referred to the "latitude"[914] and "leeway"[915] of

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[912] Definition of "case" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 345 (Exhibit USA-005).

[913] *See generally*, *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 14.125 (assimilating elements (i) and (ii)).

[914] *Japan – DRAMs (Korea) (AB)*, para. 191.

[915] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.55; *EC – Countervailing Measures on DRAM Chip (Panel)*, para. 7.213.

those "guidelines." Canada's argument would override the text of Article 14 with obligations in other provisions of the SCM Agreement and the GATT 1994 that have no textual connection to the "benefit to the recipient" guidelines set forth in Article 14 of the SCM Agreement, and would instead impose a specific and far-reaching obligation when calculating the amount of a subsidy. There is no basis in customary rules of interpretation of public international law to disregard the text of a specific provision (Articles 1 and 14 of the SCM Agreement) in relation to an issue (benefit) in favor of provisions (Articles 19.3 and 19.4 of the SCM Agreement) into which a specific meaning must be read ("credits") through text on different issues (non-discrimination and maximum levies).

504. Additionally, a proper analysis of context in the SCM Agreement further demonstrates that Canada's position is without support. The crux of Canada's argument is that, because of general requirements elsewhere in the SCM Agreement and Article VI:3 of the GATT 1994 limiting the amount of countervailing duties applied to a level that is "appropriate" and not in excess of the amount of the subsidy found to exist, the USDOC was obligated to aggregate comparison results for different financial contributions, and the USDOC was further required to provide a credit in the aggregate benefit calculation any time a transaction conferred no benefit, or, as Canada terms it, any time there was a "negative comparison result[]."[916] However, Canada's argument cannot be reconciled with the definition of a subsidy in Article 1 of the SCM Agreement.

505. Article 1.1 of the SCM Agreement provides that a subsidy shall be deemed to exist if there is "a financial contribution by a government" and "a benefit is thereby conferred."[917] That is the "Definition of a Subsidy" in Article 1.1 of the SCM Agreement. The SCM Agreement defines a subsidy in the singular form, which supports the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction-by-transaction basis. However, the ability of a Member to investigate more than one subsidy in a single proceeding is not disputed. That is, for purposes of determining the amount of subsidization of a product from each source, all subsidies that an investigating authority has found to exist may be aggregated.

506. When analyzing multiple subsidies, though, there is no obligation to provide a credit in that analysis when an investigating authority determines that a granting authority provided a subsidy in one instance but did not provide a subsidy in another instance. This reading of the SCM Agreement, permitting a disaggregated analysis of benefit, was echoed by the panel in *US – Lead and Bismuth II*:

> The term "benefit" effectively represents the portion of a "financial contribution" that, by reference to a market benchmark, the recipient gets for "free". This is the portion of a "financial

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[916] Canada's First Written Submission, paras. 935, 940.

[917] SCM Agreement, Art. 1.1 (underline added).

> contribution" that, by reference to a market benchmark, the recipient has not "paid for".[918]

The use of the singular term "benefit" in Articles 1 and 14 of the SCM Agreement supports calculating a benefit on a disaggregated basis to ensure that it reflects "the portion"[919] of the government's financial contribution that actually confers a benefit on the recipient.

507. Thus, each 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. Those non-subsidies could neither eliminate nor diminish the benefits conferred when Canadian provinces provided stumpage for less than adequate remuneration.

508. Of additional concern, Canada's argument has troubling implications, which Canada ignores. As explained above, the basis Canada offers for the purported obligation to provide credit for "negative comparison results" – or negative benefits, or instances in which a financial contribution does not confer a benefit – in the calculation of an aggregate benefit is the use of the term "appropriate amounts" in Article 19.3 of the SCM Agreement and the requirement in Article 19.4 of the SCM Agreement and in Article VI:3 of the GATT 1994 that any countervailing duty imposed not exceed the amount of the subsidy found to exist. Neither the term "appropriate amounts" nor the terms used in Article 19.4 of the SCM Agreement or Article VI:3 of the GATT 1994 appear in Article 14(d) of the SCM Agreement, nor anywhere else in Article 14 for that matter. Consequently, the purported obligation for which Canada argues, if it were found to exist, could not be limited to subparagraph (d) of Article 14. It would necessarily apply to all of Article 14 and would require that credit be provided whenever an investigating authority found that a financial contribution did not provide a benefit. Thus, Members would be required to provide credit across different types of input products and even across different types of subsidies.

509. For example, an investigating authority might examine together in a single investigation both a simple transfer of money from the government to an investigated producer, such as a grant, and the provision by the government of a good, allegedly for less than adequate remuneration. Assuming the investigating authority determines that, in every transaction examined, the good was sold for adequate remuneration (*i.e.*, it was sold for more than the benchmark price), then the amount of the benefit of the money transferred to the investigated producer via the grant should be reduced by the amount by which the price paid for the good

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[918] *US – Lead and Bismuth II (Panel)*, para. 6.70, footnote 80. This finding was not addressed by the Appellate Body on appeal.

[919] *US – Lead and Bismuth II (Panel)*, para. 6.70, footnote 80.

exceeded the benchmark price when the investigating authority calculates the "appropriate" countervailing duty to ensure that the countervailing duty does not exceed the aggregate amount of the subsidy found to exist.

510. Nothing in the SCM Agreement requires such a result. The implication of Canada's argument is that, because an investigating authority found that one alleged subsidy did not exist, it should be required to offset or reduce the amount of a separate subsidy that was found to exist. Had the investigating authority not investigated the alleged input subsidy, then it would not have been required to provide a credit or offset against the benefit conferred by the grant, and the full value of the grant could have been countervailed. Though, an additional concern is that, under Canada's logic, a respondent should be able to present evidence of any financial contribution for which it pays a so-called "negative" benefit to the government and claim an offset against the benefit of a subsidy, regardless of whether the investigating authority is investigating that particular financial contribution or not.

511. The panel in *US – Anti-Dumping and Countervailing Duties (China)* shared the concern described in the preceding paragraphs, and highlighted what it termed "a significant internal inconsistency" in the approach for which Canada now advocates:

> We also note that the approach advocated by China [and now Canada] has a significant internal inconsistency which is most easily seen in a hypothetical situation where all of the purchases of a given good from a government are for prices above "prevailing market conditions." Under China's methodology, the benefit calculations would generate "negative benefits," both individually and overall. China argues that it sees no requirement under the SCM Agreement to offset any such net negative benefits from provision of goods against positive benefits from any other kinds of subsidies. Yet, we can find no basis in China's argument on which such a distinction could be made between positive and negative benefit amounts from one given kind of subsidy and positive and negative benefit amounts across different kinds of subsidies. We see no such requirement in the SCM Agreement, and to the contrary consider that the Agreement – starting with the basic definition in Article 1 – instead provides that each subsidy must be analyzed and assessed independently.[920]

512. Like China in *US – Anti-Dumping and Countervailing Duties (China)*, Canada has not identified any limiting principle that would confine the purported aggregation/offset obligation to particular input subsidies or prevent the obligation, if it were found to exist, from applying across

[920] *US – Antidumping and Countervailing Duties (China) (Panel)*, para. 11.49.

different types of subsidies. Ultimately, there simply is no support in the terms of the covered agreements or in logic for the obligation Canada asks the Panel to invent.

4. Concluding Comments

513. As demonstrated above, nothing in the covered agreements obligates an investigating authority to provide a credit when calculating the benefit of a financial contribution for instances in which other financial contributions do not confer a benefit. Indeed, Canada does not even argue that an investigating authority is obligated to do so in each and every case. This is consistent with the position Canada took as a third party in *US – Anti-Dumping and Countervailing Duties (China)*. There, the panel noted that "Canada considers that there is no provision in the SCM Agreement that specifically requires the offsetting argued for by China."[921]

514. The panel in *US – Anti-Dumping and Countervailing Duties (China)* further noted that Canada, as a third party in that dispute, suggested that, "under certain circumstances, the examination of whether the provision of a good through one or more transactions is made for adequate remuneration may require that other transactions be examined."[922] That appears to be Canada's position in this dispute as well, as Canada contends that, under the particular circumstances here, the USDOC was obligated to aggregate and average the comparison results for various financial contributions (and provide credits for non-subsidized transactions), because not doing so was "unreasonable."[923] The following subsection demonstrates that Canada's arguments in this regard lack any basis in logic.

515. Before turning to Canada's arguments, though, the United States recalls, as discussed above, that the panel in *US – Anti-Dumping and Countervailing Duties (China)* rejected the argument that there exists "a 'basic reasonableness test' under Article 14 that would impart particular obligations that do not appear on the face of that provision."[924] Additionally, as also noted above, an earlier panel explicitly accepted an "individual transaction" approach to benefit determination. In the Article 21.5 proceeding in *US – Countervailing Measures on Certain EC Products*, the panel accepted the USDOC's segmented or separate consideration of four categories of share offerings to evaluate whether the sales transactions in each share offering occurred at arm's length and for fair market value and to determine whether the privatization had extinguished the benefit from non-recurring pre-privatization subsidies. The panel rejected the EC's arguments that the USDOC was obliged to undertake an aggregate examination of a company's privatization "as a whole":

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[921] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.28.

[922] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.28.

[923] *See*, *e.g.*, Canada's First Written Submission, paras. 924-926, 935, 942.

[924] *US – Antidumping and Countervailing Duties (China) (Panel)*, para. 11.59, footnote 821.

> In the absence of a legally prescribed methodology, the Panel agrees with the United States that it is within a Member's discretion to develop a reasonable methodology which, as required by Article 14 of the SCM Agreement, must be applied in a transparent manner and be adequately explained … The Panel's task is neither to perform a *de novo* review of the information and evidence on the record of the determination, nor to substitute our judgement for that of the USDOC. Accordingly, the issue before this Panel is not whether the Panel would have preferred that the USDOC analyse Usinor's privatization as a whole but whether the USDOC's segmented analysis of Usinor's privatization is reasonable and was transparently applied and adequately explained.[925]

The panel there ultimately concluded that the USDOC's analysis was "not unreasonable."[926]

B. Nothing about the Factual Circumstances Particular to New Brunswick and British Columbia Obligated the USDOC To Provide a Credit in the Benefit Calculation for Instances in Which Other Financial Contributions Did Not Confer a Benefit

516. Canada argues that, due to factual circumstances particular to New Brunswick and British Columbia, the USDOC's approach to the calculation of the benefit conferred by the government provision of stumpage in New Brunswick and British Columbia was "unreasonable" and "inaccurate."[927] Canada further argues that the USDOC's benefit calculations would have been more accurate if the USDOC had aggregated all of the financial contributions and provided credits in the overall average for instances where a financial contribution did not confer a benefit, or, in Canada's words, where there was a "negative comparison result."[928]

517. As demonstrated above, there is no obligation in the covered agreements that generally requires an investigating authority to apply in all countervailing duty investigations the approach for which Canada advocates. As demonstrated in this subsection, Canada's arguments that the USDOC was required to do so because of the particular factual circumstances in New Brunswick and British Columbia also fail because Canada's arguments lack any foundation in logic.

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[925] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.118 (underline added).

[926] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.122. *See also ibid*., para. 7.119.

[927] *See* Canada's First Written Submission, paras. 927-942.

[928] *See* Canada's First Written Submission, paras. 930, 931, 933-935, 940.

518. As noted earlier, Canada argues that "[b]enefit calculation methodologies used to determine the adequacy of remuneration … require a '*careful matching* of the transactions being examined with appropriate benchmarks' to ensure that the comparison is valid."[929] The USDOC undertook precisely such a "careful matching" of transactions in connection with its examination of the benefit conferred by government-provided stumpage in New Brunswick and British Columbia.

519. The USDOC's methodology for establishing the benchmark for its analysis of New Brunswick's and British Columbia's provision of stumpage is summarized above[930] and is described in detail in explanatory memoranda issued in connection with the USDOC's preliminary and final determinations. In brief, to calculate the benefit from New Brunswick's provision of stumpage, the USDOC compared net transaction-specific prices of JDIL for its purchases of New Brunswick government-provided stumpage to a monthly average benchmark of JDIL's purchases of private stumpage in Nova Scotia.[931] The USDOC explained that, "[t]o the extent possible, we matched the purchases in New Brunswick to the corresponding species/grade monthly average benchmark prices of Nova Scotia purchases."[932] The USDOC further explained the steps it took to match each purchase in New Brunswick with the most appropriate benchmark available, including in situations where there were not benchmark purchases in the relevant month or for a particular product or species or grade.[933] In making its determination regarding what comparison methodology would be most appropriate, the USDOC "considered the specific stumpage data collected and reported by the respective provincial governments and the level of detail of such data within the context of the provincial stumpage regimes."[934]

520. For British Columbia, the USDOC constructed a benchmark stumpage price using log-price data from the state of Washington, adjusting for the respondents' costs.[935] The premise of the USDOC's methodology was that "standing timber values are largely derived from the demand for logs produced from a given tree and '[t]he species of a tree largely determines the downstream products that can be produced from a tree; the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is in turn derived from

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[929] Canada's First Written Submission, para. 925 (quoting *US – Antidumping and Countervailing Duties (China) (Panel)*, para. 11.53; italics added by Canada).

[930] *See supra*, sections II.C.1 and II.C.5.a (New Brunswick), and section II.D (British Columbia).

[931] Lumber Final I&D Memo, pp. 39-41 (Exhibit CAN-010).

[932] *Memorandum to the File, RE: J.D. Irving Limited Final Calculations* (November 1, 2017) ("JDIL Final Calculation Memorandum"), p. 6 (Exhibit CAN-264 (BCI)). *See also* Lumber Final I&D Memo, pp. 39-40 (Exhibit CAN-010).

[933] *See* JDIL Final Calculation Memorandum, p. 6 (Exhibit CAN-264 (BCI)).

[934] Lumber Final I&D Memo, p. 41 (Exhibit CAN-010).

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

the demand for the type of lumber produced from these logs.'"[936] The USDOC compared the average annual price for each species in the Washington log-price data to annual prices paid by each respondent with operations in British Columbia by timbermark or stand (*i.e.*, a cutting authority or geographic area) and species.[937] The USDOC explained, *inter alia*, that:

- "To the extent possible, we have continued to match the species in Canfor's log purchase file with the species in the benchmark data. In those instances where the benchmark price data is a combination of two species, e.g., 'White Fir-Hem,' we assigned that benchmark price to both species categories in the log purchase file, as applicable. Where there were no exact species matches, we sought to compare the log purchases to the most similar species represented in the benchmark data. We followed the same matching criteria outlined in the Preliminary Calculation Memorandum."[938]

- "[For Tolko, to] calculate the benefit, we compared each timbermark/species-specific stumpage value to the benchmark value (i.e., the appropriate annual-average species-specific benchmark price multiplied by the volume on the timbermark/species-specific line and adjusted by the benchmark cost adjustments)."[939]

- "To the extent possible, we matched the species in West Fraser's Crown stumpage purchase file with the species in the benchmark data. We used the same species matches in the final calculation that were used in the Preliminary calculation. For instances where West Fraser indicated the species as … we used an average of prices for the species not listed in Table B, i.e., Ceder, [*sic*] White Pine, Pine, and Conifer."[940]

521. Thus, as just explained, the USDOC undertook the very kind of "careful matching" of

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[936] Lumber Final I&D Memo, pp. 67-68 (Exhibit CAN-010).

[937] Lumber Final I&D Memo, pp. 66-67 (Exhibit CAN-010).

[938] *Memorandum to the File, RE: Final Determination Calculations for Canfor* (November 1, 2017), p. 5 (citations omitted) (Exhibit CAN-380 (BCI)).

[939] *Memorandum to the File, RE: Final Determination Calculations for Tolko Marketing and Sales Ltd. and Tolko Industries Ltd. (collectively Tolko)* (November 1, 2017), p. 7 (Exhibit CAN-381 (BCI)).

[940] *Memorandum to the File, RE: Final Determination Calculations for West Fraser Mills, Ltd. and its cross-owned affiliates* (November 1, 2017), pp. 3-4 (Exhibit CAN-382 (BCI)).

transactions for which Canada advocates.

522. Canada complains that the USDOC "compared purchases of Crown-origin timber to benchmarks that were inherently dissimilar because of the type of information the benchmarks contained."[941] Specifically, Canada asserts that "[c]omparing transaction-specific Crown stumpage prices to an average benchmark price that reflects a wide range of harvesting and other conditions results in the identification of price differences that occur because of differing *market* conditions, not because a good is being provided at below-market rates."[942] These complaints, however, do not form the basis of Canada's claim that the USDOC acted inconsistently with the SCM Agreement and the GATT 1994. Rather, Canada explicitly accepts that "transaction-to-average comparisons can provide an accurate and reasonable benefit calculation if the individual comparison results are added together."[943] As Canada explains, "[t]his effectively averages all of the individual transactions and results in a comparison of carefully matched average transaction conditions to average benchmark conditions."[944]

523. Canada's positions are contradictory. On the one hand, Canada argues that the SCM Agreement and the GATT 1994 require "'careful matching of the transactions being examined with appropriate benchmarks' to ensure that the comparison is valid."[945] On the other hand, Canada argues that <u>all</u> of the transactions should be aggregated together and averaged. Aggregating and averaging all of the transactions would be the opposite of a "careful matching" of transactions.

524. The core of Canada's claim of a breach is that the USDOC "took the comparisons and set to zero any comparison result where the transaction price exceeded the benchmark price."[946] Canada asserts that an allegedly inflated benefit calculation "was caused <u>solely</u> by Commerce's decision to set negative comparison results to zero instead of simply aggregating them with the positive comparison results."[947] Canada further argues that "[s]etting comparison results to zero compromised the averaging effect that aggregating the comparison results would have had, undoing some of the careful matching that Commerce was required to carry out."[948]

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[941] Canada's First Written Submission, para. 927.

[942] Canada's First Written Submission, para. 930 (italics in original).

[943] Canada's First Written Submission, para. 930.

[944] Canada's First Written Submission, para. 930.

[945] Canada's First Written Submission, para. 925 (quoting *US – Antidumping and Countervailing Duties (China) (Panel)*, para. 11.53; italics removed).

[946] Canada's First Written Submission, para. 927.

[947] Canada's First Written Submission, para. 935 (underline added).

[948] Canada's First Written Submission, para. 931.

525. Again, Canada's argument is illogical. The USDOC's individual examination of separate purchases of government-provided stumpage reveals where a financial contribution was provided for more than adequate remuneration – and thus did not confer a benefit and did not result in a subsidy. As explained above, the USDOC engaged in "careful matching" to associate separate stumpage purchases with appropriate corresponding stumpage benchmarks (by product, species, grade, month, etc.). The result of each separate comparison of a financial contribution and a benchmark was a determination that a subsidy did or did not exist. Aggregating all of the separate comparison results and providing credits for non-subsidized transactions, as Canada argues the USDOC should have done, would have undone "the careful matching that [Canada argues the USDOC] was required to carry out."[949]

526. Canada's complaints about the USDOC's approach are internally inconsistent and not based in logic. Canada has failed to establish that its proposed approach would have made the USDOC's benefit calculations more "accurate." Canada has failed to establish that the USDOC's approach was "unreasonable." And Canada has failed to establish that the USDOC was obligated by the SCM Agreement and the GATT 1994 to apply Canada's preferred approach when it determined the benefit of government-provided stumpage in New Brunswick and British Columbia.

527. For the foregoing reasons, there is no basis to find, as Canada claims, that the USDOC's determination of the benefit of government-provided stumpage in New Brunswick and British Columbia is inconsistent with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

IV. THE USDOC'S DETERMINATION CONCERNING BRITISH COLUMBIA'S AND CANADA'S LOG EXPORT RESTRAINTS IS NOT INCONSISTENT WITH ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

528. Canada claims that the USDOC improperly investigated and countervailed British Columbia's and Canada's log export restraints.[950] Canada asserts that (i) export permitting processes cannot, as a matter of law, constitute a financial contribution; (ii) there is insufficient evidence that British Columbia's and Canada's log export restraints entrusted or directed log suppliers to sell to British Columbia processors, and insufficient evidence that the provision of logs is a function normally vested in the government; and (iii) there was an insufficient basis for the USDOC to initiate a countervailing duty investigation of the log export restraints. Canada's claims lack merit for a variety of reasons, including, fundamentally, that any unbiased and objective investigating authority could have concluded, as the USDOC did, that the particular log export restraints at issue, by which these governments compelled the provision of logs to BC

[949] Canada's First Written Submission, para. 931.

[950] *See* Canada's First Written Submission, paras. 943-973.

consumers, amount to the entrustment or direction of private log suppliers to provide logs to BC consumers.

529. The United States summarizes in section IV.A the USDOC's analysis supporting its determination that the log export restraints result in a financial contribution by means of entrustment or direction of private bodies, in that official government action compels British Columbia log suppliers to provide a good – *i.e.*, logs – to British Columbia consumers, including mill operators.

530. Section IV.B presents an overview of the proper interpretation of Article 1.1(a)(1) of the SCM Agreement. The United States demonstrates that the concept of entrustment or direction encompasses a range of government actions, including the imposition by the Governments of British Columbia and Canada of log export restraints as a means by which to entrust or direct private log suppliers to carry out the function of providing logs to BC consumers, including mill operators.

531. Section IV.C rebuts Canada's arguments that the USDOC breached Article 1.1(a)(1)(iv) of the SCM Agreement. Canada's legal arguments are flawed, rest on false premises, and rely on prior reports that are inapposite. Canada incorrectly argues that the record evidence does not support the USDOC's determination of entrustment or direction. Canada also incorrectly argues that the record evidence does not support the USDOC's determination that providing logs is a type of function that would normally be vested in the Governments of British Columbia and Canada.

532. Section IV.D responds to Canada's flawed arguments regarding the USDOC's initiation of a countervailing duty investigation of the log export restraints, which fail because they simply refer to and depend upon Canada's flawed arguments that the log export restraints do not result in a financial contribution as a matter of law or fact.

A. The USDOC's Analysis of British Columbia's and Canada's Log Export Restraints Demonstrates that Official Government Action Compels British Columbia Log Suppliers To Provide a Good to Consumers

533. The USDOC explained the reasons for its determination in a preliminary decision memorandum and a final issues and decision memorandum, which were published in connection with the preliminary and final determinations, respectively, in the countervailing duty investigation of softwood lumber products from Canada.[951] The following is a summary of the USDOC's analysis and reasoning.

534. As the USDOC explained, logs harvested in British Columbia are subject to either

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

provincial jurisdiction (covered under British Columbia's Forest Act) or federal jurisdiction (covered under Canada's Federal Notice to Exporters No. 102).[952] The two laws have identical in-province use requirements, which require that logs be used or provided to timber processing facilities in British Columbia unless an exception applies.[953]

535. Specifically, under the Forest Act, timber harvested from land under provincial jurisdiction "must either be used in British Columbia or manufactured within the province into a wood product."[954] The Forest Act provides the following three exemptions to the rule:

> (1) logs that are "surplus to requirements of timber processing facilities in British Columbia" (surplus criterion);
>
> (2) timber that "cannot be processed economically in the vicinity of the land on which it is cut or produced, and cannot be transported economically to a processing facility located elsewhere in British Columbia" (economic criterion); and
>
> (3) where an exemption "would prevent the waste of or improve the utilization of timber cut from [government-owned] land" (utilization criterion).[955]

All but two applications for export during the period of investigation cited the surplus criterion.[956]

536. For an applicant to establish that logs are "surplus to requirements of timber processing" in the province, the applicant must advertise its logs to BC mill operators as part of a bi-weekly list.[957] If the applicant's advertisement receives no offers, then the listed logs are considered

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[952] Lumber Preliminary Decision Memorandum, p. 57 (Exhibit CAN-008).

[953] Lumber Preliminary Decision Memorandum, pp. 58, 61 (Exhibit CAN-008).

[954] Lumber Preliminary Decision Memorandum, p. 58 (Exhibit CAN-008) (citing GOC & GBC QR at Ex. LEP-8, Part 10 (The text of Part 10 of the Forest Act, to which the USDOC cited, can be found at pages 95-96 of the PDF version of Exhibit CAN-039)).

[955] Lumber Preliminary Decision Memorandum, p. 58 (Exhibit CAN-008) (citing GOC & GBC QR at LEP-16) (Exhibit CAN-049 (BCI)).

[956] Lumber Preliminary Decision Memorandum, p. 58 (Exhibit CAN-008) (citing GOC & GBC QR at LEP-16) (Exhibit CAN-049 (BCI)).

[957] Lumber Preliminary Decision Memorandum, pp. 58-59 (Exhibit CAN-008). The GOC and GBC explained: "The biweekly list, which provides an opportunity for a domestic log processor to make an offer to the applicant to purchase the logs being advertised indicates the name, address and telephone number of the applicant, a description of the log sort, the average log size, the volume in cubic meters and the location of the logs or if the logs are in transit. The Ministry posts the list on its website." GOC & GBC QR at LEP-17 (Exhibit CAN-049 (BCI)).

surplus and a Ministerial Order approving the application for export pursuant to the surplus criterion is granted.[958] If an offer is made for the advertised logs, the Timber Export Advisory Committee evaluates whether the offer represents a "fair market value."[959] If so, the application for the surplus exemption is denied, the logs are not authorized for export, and the applicant may not resubmit an application to export the same logs. If the offer is determined not to be "fair," then the surplus criterion is satisfied and the logs are authorized for export.[960]

537. An exemption under the surplus test also may be granted through an individual or blanket Order in Council ("OIC").[961] An individual OIC applies to specific timber that is still standing, while a blanket OIC applies to a specific area of standing timber. During the period of investigation, there were no individual OICs and five blanket OICs covering specific areas in the Coast region of British Columbia. Although a blanket OIC is not subject to individual surplus tests, the OIC itself is subject to the stipulation that the relevant logs are surplus to the needs of BC processors.[962]

538. In addition to obtaining an exemption, a log exporter must, under the Forest Act, pay a fee "in-lieu of manufacturing" that ranges from C$1 per cubic meter to approximately fifteen percent of the value of the log.[963] The fees vary by location, species, and grade, with some coastal areas subject to an additional multiplication factor of 1.1 up to 1.3 times the fee.[964]

539. Logs under federal jurisdiction, which includes federal government-owned or Indian reserve land, are subject to an "almost identical process to the Ministerial Order surplus test [] for logs under provincial jurisdiction."[965] Companies apply to the Export Controls Division of the Department of Foreign Affairs, Trade and Development, which requests that the government of British Columbia list the relevant logs through the same bi-weekly publication. If an offer is received, the Federal Timber Export Advisory Committee assesses whether the offer is fair and makes a recommendation regarding whether the Department of Foreign Affairs, Trade and Development should conclude that the logs are surplus.[966]

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[958] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

[959] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

[960] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

[961] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

[962] Lumber Preliminary Decision Memorandum, pp. 59-60 (Exhibit CAN-008).

[963] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008).

[964] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008) (citing GOC & GBC QR at LEP-34-35 (Exhibit CAN-049 **(**BCI**)**)).

[965] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008).

[966] GOC & GBC QR at LEP-12 (Exhibit CAN-049 **(**BCI**)**).

540. Additionally, logs under both provincial jurisdiction and federal jurisdiction are controlled for export and require a specific permit under the Export and Import Permits Act ("EIPA"). The other products on the export control list include munitions and highly sensitive technology.[967] Violation of the EIPA is subject to severe penalties.[968]

541. Based upon the totality of the record evidence before it, including, *inter alia*, the evidence summarized above, the USDOC preliminarily made the following findings, which were unchanged in the USDOC's final determination:

- "[T]he BC log export restraints result in a financial contribution by means of entrustment or direction of private entities . . . in that official governmental action compels suppliers of BC logs to supply to BC consumers, including mill operators."[969]

- "[T]he Forest Act explicitly states that all timber harvested in British Columbia is required to be used in British Columbia or manufactured in British Columbia into wood products. These logs cannot be exported unless they meet certain criteria, the most common of which is that they are surplus to the needs of the timber processing industry in British Columbia. Therefore, the [Government of British Columbia] requires private log suppliers to offer logs to mill operators in British Columbia, and may export the logs only if there are no customers in British Columbia that want to purchase the logs. Thus, the nature of the actions undertaken by the [Government of British Columbia] require private suppliers of BC logs to sell to, and satisfy the demands of, BC consumers, including mill operators."[970]

- The USDOC found that the surplus test requirement "ensures that the timber processing and value-added wood product industry in British Columbia is assured of an abundant, low-cost source of supply."[971]

- 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

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[967] GOC & GBC QR at LEP-8 (Exhibit CAN-049 (BCI)).

[968] GOC & GBC QR at Ex. LEP-5, § 19 (Exhibit CAN-070).

[969] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, p. 152 (Exhibit CAN-010).

[970] Lumber Preliminary Decision Memorandum, pp. 60-61 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, pp. 153-154 (Exhibit CAN-010).

[971] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

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.[972]

- In addition to the legal tests to overcome the law's in-province processing requirement, the potentially lengthy nature of the process and the fees charged "result in a policy where [British Columbia] has entrusted or directed private log suppliers to provide logs to mill operators . . . and to provide a financial contribution in the form of the provision of logs."[973]

- With respect to the Canadian federal government, its identical surplus test process to overcome the in-province use or processing requirement and the penalties potentially imposed under the EIPA compels log harvesters "to divert to mill operators some volume of logs that could otherwise be exported." Accordingly, Canada "has entrusted or directed private log suppliers to provide logs to mill operators . . . and to provide a financial contribution in the form of the provision of logs."[974]

542. The USDOC further explained its determination by responding to comments from interested parties. For example, the Government of British Columbia contended that "the export permitting processes 'does not direct the harvest or owner to provide logs to any purchaser in particular'."[975] The USDOC responded that the record evidence demonstrates that "the program is designed to benefit, and in operation does benefit, downstream consumers…."[976] The USDOC further explained that:

> Timber harvesters and processors in British Columbia are limited, by the provincial or federal restrictions on the export of logs to which they are subject, in to whom they can sell their logs. These limitations result in the third-party timber harvesters and processors providing logs to BC processors of logs at the entrustment or direction of the GBC and the GOC. We continue to find that this provision of logs falls within the definition of a

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

[973] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[974] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[975] Lumber Final I&D Memo, p. 153 (citing Government of British Columbia Case Brief Log Exports, p. 9) (Exhibit CAN-010).

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

> financial contribution … because the provision of logs is the provision of a good or service, other than general infrastructure.[977]

543. The USDOC reiterated that its analysis was based on the "laws and regulations that govern the provision of logs within British Columbia."[978] The USDOC concluded that those laws and regulations present a "lengthy and burdensome export prohibition exemption process [that] discourages log suppliers from considering the opportunities that may exist in the export market by significantly encumbering their ability to export, especially where there may be uncertainty about whether their logs will be found to be surplus to the requirements of mills in BC."[979] In addition, the laws and regulations restrict the ability of log suppliers to enter into long-term supply agreements with foreign entities.[980] Log suppliers "must ensure that demand for logs in British Columbia is met before seeking a purchaser overseas and, therefore, they are forced to receive a lower price for their timber in British Columbia than they would if they were able to export free of [British Columbia's] and [Canada's] export restrictions."[981]

544. Finally, the USDOC explained 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.[982] The USDOC accordingly continued to conclude in the final determination that the provision of logs "normally would be vested in the government."[983]

545. In sum, it is evident from a review of the USDOC's preliminary decision memorandum and final issues and decision memorandum that the USDOC's explanation of its determination is "reasoned and adequate,"[984] the USDOC's determination, which is based on the totality of information on the administrative record,[985] is supported by ample evidence, and any unbiased

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

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

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

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

[981] Lumber Final I&D Memo, pp. 154-155 (Exhibit CAN-010).

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

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

[984] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).

[985] *See*, *e.g.*, Lumber Preliminary Decision Memorandum, p. 60 ("Based on the record evidence, we preliminarily find that the BC log export restraints result in a financial contribution by means of entrustment or direction of private entities…, in that official governmental action compels suppliers of BC logs to supply to BC consumers, including mill operators." (underline added)) (Exhibit CAN-008); Lumber Final I&D Memo, pp. 139 (noting its consideration of record information in its "totality"), 145 ("record evidence supports our preliminary determination") (Exhibit CAN-010).

and objective investigating authority, examining the same evidence, could reach the same conclusions that the USDOC reached.[986] Canada's claim to the contrary lacks any foundation.

B. Properly Interpreted, Article 1.1(a)(1)(iv) of the SCM Agreement Encompasses a Range of Government Action, Including the Imposition by the Governments of British Columbia and Canada of Log Export Restraints as a Means by which to Entrust or Direct Private Log Suppliers to Carry Out the Function of Providing Logs to BC Consumers, Including Mill Operators

546. Any interpretation of Article 1.1 of the SCM Agreement must begin with an examination of the text "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."[987] Article 1.1(a)(1) provides that a "financial contribution" exists where:

> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.[988]

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[986] *See*, *e.g.*, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, paras. 7.78-7.83; *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.

[987] As explained above in section I.B, Article 3.2 of the DSU provides that the purpose of the WTO dispute settlement system is to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law," and Article 31 of the Vienna Convention has been recognized as reflecting such rules. *US – Gasoline (AB)*, p. 17. 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."

[988] SCM Agreement, Art. 1.1(a)(1) (footnote omitted).

547. It is evident from the text of Article 1.1(a)(1) that Members recognized that governments have a wide variety of mechanisms at their disposal to provide a financial contribution to domestic enterprises or industries, and that Members intended to bring those mechanisms within the disciplines of the SCM Agreement. In *US – Large Civil Aircraft (Second Complaint)*, the Appellate Body explained that, although Article 1.1(a)(1) of the SCM Agreement provides an exhaustive list of the general types of conduct that constitute a financial contribution, the examples of activities that fall under such conduct are not exhaustive.[989]

548. Furthermore, the text of subparagraph (iv) of Article 1.1(a)(1) recognizes that, in addition to conferring subsidies directly, governments may confer subsidies indirectly by "entrust[ing] or direct[ing]" private actors. The Appellate Body has agreed with this interpretation, reasoning that "[t]he situations listed in paragraphs (i) through (iii) refer to a financial contribution that is provided *directly* by the government" while, "[b]y virtue of paragraph (iv), a financial contribution may also be provided *indirectly* by a government…."[990]

549. As explained above, the USDOC determined that "the BC log export restraints result in a financial contribution by means of entrustment or direction of private entities . . . in that official governmental action compels suppliers of BC logs to supply to BC consumers, including mill operators."[991] The relevant "type[] of function illustrated in (i) to (iii)" at issue here, as Canada appears to agree,[992] is the provision of a good other than infrastructure (*i.e.*, the provision of logs), which is described in Article 1.1(a)(1)(iii) of the SCM Agreement.

550. Canada's challenge of the USDOC's determination calls upon the Panel to examine whether the USDOC was justified (1) in determining that the Government of British Columbia and the Government of Canada "entrust[] or direct[]" private log suppliers to carry out the function of providing goods (logs), and (2) in determining that this "type of function[] … would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." In examining the USDOC's determination, it will be necessary for the Panel to undertake an interpretive analysis of Article 1.1(a)(1)(iv) of the SCM Agreement. The following subsections discuss the proper interpretation of the terms of Article 1.1(a)(1)(iv) and demonstrate that the term "entrusts or directs" encompasses a range of

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[989] *US – Large Civil Aircraft (Second Complaint) (AB)*, para 613 ("Subparagraphs (i) – (iv) exhaust the types of government conduct deemed to constitute a financial contribution . . . Some of the categories of conduct—for instance those specified in subparagraphs (i) and (ii) – are described in general terms with illustrative examples that provide an indication of the common features that characterize the conduct referred to more generally.").

[990] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 108 (italics in original).

[991] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, p. 152 (Exhibit CAN-010).

[992] *See* Canada's First Written Submission, para. 947 (explaining that "the government must 'entrust or direct' the private body to act as its 'proxy' in carrying out one of the types of government functions listed in paragraphs (i) through (iii)–here, the government provision of goods other than general infrastructure under Article 1.1(a)(1)(iii).").

government action, including the imposition by the Governments of British Columbia and Canada of log export restraints as a means by which to entrust or direct private log suppliers to carry out the function of providing logs to BC consumers, including mill operators.

1. The Ordinary Meaning of "Entrusts or Directs" Encompasses a Range of Actions

551. "Entrust" is defined, in relevant part, as "[i]nvest with a trust; give (a person, etc.) the responsibility for a task . . . [c]ommit the . . . execution of (a task) to a person."[993] This definition encompasses a range of actions. The word "entrust" implies that a degree of discretion is given to the person being entrusted. It is not necessary that the government spell out in minute detail the task which it is entrusting. Rather, the ordinary meaning of "entrust" captures situations in which the government leaves a certain amount of responsibility to the private body that is entrusted.

552. Definitions of the word "direct" include "Cause to move in or take a specified direction; turn towards a specified destination or target;" "Give authoritative instructions to; to ordain, order (a person) *to do*, (a thing) *to be done*; order the performance of" or "Regulate the course of; guide with advice."[994] Additional definitions of "direct" include "Inform or guide (a person) as to the way; show or tell (a person) the way (to);" and "govern the actions ... of."[995] Thus, the ordinary meaning of "direct" also encompasses a wide range of actions. These actions are not limited to commanding a person or entity to do something in particular.

553. The proper interpretation of "entrusts or directs" is one that takes account of the full range of government actions that fall within the ordinary meaning of this term: a government investing trust in a private body to carry out a task, a government giving responsibility to a private body to carry out a task, a government informing or guiding a private body as to how to carry out a task, a government regulating the course of a private body's conduct, as well as a government delegating or commanding a private body to carry out a task.

554. The panel in *US – Export Restraints*, on which Canada relies,[996] defined "entrusts or directs" simply as "delegation or command."[997] Numerous reports have correctly rejected that

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[993] Definition of "entrust" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 831 (Exhibit USA-006).

[994] Definition of "direct" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 679 (Exhibit USA-007).

[995] Definition of "direct from" *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 679 (Exhibit USA-007).

[996] *See* Canada's First Written Submission, para. 955.

[997] *See, e.g., US – Export Restraints (Panel)*, para. 8.44.

interpretation as being too "narrow."[998] For example, the Appellate Body reasoned in *US – Countervailing Duty Investigation on DRAMS* that "[d]elegation is usually achieved by formal means, but delegation also could be informal. Moreover, there may be other means, be they formal or informal, that governments could employ for the same purpose."[999] As for the term "direct," the Appellate Body emphasized the "authority … exercised by a government over a private body" and reasoned that a "command" "is certainly one way in which a government can exercise authority over a private body in the sense foreseen by Article 1.1(a)(1)(iv), but governments are likely to have other means at their disposal to exercise authority over a private body. Some of these means may be more subtle than a 'command' or may not involve the same degree of compulsion."[1000] The Appellate Body further explained that Article 1.1(a)(1)(iv) "is intended to ensure that governments do not evade their obligations under the SCM Agreement by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself. In other words, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision."[1001] The Appellate Body's reasoning supports the conclusion that the term "entrusts or directs" encompasses a range of possible government actions.

555. Other panels likewise have rejected the *US – Export Restraints* panel's interpretation that "entrusts" or "directs" must be "an explicit and affirmative action."[1002] For instance, in *Japan – DRAMs (Korea)*, the panel recognized that, "the entrustment or direction of a private body will rarely be formal, or explicit."[1003] In *Korea – Commercial Vessels*, the panel stated that it saw "nothing in the text of Article 1.1(a)(1)(iv) that would require the act of delegation or command to be 'explicit.' . . . In [its] view, the affirmative act of delegation or command could be explicit or implicit, formal or informal."[1004] The panel in *EC – Countervailing Measures on DRAM*

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[998] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 110, 111. *See also Japan – DRAMs (Korea) (Panel)*, para 7.73; *Korea – Commercial Vessels (Panel)*, para. 7.370; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.105.

[999] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 110. *See also Japan – DRAMs (Korea) (Panel)*, para 7.73.

[1000] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 111.

[1001] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 113.

[1002] The *US – Export Restraints* panel stated that, "[t]o [their] minds, both the act of entrusting and that of directing . . . necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty." *US – Export Restraints (Panel)*, para. 8.29. Based on its finding that entrustment or direction must be achieved through an "explicit and affirmative action of delegation or command," the panel found that an export restraint as defined in *US – Export Restraints* could not meet the subsection (iv) entrustment or direction standard for indirect subsidies.

[1003] *Japan – DRAMs (Korea) (Panel)*, para. 7.73.

[1004] *Korea – Commercial Vessels (Panel)*, para. 7.370.

Chips similarly reasoned that, "[i]n the absence of a clear and explicit government order, the evidence to be relied on will inevitably be circumstantial."[1005]

556. Accordingly, the ordinary meaning of the term "entrusts or directs," as confirmed by prior panel and Appellate Body findings interpreting that term, supports the conclusion that the term encompasses a range of possible government actions.

2. The Context of the Term "Entrusts or Directs" Supports the Conclusion that the Term "Entrusts or Directs" Encompasses a Range of Actions

557. As noted above, Article 31 of the Vienna Convention provides that the terms of a treaty must be interpreted according to their "ordinary meaning" in their "context." The context of Article 1.1(a)(1)(iv) supports the conclusion that the term "entrusts or directs" encompasses a range of government actions. The immediate context of the phrase "entrusts or directs" includes the remainder of Article 1.1(a)(1)(iv), specifically the language that a financial contribution exists where a government "entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments."

558. Article 1.1(a)(1)(iv) reaches "practices" which would normally be vested in the government and which do not differ, in any real sense, from "practices" normally followed by governments. The use of the term "practice" implies that entrustment or direction is not limited to any particular official or formal program, but also includes broader "practices" in which governments engage.

559. Additionally, the last instance of the term "government" in Article 1.1(a)(1)(iv) is plural, "governments."[1006] Thus, in addition to assessing whether the function "would normally be vested in the government" alleged to have entrusted or directed a private body, it is necessary also to assess the "practices normally followed by governments" other than that government. This again suggests a wider range of potentially relevant government actions that may be relevant to the analysis of entrustment or direction.

560. Furthermore, the phrase "in no real sense" also suggests that Members were seeking to avoid circumvention. The practice of a private body need not necessarily be identical to a practice of the particular government at issue or even the practices normally followed by

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[1005] *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.105.

[1006] This is the case also in the Spanish version of the SCM Agreement, where the term "gobiernos" in the plural is used at the end of Article 1.1(a)(1)(iv), in contrast to the term "gobierno" in the singular, which is used earlier in subparagraph (iv) and elsewhere throughout Article 1.1(a)(1). In the French version of the SCM Agreement, the term "pouvoirs publics," which is itself plural, is used throughout Article 1.1(a)(1).

governments, but rather must be determined to, "in no real sense," differ from such practices – *i.e.*, not differ in any real sense. This contextual element supports an interpretation of "entrusts or directs" that gives effect to its full range of meanings. Article 1.1(a)(1)(iv) captures subsidies that differ "in no real sense" from those provided by a government itself, except for the fact that they are provided through private bodies.

561. Similarly, Article 1.1(a)(1)(iv) refers to "one or more of the type of functions … which would normally be vested in the government."[1007] 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[1008] in the present unreal conditional form.[1009] 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."[1010] The use of the term "would normally be" instead of the term "are" indicates that it is not necessary to establish that the government alleged to have entrusted or directed a private body actually performs the precise function carried out by the private body, but that the government normally would perform that type of function, and also "the practice, in no real sense, differs from the practices normally followed by governments."[1011]

562. The context of "entrusts or directs" supports the conclusion that Members did not intend that governments be able to evade the subsidy disciplines by using other means of granting subsidies – that is, means that differ in no real sense from those normally used by governments. To ensure that governments do not provide market-distorting subsidies through private bodies, it is necessary to accord a proper interpretation to the term "entrusts or directs" under the customary rules of interpretation. It is incumbent that the term "entrusts or directs" be interpreted in a manner that recognizes that there are many ways in which a government might exercise its leverage over private bodies to accomplish tasks that normally the government would undertake. The context of "entrusts or directs" supports such an interpretation.

3. Interpreting the Term "Entrusts or Directs" as Encompassing a Range of Actions Is Consistent with the Object and Purpose of the SCM Agreement

563. While several expert commenters have noted that the SCM Agreement does not set out an

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[1007] SCM Agreement, Art. 1.1(a)(1)(iv) (underline added).

[1008] *See* Definition of "would" from englishpage.com (Exhibit USA-008).

[1009] *See* Explanation of Present Conditionals from englishpage.com (Exhibit USA-009).

[1010] Explanation of Present Conditionals from englishpage.com (Exhibit USA-009).

[1011] SCM Agreement, Art. 1.1(a)(1)(iv).

object and purpose itself,[1012] it is useful to note that the WTO Agreement sets out an object and purpose of "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade."[1013] The SCM Agreement reflects that object and purpose by setting out commitments to refrain from providing subsidies in situations in which certain effects adverse to the interests of other Members are caused. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body noted that its interpretation of the term "entrusts or directs" was consistent with this object and purpose reflected in the SCM Agreement:

> [The SCM Agreement] reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures. . . . . This balance must be borne in mind in interpreting paragraph (iv), which allows Members to apply countervailing measures to products in situations where a government uses a private body as a proxy to provide a financial contribution (provided, of course, that the other requirements of a countervailable subsidy are proved as well).[1014]

564. This understanding of the reciprocal and mutually advantageous commitments to reduce barriers to trade supports interpreting the term "entrusts or directs" as encompassing a range of government actions. Indeed, the Appellate Body summarized its own interpretive findings as follows:

> In sum, we are of the view that, pursuant to paragraph (iv), "entrustment" occurs where a government gives responsibility to a private body, and "direction" refers to situations where the government exercises its authority over a private body. In both instances, the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii). <u>It may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not</u>. The particular label used to describe the governmental action is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, "guidance" by a government can constitute

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[1012] *See*, *e.g.*, 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, pp. 992-993 (Exhibit USA-017).

[1013] *Agreement Establishing the World Trade Organization* ("WTO Agreement"), Preamble.

[1014] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 115 (footnote omitted).

> direction. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case.[1015]

565. The Appellate Body's summary of its interpretation of the term "entrusts or directs" is well reasoned and, as demonstrated above, accords with the interpretation that follows from a proper application of the customary rules of interpretation of public international law.

C. Canada's Arguments against the USDOC's Determination Concerning British Columbia's and Canada's Log Export Restraints Lack Merit

566. Canada argues that the USDOC's determination that British Columbia's and Canada's log export restraints result in a financial contribution by means of entrustment or direction of private entities is deficient because, in Canada's view, (1) an export restraint cannot legally constitute a financial contribution, (2) the USDOC's determination of entrustment or direction is not supported as a matter of fact, and (3) the USDOC's determination that providing logs is a function that would normally be vested in the governments of British Columbia and Canada is not supported as a matter of fact.

567. As demonstrated below, Canada's arguments lack merit. Canada's legal arguments are flawed, rest on false premises, and rely on prior reports that are inapposite. The record evidence that was before the USDOC supports the USDOC's determination of entrustment or direction and supports the USDOC's determination that providing logs is a type of function that would normally be vested in the governments of British Columbia and Canada. The USDOC's determination is one that could have been reached by any other unbiased or objective investigating authority examining the same evidence.

1. Canada's Legal Arguments Are Flawed, Rest on False Premises, and Rely on Prior Reports that Are Inapposite

568. Canada first argues that a log export restraint cannot constitute a financial contribution as a matter of law because "it is not enumerated among the types of direct government action in Articles 1.1(a)(1)(i) through (iii) of the SCM Agreement that are capable of giving rise to the existence of a financial contribution."[1016] Canada misunderstands or misrepresents the USDOC's determination.

569. The USDOC did not determine that the log export restraints themselves are financial

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[1015] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116 (underline added; footnote omitted).

[1016] Canada's First Written Submission, para. 952.

contributions. The USDOC determined that "the BC log export restraints result in a financial contribution by means of entrustment or direction of private entities . . . in that official governmental action compels suppliers of BC logs to supply to BC consumers, including mill operators."[1017] The USDOC also determined that the Government of Canada "entrusted and directed private log suppliers to provide logs to mill operators insofar as the surplus test and the legal penalties for exporting logs without an export permit compel such suppliers to divert to mill operators some volume of logs that could otherwise be exported."[1018]

570. Thus, the USDOC identified the relevant "type of function[] illustrated in [Article 1.1(a)(1)](i) to (iii)"[1019] as being the provision of a good other than infrastructure (*i.e.*, the provision of logs), which is described in Article 1.1(a)(1)(iii). Canada appears to agree with this elsewhere in its first written submission.[1020] The USDOC never suggested that the log export restraints themselves are among the "type of functions" illustrated in subparagraphs (i) to (iii). Rather, the log export restraints are the legal mechanism through which the governments take action to entrust or direct private log suppliers to carry out the function of providing a good (logs) to BC consumers, including mill operators. Canada's first argument fails because it rests on a false premise.

571. Canada next argues that an "export permitting process" cannot be found to result in entrustment or direction because it "does not task a manufacturer of a good or other market operator with selling the good in question or selling at any particular price."[1021] Therefore, Canada contends, "the requisite link between the government action and the specific conduct of the private body is missing."[1022] Canada misunderstands the meaning of the term "entrusts or directs."

572. As explained above, the term "entrusts or directs" does not require a government to "task" – as Canada puts it[1023] – a private body. Entrustment "occurs where a government gives responsibility to a private body," and direction "refers to situations where the government

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[1017] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, p. 152 (Exhibit CAN-010).

[1018] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[1019] SCM Agreement, Art. 1.1(a)(1)(iv).

[1020] *See* Canada's First Written Submission, para. 947 (explaining that "the government must 'entrust or direct' the private body to act as its 'proxy' in carrying out one of the types of government functions listed in paragraphs (i) through (iii)–here, the government provision of goods other than general infrastructure under Article 1.1(a)(1)(iii).").

[1021] Canada's First Written Submission, para. 953.

[1022] Canada's First Written Submission, para. 953.

[1023] Canada's First Written Submission, para. 953.

exercises its authority over a private body."[1024] The Appellate Body and previous panels, when interpreting the term "entrusts or directs," have found that entrustment or direction need not be, and seldom is, explicit or formal.[1025] The implication of Canada's argument is that, in the absence of an explicit command to sell the particular good to a particular purchaser at a particular price, there can never be a finding of entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement. Canada's position has been rejected in numerous prior panel and Appellate Body reports, and it is contrary to the correct interpretation of the term "entrusts or directs" that follows from a proper application of customary rules of interpretation, as explained above.

573. Canada also argues that "an effects-based approach to assessing the existence of a financial contribution is not permitted."[1026] As support for this argument, Canada relies on the panel reports in *US – Export Restraints* and *US – Countervailing Measures (China)*. Canada's reliance on those panel reports is misplaced, because (1) the reports are inapposite and also because (2) the USDOC did not take a mere effects-based approach in its examination of British Columbia's and Canada's log export restraints in the underlying countervailing duty investigation of softwood lumber products from Canada. Rather, the USDOC examined the record evidence and concluded that the expressly stated aim of the government measures imposing the log export restraints is to ensure that private log suppliers provide a good – logs – to consumers, including mill operators, in British Columbia before, or instead of, providing logs to consumers in export markets.

574. With respect to the two inapposite panel reports relied on by Canada, first, in *US – Export Restraints*, Canada alleged that aspects of U.S. law and hypothetical practice required the USDOC to treat export restraints as a subsidy. The panel disagreed with Canada as a matter of fact, and found that the challenged U.S. measures did not require the USDOC to treat export restraints as a subsidy. Accordingly, the panel found that the challenged measures were not WTO-inconsistent and made no recommendations with respect to any U.S. measure under the SCM and WTO Agreements.[1027]

575. The *US – Export Restraints* panel nevertheless went on in a lengthy advisory opinion to state that a hypothetical export restraint "as defined in this dispute" by Canada, cannot constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement.[1028] There was no

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[1024] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[1025] *See Japan – DRAMs (Korea) (Panel)*, para 7.73; *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 110-11; *Korea – Commercial Vessels (Panel)*, para. 7.370; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.105.

[1026] Canada's First Written Submission, para. 954.

[1027] *See US – Export Restraints (Panel)*, paras. 8.131, 9.3.

[1028] *US – Export Restraints (Panel)*, para. 8.75. *See also ibid*., para. 8.17.

basis for the panel in *US – Export Restraints* to make the statements it made when no actual measure was before it with the criteria in the hypothetical measure that the panel described. A panel is not permitted under Article 7.1 of the DSU, which establishes a panel's terms of reference, to give such advisory opinions.[1029] Rather, a panel is to make such findings as will assist the DSB in making a recommendation to party to bring a WTO-inconsistent measure into conformity with WTO rules.

576. In any event, the *US – Export Restraints* panel described the hypothetical measure that it analyzed as "a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports."[1030] The panel found that such a hypothetical measure "cannot satisfy the 'entrusts or directs' standard of subparagraph (iv)" because "the ordinary meanings of the words 'entrusts' and 'directs' require an explicit and affirmative action of delegation or command."[1031] As explained above, the Appellate Body in *US – Countervailing Duty Measures on DRAMS* expressly rejected the legal reasoning and the interpretation of the term "entrusts or directs" set forth in the *US – Export Restraints* panel report.[1032] Other panels have rejected the interpretive findings of the *US – Export Restraints* panel as well.[1033]

577. The Panel here should not consider persuasive *obiter dicta* from a prior panel report concerning a hypothetical measure when the legal reasoning underlying that panel's statements has been so thoroughly repudiated by other panels and the Appellate Body, and when that earlier panel's interpretation has been demonstrated to be contrary to customary rules of interpretation.

578. Second, the *US – Export Restraints* panel also found that "the 'effects' test (i.e., a proximate causal relationship) advanced by the United States as the definition of 'entrusts or directs' has implications which in our view would be contrary to the intended scope and coverage of the SCM Agreement."[1034] The United States does not argue in this dispute that the term "entrusts or directs" should be defined on the basis of any so-called "effects test," and the USDOC's analysis was not limited to the effects of the British Columbia and Canada log export restraints. The panel report in *US – Export Restraints* is, in that regard, simply inapposite.

[1029] *See* WT/DSB/M/108, paras. 44-51.

[1030] *US – Export Restraints (Panel)*, para. 8.17.

[1031] *US – Export Restraints (Panel)*, para. 8.44.

[1032] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 110, 111.

[1033] *See Japan – DRAMs (Korea) (Panel)*, para. 7.73; *Korea – Commercial Vessels (Panel)*, para. 7.370; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.105.

[1034] *US – Export Restraints (Panel)*, para. 8.44.

579. Third, the panel report *US – Countervailing Measures (China)* likewise does not support Canada's claims in this dispute. As initial matter, the *US – Countervailing Measures (China)* panel expressly limited its findings to the facts before it, explaining that the panel "[did] not exclude the possibility that initiation of a countervailing duty investigation with respect to measures involving export restraints might be justified under other factual scenarios."[1035] Indeed, the panel contemplated that there may be a financial contribution through entrustment or direction where there is "contextual evidence" that "the export restraints are part of broader governmental policies to promote development of higher value goods producing industries."[1036]

580. Additionally, the panel in *US – Countervailing Measures (China)* considered that "the key issue before us in this case is whether it is consistent with Articles 11.2 and 11.3 of the SCM Agreement for an investigating authority to initiate a countervailing duty investigation based on an allegation and evidence that a financial contribution exists by virtue of an export restraint applied by a foreign government and its effects on domestic prices in the exporting country."[1037] The panel's statement of the issue conflates the analyses of financial contribution and benefit. Again, the United States does not argue in this dispute for an effects-based understanding of the term "entrusts or directs," nor did the USDOC take a mere effects-based approach in the underlying investigation.

581. Fourth, the findings by the USDOC on the measure at issue in the underlying investigation is very different from the measure (hypothetical or actually at issue) in these two panel reports. For example, the *US – Countervailing Measures (China)* panel expressed concern that the export restraints at issue "[did] not 'give responsibility' to domestic producers to do anything."[1038] Similarly, the panel explained that:

> The fact that the Government of China exercises its authority and thus engages in an act of direction with respect to the conditions under which magnesium and coke may be exported from China, is not sufficient to establish that the Government of China exercises authority over a private body to carry out the function of providing magnesium and coke to domestic users in China. In order for a government action to constitute "direction" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, it is not sufficient that

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[1035] *US – Countervailing Measures (China) (Panel)*, para. 7.404. In the countervailing duty investigations at issue in that dispute, the USDOC found that the export restraints constituted countervailable subsidies, though, in making those determinations, the USDOC relied on the use of facts otherwise available and drew adverse inferences due to the failure of Chinese respondents to cooperate with the USDOC's investigation. *See US – Countervailing Measures (China) (Panel)*, para. 7.359.

[1036] *US – Countervailing Measures (China) (Panel)*, para. 7.391.

[1037] *US – Countervailing Measures (China) (Panel)*, para. 7.392.

[1038] *US – Countervailing Measures (China) (Panel)*, para. 7.400.

> the action involves an exercise of authority over a private body. The exercise of authority must have as its object one of "types of function" within the meaning of Articles 1.1(a)(1)(iv).[1039]

582. However, in the countervailing duty investigation of softwood lumber products from Canada that is under review here, the USDOC determined, based on record evidence, that:

> [T]he Forest Act explicitly states that all timber harvested in British Columbia is required to be used in British Columbia or manufactured in British Columbia into wood products. These logs cannot be exported unless they meet certain criteria, the most common of which is that they are surplus to the needs of the timber processing industry in British Columbia. Therefore, the [Government of British Columbia] requires private log suppliers to offer logs to mill operators in British Columbia, and may export the logs only if there are no customers in British Columbia that want to purchase the logs. Thus, the nature of the actions undertaken by the [Government of British Columbia] require private suppliers of BC logs to sell to, and satisfy the demands of, BC consumers, including mill operators.[1040]

In other words, the USDOC found that the "object"[1041] of the surplus test requirement, which is part of both the BC and Canada log export restraints, is to "ensure[] that the timber processing and value-added wood product industry in British Columbia is assured of an abundant, low-cost source of supply."[1042] That is, the object of the log export restraints is to ensure that private log suppliers provide a good – logs – to consumers, including mill operators, in British Columbia before, or instead of, providing logs to consumers in export markets.

583. The *US – Countervailing Measures (China)* panel also noted the Appellate Body's finding in *US – Countervailing Duty Investigation on DRAMS* "that entrustment and direction 'imply a more active role than mere acts of encouragement', that entrustment or direction 'cannot be inadvertent or a mere by-product of governmental regulation' and that 'in most cases,

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[1039] *US – Countervailing Measures (China) (Panel)*, para. 7.401.

[1040] Lumber Preliminary Decision Memorandum, pp. 60-61 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, pp. 153-154 (Exhibit CAN-010).

[1041] *US – Countervailing Measures (China) (Panel)*, para. 7.401.

[1042] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction'."[1043]

584. The BC and Canada prohibitions on the export of logs, with certain limited exceptions, the first of which is that the logs are surplus to the needs of the domestic industry in British Columbia, is no mere act of encouragement. As the USDOC found, "[t]he cumulative impact of these legal restrictions on the export of timber has resulted in only a small volume of the logs in BC being exported during the [period of investigation]."[1044] This is not "inadvertent," nor is it "a mere by-product of governmental regulation"; it is the purpose of the government action. Furthermore, the USDOC found that there is a "threat or inducement" in the form of severe penalties under the EIPA for exporting logs without a permit.[1045]

585. The *US – Countervailing Measures (China)* panel also stressed the Appellate Body's observation "that 'there must be a demonstrable link between the government and the conduct of the private party'," [1046] and the panel agreed "with Canada's comment that '[t]here is no such demonstrable link between an export restraint and the reactions of market operators, because the government does not task market operators to sell in the domestic market'."[1047] The BC and Canada log export restraints do, in actuality, task market operators to sell in the domestic market. The export restraints do this by prohibiting private log suppliers from selling in the export market unless and until the needs of the domestic market have been met (or another less-often utilized exemption applies because the timber cannot be processed in British Columbia economically or to avoid waste).

586. Private log suppliers, as ongoing concerns in the business of selling logs, therefore ultimately must sell logs in British Columbia if there is demand or not sell logs at all. This does not, however, mean that the "entrusts or directs" analysis simply depends on the reaction of private entities to a governmental measure, nor does it necessitate a focus on effects of the measure that cannot be anticipated.[1048] Again, the USDOC determined that the log export restraint set forth in the Forest Act "explicitly states that all timber harvested in British Columbia is required to be used in British Columbia or manufactured in British Columbia into wood

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[1043] *US – Countervailing Measures (China) (Panel)*, para. 7.402 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 114 and 116).

[1044] Lumber Preliminary Decision Memorandum, p. 62 (Exhibit CAN-008).

[1045] GOC & GBC QR at Ex. LEP-5, § 19 (Exhibit CAN-070).

[1046] *US – Countervailing Measures (China) (Panel)*, para. 7.402 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 113).

[1047] *US – Countervailing Measures (China) (Panel)*, para. 7.402.

[1048] *See, e.g.,* Canada's First Written Submission, para. 955.

products."[1049] The governments of British Columbia and Canada took explicit action to instruct private log suppliers to sell to certain consumers (BC consumers) and not to sell to other consumers (in export markets) except in certain narrow circumstances. Private log suppliers reacted to this government action by abiding by the law and selling logs to BC consumers, including mill operators.[1050]

587. As the Appellate Body has observed, "[t]he determination of entrustment or direction will hinge on the particular facts of the case."[1051] The Appellate Body also has recognized that, particularly in cases of entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement, circumstantial evidence can play an important role in an investigating authority's analysis.[1052] The Appellate Body also has further indicated that, "strictly speaking, entrustment or direction is not a pure fact. It is, rather, a legal assessment based on a proven set of facts."[1053] For example, as discussed above, certain considerations may shed light on whether particular export restraints constitute entrustment or direction, including the reason for a particular export restraint, whether the investigated government had an objective of encouraging or supporting downstream production or whether such assistance was a mere "side-effect", whether the export restraints were imposed with some particular consequences in mind, whether there were WTO-consistent mechanisms that would allow a government to accomplish its goal, etc.

588. Canada's argument that an export permitting process can never result in a financial contribution by means of entrustment or direction relies on the false premise that an export permitting process "neither gives responsibility to nor constitutes an exercise of authority over a private body to carry out the government function of providing a good."[1054] Again, when a domestic producer is in the business of selling a product, a restriction against exporting can be a direction to sell (*i.e.*, provide goods) to domestic purchasers within any normal commercial setting. Simply put, because the producer of logs has incurred costs to obtain those logs (*e.g.*, stumpage, harvesting costs, etc.), the producer must sell logs in order to remain in business.

[1049] Lumber Preliminary Decision Memorandum, pp. 60-61 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, pp. 153-154 (Exhibit CAN-010).

[1050] Additionally, an "entrusts or directs" analysis under Article 1.1(a)(1)(iv) necessarily involves at least some consideration of the reaction of the private body to the government action. If the private body reacts to the government action by carrying out a type of function illustrated in subparagraphs (i) to (iii), then there can be a financial contribution. If, on the other hand, the government takes the same action but the private body reacts by refusing to carry out the function, as it has been entrusted or directed to do, then there can be no financial contribution. The suggestion that the reaction of the private body or the effect of the government action has no relevance at all is plainly incorrect.

[1051] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[1052] *US – Countervailing Duty Investigation on DRAMS (AB)*, note 277.

[1053] *US – Countervailing Duty Investigation on DRAMS (AB)*, note 277.

[1054] Canada's First Written Submission, para. 953.

589. For these reasons, Canada simply is wrong when it argues that, as a matter of law, the BC and Canada log export restraints cannot result in a financial contribution by means of entrustment or direction of private log suppliers to provide logs to BC consumers, including mill operators. As with all determinations of a government's entrustment or direction of a private body, the investigating authority's determination regarding whether an export restraint provides an indirect financial contribution will be based on the record evidence before it.

2. The Record Evidence Supports the USDOC's Determination of Entrustment or Direction

590. Canada contends that the record of the underlying USDOC investigation contains insufficient evidence that Canada or British Columbia gave responsibility to, or exercised authority over, any log suppliers to provide their logs to anyone in particular.[1055] Canada points to the number of export applications that were granted as supporting its assertion that "British Columbian log suppliers retain freedom to choose what to do with their logs."[1056] On the contrary, given the statements in Canada's and British Columbia's own government measures restricting sales to domestic purchasers if there is demand, any unbiased and objective investigating authority looking at the same evidence that was before the USDOC could have made the same determination of entrustment or direction that the USDOC made in the underlying investigation.

591. Canada's first written submission omits discussion of the core feature of the log export restraints: they require in-province processing of wood fiber, subject to exemption only if British Columbian timber processing facilities do not need or cannot economically use the input material, or if the material would otherwise be wasted. On this basis, the USDOC found that "official government action compels suppliers of BC logs to supply to BC customers."[1057] Under the surplus criterion explained above, log sellers are required to advertise their logs for sale to domestic mill operators for at least a two-week period prior to obtaining export approval. Both British Columbia and Canada have committees of individuals that evaluate whether any offers received reflect a fair price, and where they find that the offers are fair, the application for export is denied, the applicant is not authorized to export the logs, and the applicant may not reapply to export those logs.[1058] Thus, as the USDOC explained, Canada and British Columbia directly interfere with the ability of log suppliers to enter into long-term contracts with foreign purchasers, and to sell to foreign purchasers at all, to the extent that their logs are not deemed

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[1055] *See* Canada's First Written Submission, para. 962.

[1056] Canada's First Written Submission, para. 963.

[1057] Lumber Preliminary Decision Memorandum, p. 60 (underline added) (Exhibit CAN-008). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[1058] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008); Lumber Final I&D Memo, p. 150 (Exhibit CAN-010).

surplus to the needs of in-province processors.[1059] In addition, the provincial and federal governments impose a process of at least two-and-a-half weeks, fees in-lieu of manufacturing, and, potentially, penalties for unauthorized exports.[1060]

592. Accordingly, this is not a case where the government's intent to assist downstream industries is hidden or implicit and discoverable only upon studying the effects of the policies. Rather, the express purpose of Canada's and British Columbia's laws is that private log suppliers will provide to in-province mill operators all the input material that mills need and/or can economically use. Specifically, the laws single out "timber processing facilities in British Columbia,"[1061] and prioritize their supply, to the exclusion of consumers in export markets. Therefore, the USDOC concluded that log harvesters are required to "to divert to mill operators some volume of logs that could otherwise be exported."[1062] Canada's argument that the measures do not require log suppliers to provide their logs "to anyone in particular" simply is incorrect.

593. Canada's additional assertion that its and British Columbia's log export restraints have not, in practice, impacted the ability of log suppliers to export because virtually all applications for export are approved ignores substantial record evidence. As the USDOC explained, the fact that "logs in British Columbia are by default not allowed to be exported from the province" restrains exports.[1063] Furthermore, the record evidence demonstrates that log suppliers are forced to negotiate with other domestic processors to lower their export volumes or their prices, under the threat that the purchaser would otherwise "block" the suppliers' export sales in the surplus test process.[1064] Certain record evidence indicates that blocking is widespread, and that the high approval rate of export applications reflects that log suppliers have made agreements with processors in advance of applying for export approval, to ensure that those processors do not bid on their logs when offered in connection with the export authorization surplus test.[1065] Thus, log suppliers do not "retain freedom" in any meaningful way, despite Canada's suggestion to the contrary.[1066]

[1059] Lumber Final I&D Memo, p. 154 (Exhibit CAN-010).

[1060] Lumber Final I&D Memo, pp. 154-155 (Exhibit CAN-010).

[1061] Lumber Preliminary Decision Memorandum, p. 58 (Exhibit CAN-008).

[1062] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[1063] Lumber Final I&D Memo, p. 139 (Exhibit CAN-010).

[1064] Lumber Final I&D Memo, p. 139 (Exhibit CAN-010).

[1065] Lumber Final I&D Memo, p. 141 (Exhibit CAN-010).

[1066] Canada's First Written Submission, para. 963.

594. Canada asserts that the USDOC erred by basing its financial contribution analysis upon the existence of fees and the length of processing time, stating that the USDOC's position is that "any hindrance on the free export of logs, no matter how small, would be sufficient to find a financial contribution."[1067] Canada's argument rests on a false premise. The USDOC did not characterize either the "fees-in-lieu of manufacturing" imposed upon the export of logs or the amount of time to process an application for export as an independently sufficient basis for its financial contribution finding. Instead, the USDOC identified them as added hindrances that support the USDOC's conclusion in light of the totality of the circumstances.[1068]

595. Similarly, the USDOC appropriately considered as one factor in its analysis the presence of penalties under the EIPA for unauthorized log exports. The inclusion of logs on Canada's Export Control List supports a finding that Canada's and British Columbia's in-province processing requirement is formal and enforceable, including through severe fines and jail time. Canada's claim that the penalties are not relevant because they do not pertain to the alleged financial contribution is incorrect. The USDOC referenced Article 3(1)(b) of the EIPA, which provides that one purpose of Canada's Export Control List is "to ensure that any action taken to promote the further processing in Canada of a natural resource that is produced in Canada is not rendered ineffective by reason of the unrestricted exportation of that natural resource."[1069] The USDOC explained that the stature of the Export Control List and the severity of the possible penalties for acting without authorization obtained under the permitting process "compel [log] suppliers to divert to mill operators logs that could otherwise be exported."[1070]

596. Canada attempts to support its arguments by focusing narrowly on individual pieces of evidence, suggesting that each piece of evidence, on its own, cannot support the USDOC's determination.[1071] The USDOC's determination, however, is based on the totality of the evidence on the record.[1072] The Appellate Body has found previously that "[w]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the totality of the evidence, how the interaction of certain pieces of evidence may justify certain inferences that could not have been justified by a

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[1067] Canada's First Written Submission, para. 965.

[1068] *See* Lumber Final I&D Memo, pp. 139, 142 (Exhibit CAN-010).

[1069] Lumber Final I&D Memo, p. 143, footnote 854 (Exhibit CAN-010) (citing GBC QR at Ex. LEP-5 (Exhibit CAN-070)).

[1070] Lumber Final I&D Memo, p. 152 (Exhibit CAN-010).

[1071] *See* Canada's First Written Submission, paras. 962-966.

[1072] *See* Lumber Final I&D Memo, pp. 139, 142 (Exhibit CAN-010).

review of the individual pieces of evidence in isolation."[1073] The panel in *US – Anti-Dumping and Countervailing Duties (China)* followed this approach, explaining that:

> [W]e recall the Appellate Body's ruling that a panel reviewing a determination on a particular issue that is based on the "totality" of the evidence relevant to that issue must conduct its review on the same basis. In particular, the Appellate Body held that if an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination, rather than assessing whether each piece on its own would be sufficient to support that determination.[1074]

597. Accordingly, as the Appellate Body has explained, "in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference."[1075] Canada appears to be inviting the Panel to undertake an erroneous approach to its review of the USDOC's determination and the record evidence that the USDOC had before it.

598. For these reasons, Canada's argument lacks merit. The USDOC's determination of entrustment or direction with respect to British Columbia's and Canada's log export restraints is one that any other unbiased and objective investigating authority also could have made.

3. The Record Evidence Supports the USDOC's Determination that Providing Logs Is a Type of Function that Would Normally Be Vested in the Governments of British Columbia and Canada

599. Canada further contests the USDOC's determination that the provision of logs is a function that "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments."[1076] Canada argues that the determination is not supported by record evidence.[1077] Canada incorrectly asserts that neither the

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[1073] *Japan – DRAMs (Korea) (AB)*, para. 131.

[1074] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52.

[1075] *Japan – DRAMs (Korea) (AB)*, para. 131.

[1076] SCM Agreement, Art. 1.1(a)(1)(iv).

[1077] *See* Canada's First Written Submission, para. 967.

150-year history of the government managing the forest in British Columbia nor the 125-year history of the government restricting log exports supports a finding that the provision of logs is a function normally vested in the Government of British Columbia. This is simply wrong. Where the government owns a resource, such as standing timber, the exploitation of that resource is necessarily, for that government, a function that would be vested in that government.

600. As the USDOC explained, "logs are harvested from standing timber in forests."[1078] The province of British Columbia controls over 94 percent of all forest land within its boundaries, which demonstrates its near total control over the timber supply.[1079] Providing a good – timber – is unquestionably a function normally vested in the Government of British Columbia, which provides access to government-owned timber through a licensing scheme discussed elsewhere in the USDOC's determination and in this submission. Given the low degree of processing required to create a log from standing timber, control over (and provision of) standing timber is closely linked to control over (and provision of) logs. Both represent control over the wood fiber natural resource that is the input used to produce softwood lumber products. Thus, the USDOC concluded on the basis of record evidence that the provision of logs "would normally be vested in the government" of British Columbia based upon the government's management of standing timber.[1080]

601. Additionally, the presence for more than 125 years of log export restraints in British Columbia, which are the legal means through which the government entrusts or directs log suppliers to provide logs to processors in British Columbia, is similarly probative of what is typical or expected of the governments of Canada and British Columbia.[1081] Such reasoning does not reflect circular logic, as Canada suggests.[1082] The sheer longevity of the provision of logs to BC consumers, including mill operators, resulting from the government application of export restraints, rather than the mere presence of such restraints, supports the USDOC's conclusion that practice of providing logs is one "normally … vested" in the governments of British Columbia and Canada.

602. Thus, contrary to Canada's contention, the USDOC's conclusion that the provision of logs is a function that "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments" is supported by record evidence.

[1078] *See* Lumber Final I&D Memo, p. 156 (Exhibit CAN-010).

[1079] *See* Lumber Final I&D Memo, p. 156 (Exhibit CAN-010).

[1080] *See* SCM Agreement, Art. 1.1(a)(1)(iv).

[1081] *See* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[1082] *See* Canada's First Written Submission, para. 968.

603. Furthermore, the United States observes that the implication of Canada's argument, in effect, 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." Canada's position is untenable and inconsistent with the terms of Article 1.1(a)(1)(iv) of the SCM Agreement. As discussed above in section IV.B.2, Article 1.1(a)(1)(iv) refers to "one or more of the type of functions … which would normally be vested in the government."[1083] Article 1.1(a)(1)(iv) does not refer to one or more of the type of functions which are vested in the government. The use of the term "would normally be" instead of the term "are" indicates that it is not necessary to establish that the government alleged to have entrusted or directed a private body actually performs the precise function carried out by the private body, but that the government normally would perform that type of function, and also "the practice, in no real sense, differs from the practices normally followed by governments."[1084]

604. As explained above, the Government of British Columbia is, without question, normally vested with the function of providing goods, including, *inter alia*, timber. Canada cannot credibly argue that this is not the case. Providing a similar good – logs – that is used for a similar purpose – the production of softwood lumber products – "in no real sense, differs from the practices normally followed" by the governments of British Columbia, Canada, and governments generally, many of which provide goods.

605. There is no basis for Canada's assertion that, "[u]nder Commerce's reasoning, the 'normally vested in government' prong would always be met."[1085] A determination of entrustment or direction involves consideration of both the types of functions that "would normally be vested in the government" alleged to have entrusted or directed a private body and also the "practices normally followed by governments" other than that government. As the Appellate Body has explained, "[t]he determination of entrustment or direction will hinge on the particular facts of the case."[1086]

606. Canada has made an "as applied" claim in this dispute concerning the USDOC's determination in the countervailing duty investigation of softwood lumber products from Canada. There is ample record evidence supporting the USDOC's determination in that investigation that the provision of logs is a function that normally would be vested in the governments of British Columbia and Canada. The USDOC's conclusion is one that could have been reached by any other unbiased or objective investigating authority examining the same evidence.

[1083] SCM Agreement, Art. 1.1(a)(1)(iv) (underline added).

[1084] SCM Agreement, Art. 1.1(a)(1)(iv).

[1085] Canada's First Written Submission, para. 968.

[1086] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116 (underline added; footnote omitted).

D. The USDOC's Initiation of a Countervailing Duty Investigation into Canada's and British Columbia's Log Export Restraints Is Not Inconsistent with Articles 11.2 and 11.3 of the SCM Agreement

607. Canada also claims that the USDOC's initiation of a countervailing duty investigation into Canada's and British Columbia's log export restraints is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement.[1087] Canada's claims lack merit.

608. Canada attempts to establish its claims under Articles 11.2 and 11.3 of the SCM Agreement simply by referring to its prior unavailing arguments under Article 1.1(a)(1)(iv) of the SCM Agreement. Canada asserts that, because the log export restraints do not provide a financial contribution as a matter of law or fact, there was no basis for the USDOC to initiate an investigation into the export restraints. Canada's Article 11.2 and 11.3 claims fail for the same reasons that Canada's Article 1.1(a)(1)(iv) claims fail, as demonstrated above.

609. In brief, an investigating authority reviews the "accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation."[1088] To justify initiation, "adequate evidence, tending to prove or indicating the existence of" a subsidy is required.[1089] A panel does not conduct a *de novo* review of the accuracy and adequacy of the evidence to reach its own conclusion as to the sufficiency of the evidence in the application.[1090]

610. The allegation and supporting information in the petition (or application) requesting the underlying countervailing duty investigation provided "sufficient information" concerning a financial contribution for purposes of initiating an investigation into the log export restraints. The petitioners alleged that Canada and British Columbia "maintain a ban that requires that logs produced from timber harvested in the province be used within the province of British Columbia, with limited exceptions."[1091] Furthermore, the petitioners alleged:

> [D]uring the proposed [period of investigation], high-value timber of Douglas fir, hemlock, and spruce species were not eligible for an exemption. Further, in many instances, to receive an exemption, logs harvested under both federal and provincial jurisdictions must be offered first for domestic sale. A government-appointed committee then applies a surplus test to

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[1087] *See* Canada's First Written Submission, paras. 969-973.

[1088] SCM Agreement, Art. 11.3.

[1089] *China – GOES (Panel)*, para. 7.55.

[1090] *See China – GOES (Panel)*, para. 7.51.

[1091] Initiation Checklist, p. 21 (Exhibit CAN-384).

> determine whether that particular log is deemed surplus to domestic needs and judges whether any domestic offers of the purchase are fair. Additionally, all logs harvested under provincial jurisdiction that are exported are subject to a fee-in-lieu of domestic manufacture.[1092]

The petitioners supported their allegation with sufficient evidence that was reasonably available to them, including the BC Forest Act and related policy bulletins, the Government of Canada's Notice to Exporters No. 102, the EIPA, and academic studies regarding the operation of the log export restraints.[1093]

611. Thus, the petitioners' allegations addressed the same in-province use requirements, surplus test criterion, and fees-in-lieu of manufacturing that the USDOC ultimately relied upon in determining that the log export restraints result in a financial contribution by means of entrustment or direction of private log suppliers to provide logs to BC consumers, including mill operators. Canada's argument that the USDOC's initiation was not based upon "sufficient evidence" under Articles 11.2 and 11.3 of the SCM Agreement, therefore, fails for the same reasons that its arguments under Article 1.1(a)(1)(iv) fail, as demonstrated above.

V. THE USDOC'S DETERMINATIONS REGARDING GRANTS PROVIDED FOR SILVICULTURE AND FOREST MANAGEMENT ARE NOT INCONSISTENT WITH ARTICLES 1.1(A)(1)(I), 1.1(B), 14(D), 19.3, AND 19.4 OF THE SCM AGREEMENT

A. The Governments of New Brunswick and Quebec Each Provided a Financial Contribution under Article 1.1(a)(1)(i) of the SCM Agreement in the Form of Grants for Silviculture and Forest Management

612. Canada alleges that silviculture and forest management[1094] payments to JDIL[1095] and Resolute provided by the Governments of New Brunswick and Quebec, respectively, do not constitute a financial contribution under Article 1.1(a)(1) of the SCM Agreement.[1096] Canada

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[1092] Initiation Checklist, p. 21 (Exhibit CAN-384).

[1093] *See* Petition, pp. 116-131 (pp. 133-148 of the PDF version of Exhibit CAN-005), Exhibit 93 (Exhibit 93 of the Petition is the text of the Forest Act, which Canada has placed before the Panel as Exhibit CAN-039), and Exhibits 242-257 (Exhibit USA-010).

[1094] Canada refers to the separate grant programs provided by New Brunswick and Quebec as reimbursements or reimbursement payments relating to license management and silviculture. Canada's First Written Submission, title V and subtitle V.A. (p. 403) and subtitle V.B. (p. 415). To avoid confusion, the United States will likewise discuss these grant programs together, albeit the evidence demonstrates differences between the two.

[1095] Canada abbreviates J.D. Irving, Ltd., or JDIL, in its first written submission as "Irving."

[1096] Panel Request, p. 3 (C.10 and C.12).

argues that these payments should be considered government purchases of services and not countervailable financial contributions.[1097]

613. Canada's arguments lack merit. The USDOC found that the evidence of record demonstrated that reimbursements for silviculture and forest management to JDIL provided by New Brunswick and for partial cut restrictions to Resolute provided by Quebec are financial contributions, because the reimbursements are a direct transfer of funds in the form of grants under Article 1.1(a)(1)(i) of the SCM Agreement. The USDOC's findings are reasoned and adequate, and they are such as could have been reached by an unbiased and objective investigating authority. The Panel should reject Canada's claims and find that the USDOC's financial contribution findings were not inconsistent with Article 1.1(a)(1)(i).

614. Section V.A.1 summarizes the legal framework for Article 1.1(a)(1)(i) of the SCM Agreement.

615. Section V.A.2 explains how the investigatory record demonstrates that the USDOC evaluated the evidence in an unbiased and objective manner and provided a reasoned and adequate explanation for its conclusion that the payments by New Brunswick to JDIL and by Quebec to Resolute constitute financial contributions in the form of grants under Article 1.1(a)(1)(i).

616. Section V.A.3 demonstrates that the USDOC's conclusions are such as an unbiased and objective investigating authority could have reached, and Canada therefore has failed to make out its claims that the United States acted inconsistent with its obligations under Article 1.1(a)(1)(i) of the SCM Agreement.

617. Finally, Section V.A.4 respectfully requests that the Panel reject Canada's claims under Articles 19.3 and 19.4 of the SCM Agreement because Canada's first written submission does not include legal arguments in support of these claims.

1. The Proper Legal Framework for Understanding the Obligations Set Out in Article 1.1(a)(1) of the SCM Agreement

618. As discussed in section IV.B., a subsidy is deemed to exist if "there is a financial contribution by a government or any public body within the territory of a Member."[1098] Article 1.1(a)(1)(i) of the SCM Agreement indicates that a financial contribution exists where "a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity

[1097] Canada's First Written Submission, paras. 974, 981-1006.

[1098] SCM Agreement, Art. 1.1(a)(1) (a government or any public body within the territory of a Member is referred to in the SCM Agreement as "government").

infusion)."[1099] The SCM Agreement does not define the terms set out in Article 1.1(a)(1)(i). Accordingly, the Panel should interpret these terms based on their ordinary meaning in their context and in light of the object and purpose of the SCM Agreement.[1100]

619. For Article 1.1(a)(1)(i), the ordinary meaning of the term "transfer" "signifies a conveyance of something from one person or entity to another," and the modification of the term "transfer" by the adjective "direct" indicates that the transfer is "occurring immediately, without intermediaries or interference."[1101] The phrase "direct transfer" thus focuses on "the *manner* or *method* by which the funds are conveyed" from the government to the recipient and "indicates a certain immediacy to the conveyance."[1102] A "grant" is one example of a direct transfer of funds. The ordinary meaning of "grant" is "[a] formal gift or legal assignment of money, privilege, etc."[1103] A grant exists for purposes of Article 1.1(a)(1)(i) when the government confers something on a recipient without getting anything in return.[1104]

2. The USDOC Provided a Reasoned and Adequate Explanation for its Conclusions that the Reimbursements Provided by the Governments of New Brunswick and Quebec for Silviculture and Forest Management Involve a Direct Transfer of Funds to Recipients in the Form of Grants

620. Based on its investigation, the USDOC found that the reimbursements for silviculture and forest management to JDIL provided by New Brunswick and reimbursements for partial cut restrictions to Resolute provided by Quebec constitute financial contributions in the form of a direct transfer of funds. As explained below, the USDOC provided a reasoned and adequate explanation for its conclusion that New Brunswick's reimbursement of the additional costs incurred by JDIL because of the legally mandated silviculture and forest management constitute financial contributions in the form of grants. The USDOC also provided a reasoned and adequate explanation for its conclusion that Quebéc's reimbursement of the additional costs incurred by Resolute because of legally mandated partial cut prescriptions constitute financial contributions in the form of grants. The USDOC's conclusions are such as an unbiased and

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[1099] SCM Agreement, Art. 1.1(a)(1)(i).

[1100] *See* DSU, Article 3.2; *US – Large Civil Aircraft (Second Complaint) (Panel)*, p. 187.

[1101] *US – Carbon Steel (India) (AB)*, para. 4.89.

[1102] *US – Carbon Steel (India) (AB)*, para. 4.89 (italics in original). *See also US – Large Civil Aircraft (Second Complaint) (AB)*, para. 614.

[1103] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1131 (Exhibit USA-020).

[1104] *US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 616-617 (finding that a grant exists when "money or money's worth is given to a recipient, normally without an obligation or expectation that anything will be provided to the grantor in return").

objective investigating authority could have reached and thus are not inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.

a. The USDOC's Analysis of the Evidence Demonstrated that New Brunswick Reimbursed the Costs JDIL Incurred for Silviculture and Forest Management without Getting Anything in Return

621. In New Brunswick, the right to harvest timber from Crown land has been provided under 10 timber licenses.[1105] The *Crown Lands and Forests Act* ("*CLFA*") establishes that a licensee is obligated to perform and pay all expenses for silviculture and forest management described in the licensee's forest management agreement.[1106] Section 28(b) of the *CLFA* requires that each timber licensee enter into a forest management agreement with the Minister of the New Brunswick Department of Natural Resources.[1107] According to section 30(2) of the *CLFA*, "[a] licensee shall manage Crown Lands described in his license in accordance with the forest management agreement, this Act and the regulations."[1108] A forest management agreement is entered into for a 25-year period; grants a licensee the right to grow, harvest, and remove standing timber from the license's designated area;[1109] and describes the manner in which a licensee is required to manage Crown lands with respect to silviculture and general land management.[1110] Section 38(1) of the *CLFA* dictates that "a licensee is responsible for all expenses of forest management on Crown Lands described in his license."[1111]

[1105] Letter from the Government of New Brunswick, "Questionnaire Response of the Government of the Province of New Brunswick: NB Volume II of III Stumpage Questions" (Mar. 17, 2017) ("GNB Stumpage QR"), p. NBII-20 (Exhibit CAN-240 (BCI)). There are three primary methods by which lumber producers can harvest standing timber from New Brunswick provincial Crown land: (1) as a licensee; (2) as a sublicensee; or (3) under a permit. Lumber Preliminary Decision Memorandum, pp. 21–22 (Exhibit CAN-008). *See also* GNB Stumpage QR, pp. NBII-20–23 (Exhibit CAN-240 (BCI)).

[1106] Lumber Final I&D Memo, p. 184 (Exhibit CAN-010).

[1107] Letter from JDIL, "Response to Section III of the Questionnaire for Producers/Exporters" (Mar. 15, 2017) ("JDIL QR"), Exhibit STUMP-04 (*CLFA*, section 28(b)) (Exhibit CAN-242).

[1108] JDIL QR, Exhibit STUMP-04 (*CLFA*, section 30(2)) (Exhibit CAN-242).

[1109] Lumber Preliminary Decision Memorandum, p. 22 (Exhibit CAN-008). *See also* GNB Stumpage QR, pp. NBII-20 (Exhibit CAN-240 (BCI)).

[1110] JDIL QR, Exhibit STUMP-04 (*CLFA*, section 29(4)(b)) (Exhibit CAN-242).

[1111] JDIL QR, Exhibit STUMP-04 (*CLFA*, section 38(1)) (Exhibit CAN-242). *See Lumber Preliminary Decision Memorandum*, p. 22 (Exhibit CAN-008).

622. JDIL's forest management agreement requires JDIL to perform basic silviculture and forest management obligations.[1112] According to the agreement, basic silviculture includes "(a) tree planting activities, (b) pre-commercial thinning of natural regeneration activities, (c) plantation cleaning, and other stand tending activities approved by the Minister, and (d) commercial thinning activities."[1113] New Brunswick requires that JDIL's basic silviculture obligations "'correspond to the level of basic silviculture funding provided by the Minister.'"[1114]

623. JDIL's forest management agreement also requires JDIL to manage the Crown lands covered by its license according to the forest management manual,[1115] which establishes certain management obligations that JDIL must follow.[1116] For example, the forest management manual holds JDIL responsible for designing and constructing forest roads that comply with all pertinent laws.[1117] These forest roads are primarily "built and maintained to access and transport Crown timber and to facilitate other forest management and forest protection activities."[1118]

624. New Brunswick reimburses licensees for the expenses they incur with respect to legally mandated silviculture and forest management. Section 38(2) of the *CLFA* provides that the Government of New Brunswick:

> (a) shall reimburse the licensee for such expenses of forest management as are approved in and carried out in accordance with the operating plan, including expenses with respect to
>
> (i) pre-commercial thinning, …
> …
> (iii) tree planting, …
>
> subject to the regulations and the provisions of any agreement between the licensee and the Minister, and

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[1112] Lumber Final I&D Memo, pp. 184-185 (Exhibit CAN-010). *See also* JDIL QR, Exhibit STUMP-10 (JDIL's Forest Management Agreement, para. 13.1) (Exhibit CAN-250 (BCI)); Lumber Preliminary Decision Memorandum, p. 22 (Exhibit CAN-008).

[1113] JDIL QR, Exhibit STUMP-10 (JDIL's Forest Management Agreement, para. 13.1) (Exhibit CAN-250 (BCI)). *See* Lumber Final I&D Memo, p. 185 ("basic silviculture is defined as the silvicultural activity required to product the annual allowable harvest of timber as identified in paragraph 13.1 [of the CFLA].") (Exhibit CAN-010).

[1114] Lumber Final I&D Memo, p. 185 (Exhibit CAN-010), quoting JDIL QR, Exhibit STUMP-10 (JDIL's Forest Management Agreement, para. 13.3) (Exhibit CAN-250 (BCI)).

[1115] JDIL QR, Exhibit STUMP-10 (JDIL's Forest Management Agreement, para. 7.1) (Exhibit CAN-250 (BCI)).

[1116] JDIL QR, Exhibit LMF-04 (JDIL's Forest Management Manual, p. 3) (Exhibit CAN-250 (BCI)).

[1117] JDIL QR, Exhibit LMF-04 (JDIL's Forest Management Manual, p. 19) (Exhibit CAN-250 (BCI)).

[1118] JDIL QR, Exhibit LMF-04 (JDIL's Forest Management Manual, p. 19) (Exhibit CAN-250 (BCI)).

> (b) shall compensate the licensee for other expenses of forest management in accordance with the regulations.[1119]

The financial assistance provided by New Brunswick for a licensee's silviculture expenses is based on pre-established rates for each cubic meter of standing timber harvested from the Crown land covered by the license.[1120]

625. Based on the evidence collected during its investigation, the USDOC found that JDIL, as a licensee, was legally obligated to perform and pay all expenses for certain silviculture and forest management described in its forest management agreement within the designated Crown land for the license.[1121] JDIL has operated on New Brunswick provincial Crown land for over 50 years and is currently a licensee (Licenses 6 and 7) and a sublicensee.[1122] The silviculture and forest management conducted by JDIL "involve the renewal and maintenance of forestry land, *i.e.*, the management of JDIL's input and supply chain."[1123] JDIL must perform silviculture and forest management as a condition to its access to Crown stumpage, as well as to sustain the growth of commercial quantities of timber on the Crown lands and produce the annual allowable harvest of its input supply.

626. The USDOC found that the evidence demonstrated that the reimbursement by New Brunswick of JDIL's expenses for silviculture and forest management constituted a financial contribution to JDIL in the form of a direct transfer of funds, "because the [government] provides reimbursements to JDIL for costs it incurs in the course of managing its input and ensuring the efficient operation of its supply chain, *i.e.*, activities it was obligated to undertake as part of its operations."[1124] JDIL reported that it received payments in the form of reimbursements from New Brunswick for silviculture and forest management.[1125] Silviculture

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[1119] Lumber Final I&D Memo, pp. 184-185 (Exhibit CAN-010); JDIL QR, Exhibit STUMP-04 (*CLFA*, section 38(2)) (Exhibit CAN-242).

[1120] Lumber Preliminary Decision Memorandum, pp. 67-68 (Exhibit CAN-008).

[1121] Lumber Preliminary Decision Memorandum, pp. 22, 67-68 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 184-186 ("As stated, the facts of this investigation indicate that it is JDIL, not the [Government of New Brunswick], that has the mandate and ultimate responsibility to carry out basic silviculture and license management activities.") (Exhibit CAN-010).

[1122] Lumber Preliminary Decision Memorandum, p. 22 (Exhibit CAN-008); Lumber Final I&D Memo, p. 184 (Exhibit CAN-010). *See also* GNB Stumpage QR, pp. NBII-20–22 (Exhibit CAN-240 (BCI)); JDIL QR, Exhibits STUMP-01, p.24 (Exhibit CAN-262) and STUMP-05 (Licenses 6 and 7) (Exhibit CAN-253). The USDOC jointly referred to JDIL's two licenses as "License 7." *See, e.g.*, Lumber Final I&D Memo, p. 184 (Exhibit CAN-010).

[1123] Lumber Final I&D Memo, p. 185 (Exhibit CAN-010).

[1124] Lumber Final I&D Memo, p. 186 (Exhibit CAN-010). *See also* Lumber Preliminary Decision Memorandum, p. 73 (finding that the reported silviculture and forest management costs "are a condition of the tenure holder's or licensee's access to Crown timber and are directly tied to the BC Crown stumpage price") (Exhibit CAN-008).

[1125] Lumber Preliminary Decision Memorandum, pp. 67-68 (Exhibit CAN-008). *See also* JDIL QR, p. 16.

and forest management "involve the renewal and maintenance of forestry land, *i.e.*, the management of JDIL's input and supply chain, … which JDIL would undertake even in the absence of the reimbursements."[1126] New Brunswick thus reimbursed JDIL for expenses incurred by JDIL in the maintenance of its input and supply chain.[1127] "Indeed, the manner in which the payments were provided, as reimbursements for obligatory expenses incurred, further indicates that the payments were provided to alleviate the financial burden to JDIL."[1128]

627. The investigatory record demonstrates that the USDOC evaluated the evidence in an unbiased and objective manner and provided a reasoned and adequate explanation for its conclusion that the reimbursement of the silviculture and forest management expenses incurred by JDIL constitute financial contributions in the form of grants.[1129] JDIL was legally responsible for performing and bearing the expense of silviculture and forest management. The reimbursements for silviculture and forest management provided by New Brunswick offset those expenses. Therefore, the USDOC appropriately found these reimbursements are grants, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, because the Government of New Brunswick provided a financial contribution to JDIL without an obligation or expectation that anything would be provided to New Brunswick in return.[1130]

b. The USDOC's Analysis of the Evidence Demonstrated that Quebec Reimbursed the Costs Incurred by Resolute for the Partial Cut Prescriptions without Getting Anything in Return

628. In Quebec, standing timber from Crown land is obtained through two methods: timber supply guarantees or government-run auctions.[1131] The *Sustainable Forest Development Act* ("*SFDA*") governs a timber supply guarantee holder's access and use of standing timber from Quebec provincial Crown lands.[1132] The *SFDA* was established, in part, to "determine how

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[1126] Lumber Final I&D Memo, p. 185 (Exhibit CAN-010).

[1127] Lumber Final I&D Memo, p. 186 (Exhibit CAN-010).

[1128] Lumber Final I&D Memo, p. 186 (Exhibit CAN-010).

[1129] Lumber Preliminary Decision Memorandum, pp. 67-68 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 183-86 (Exhibit CAN-010).

[1130] Lumber Preliminary Decision Memorandum, pp. 67-68 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 183-86 (Exhibit CAN-010).

[1131] Lumber Preliminary Decision Memorandum, p. 24 (Exhibit CAN-008).

[1132] Quebec previously had a tenure system through which lumber mills would access standing timber on provincial Crown land. However, the stumpage system in Quebec was reformed in 2010 with the passage of the *SFDA*. The *SFDA* eliminated the tenure system and companies that were tenure holders at the time were given until January 1, 2012 to apply for a timber supply guarantee of up to 75 percent of the standing timber volume provided under the eliminated tenure system. The remaining 25 percent was made available in public auctions organized and administered by the Government of Quebec's Timber Marketing Bureau, which is part of the Ministry of Forest, Wildlife and Parks. Lumber Preliminary Decision Memorandum, pp. 23-24 (Exhibit CAN-008).

responsibilities under the forest regime are shared between the State, regional bodies, Native communities and users of the forest."[1133]

629. The *SFDA* and its accompanying regulations require timber supply guarantee holders to perform and pay all expenses for various forest development activities (such as partial cutting in certain harvest areas) to maintain the long-term health of the forest and to sustain the growth of commercial quantities of timber.[1134] The *SFDA* requires holders of timber supply guarantees to perform "other forest development activities,"[1135] which are defined as "related to timber felling and harvesting, the operation of a sugar bush, the construction, improvement, repair, maintenance or closure of infrastructures, the carrying out of silviculture treatments, including reforestation and the use of fire, fire protection, the suppression of insect epidemics, cryptogamic diseases and competing vegetation, and all similar activities that tangibly affect forest resources."[1136] In furtherance of these performance requirements, the regulations accompanying the *SFDA* prohibit "any cutting without regeneration and soil protection."[1137] This prohibition precludes holders of timber supply guarantees from harvesting timber using cost-efficient clear cutting techniques in certain harvest areas.[1138] Instead, timber in these areas must be harvested using partial cutting techniques such as "block cutting," which is defined in the *SFDA* regulations as "cutting with regeneration and soil protection carried out on a given territory so as to preserve, within the limits of the harvest site, a residual forest having the characteristics set out in section 79.2."[1139] Partial cutting increases the costs associated with harvesting timber on Crown lands, and holders of timber supply guarantees are responsible for such costs.[1140]

[1133] Letter from the Government of Quebec, "Response of the Government of Québec to the Department's January 19, 2017 Initial Questionnaire" (Mar. 13, 2017) ("GOQ QR"), Exhibit QC-STUMP-20 (*SFDA*, section 1) (Exhibit CAN-169). *See also* GOQ QR, Exhibit QC-STUMP-20 (*SFDA*, section 38) (indicating that the standards established by the Government of Quebec ensure the preservation or renewal of the forest cover, the protection of the forest environment and forest regeneration, etc.) (Exhibit CAN-169).

[1134] Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010).

[1135] Lumber Final I&D Memo, p. 189 (Exhibit CAN-010). *See also* GOQ QR, Exhibit QC-STUMP-20 (*SFDA*, section 103.4) (Exhibit CAN-169).

[1136] GOQ QR, Exhibit QC-STUMP-20 (*SFDA*, section 4) (Exhibit CAN-169).

[1137] GOQ QR, Exhibit QC-STUMP-22 (*SFDA* Regulations, section 89 of the regulation respecting standards of forest management for forests in the domain of the State) (Exhibit CAN-197).

[1138] GOQ QR, p. QC-OTHER-18 (Exhibit CAN-204). *See Lumber Final I&D Memo*, p. 189 (Exhibit CAN-010).

[1139] GOQ QR, Exhibit QC-STUMP-22 (*SFDA* Regulations, section 1 of the regulation respecting standards of forest management for forests in the domain of the State) (Exhibit CAN-197).

[1140] Lumber Preliminary Decision Memorandum, p. 71 (Exhibit CAN-008); *Lumber Final I&D Memo*, p. 189 (Exhibit CAN-010); GOQ QR, Exhibit QC-STUMP-20 (*SFDA*, section 103.3) ("Subject to subparagraphs 2 and 3 of the third paragraph of section 103.7, holders of a timber supply guarantee are responsible for harvesting the standing timber they purchase.") (Exhibit CAN-169).

630. Quebec's Partial Cut Investment Program ("PCIP") offset a portion of the expenses that holders of timber supply guarantees incur for harvesting timber using mandatory partial cut techniques.[1141] Partial cutting is defined as "silvicultural treatments for which the harvest is less than 50% of the total basal area prior to harvesting"[1142] (*i.e.*, removal of less than 50 percent of the volume of a stand[1143]). The PCIP operated from April 1, 2013, through March 31, 2016, and was administered by Quebec's Ministry of Forest, Wildlife and Parks ("MFFP").[1144] Timber supply guarantee holders can submit an application to the MFFP for financial assistance under the PCIP and recoup up to 90 percent of the costs associated with partial cutting.[1145]

631. Based on the evidence collected during its investigation, the USDOC found that Resolute relied significantly on timber from Crown lands for its input supply and was legally obligated to perform and pay all expenses for forest development prescribed by Quebec, including partial cuts on certain harvest stands to allow forest areas to regenerate naturally without the need to replant.[1146] Resolute purchased standing timber from Quebec provincial Crown land as a timber supply guarantee holder[1147] and reported that it received PCIP payments from Quebec.[1148] The USDOC found that "[t]he PCIP reimburses harvesters for up to 90 percent of the increased costs associated with the MFFP mandate that certain areas be harvested applying a partial cut (*i.e.*, removing less than 50 percent of the volume of a stand)."[1149] The USDOC concluded that the reimbursements provided by Quebec under the PCIP constituted financial contributions to Resolute in the form of grants,[1150] because these payments partially offset a cost that Resolute was legally required to incur as part of its responsibilities as a timber supply guarantee holder.[1151]

[1141] GOQ QR, pp. QC-OTHER-19-21 (Exhibit CAN-204) and Exhibit QC-OTHER-13 (PCIP) (Exhibit CAN-208).

[1142] GOQ QR, Exhibit QC-OTHER-13 (PCIP, section 3) (Exhibit CAN-208).

[1143] Lumber Preliminary Decision Memorandum, p. 71 (Exhibit CAN-008).

[1144] GOQ QR, p. QC-OTHER-20 (Exhibit CAN-204).

[1145] GOQ QR, p. QC-OTHER-18 (Exhibit CAN-204) and Exhibit QC-OTHER-13 (PCIP, section 7.4) (Exhibit CAN-208).

[1146] Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010).

[1147] Letter from Resolute, "Resolute's Response to Section III of Initial Questionnaire on Stumpage Programs" (Mar. 15, 2017), p. 16 (Exhibit CAN-150).

[1148] Letter from Resolute, "Resolute's Response to Section III of Initial Questionnaire on General Issues and Non-Stumpage Programs" (Mar. 15, 2017), pp. 63-64 (Exhibit CAN-434 (BCI)).

[1149] Lumber Preliminary Decision Memorandum, p. 71 (Exhibit CAN-008).

[1150] Lumber Final I&D Memo, p. 189 (Exhibit CAN-010).

[1151] Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010). *See also* GOQ QR, Exhibit QC-OTHER-15 (PCIP Implementation Supporting Document) ("The program authorizes the payment of financial assistance to offset the additional costs engendered by partial cutting work.") (Exhibit USA-011).

632. The investigatory record demonstrates that the USDOC evaluated the evidence in an unbiased and objective manner and provided a reasoned and adequate explanation for its conclusion that the PCIP reimbursements to Resolute constitute financial contributions in the form of grants. Resolute was legally responsible for performing partial cutting activities in certain harvest areas and incurred added costs associated with this harvesting method. The PCIP reimbursements provided by Quebec partially offset expenses that Resolute incurred as part of this business operation. Therefore, the USDOC appropriately found that these reimbursements are grants, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, because the Government of Quebec provided a financial contribution to Resolute without an obligation or expectation that anything would be provided to Quebec in return.[1152]

3. Canada Fails To Establish that the USDOC's Determinations that the Grants Provided for Silviculture and Forest Management Are Inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement

633. As the Appellate Body has explained, "the task of a panel [is] to assess whether the explanations provided by the authority are 'reasoned and adequate' by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning."[1153] Moreover, "a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference."[1154]

634. Canada relies on a fictional reading of the evidence to argue that the subsidies provided by the Governments of New Brunswick and Quebec for silviculture and forest management should be considered a "purchase of services" by these governments, which is not countervailable under Articles 1.1(a)(1) of the SCM Agreement.[1155] As is evident from the USDOC's determination, neither New Brunswick, nor Quebec, "purchased" silviculture or forest management. New Brunswick had legally required JDIL as a licensee to undertake silviculture and forest management as a condition to its access to and right to harvest New Brunswick provincial Crown timber. Similarly, Quebec had legally required Resolute as a holder of a timber supply guarantee to undertake partial cut prescriptions as a condition to its access to and right to harvest Quebec provincial Crown timber. The governments each reimbursed the relevant companies for performing tasks that they had legally required the companies to perform. This

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[1152] Lumber Preliminary Decision Memorandum, p. 71 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010).

[1153] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).

[1154] *Japan – DRAMs (Korea) (AB)*, para. 131 (quoting *US – Countervailing Duty Investigation on DRAMS*, para. 154).

[1155] Canada's First Written Submission, paras. 974, 981-1006.

government practice clearly involved a direct transfer of funds, especially since the conveyance of these funds did not involve a reciprocal obligation on the part of the recipient companies.

635. The following sections address each of Canada's arguments and explain that Canada has failed to demonstrate that an unbiased and objective investigating authority could not have concluded that New Brunswick's and Quebec's reimbursements of silviculture and forest management constitute financial contributions. Therefore, Canada has failed to demonstrate an inconsistency with Article 1.1(a)(1)(i) of the SCM Agreement.

a. New Brunswick's Reimbursement of Silviculture and Forest Management Involved a Direct Transfer of Funds that Did Not Involve a Reciprocal Obligation on the Part of JDIL

636. Relying on the pretense that New Brunswick is obligated to perform silviculture and forest management, Canada argues that New Brunswick's reimbursement of silviculture and forest management should be characterized as a purchase of services.[1156] As the USDOC determined, the evidence shows that New Brunswick obligated JDIL, as a condition of its license to access Crown stumpage, to perform silviculture and forest management. In other words, the evidence reviewed by the USDOC demonstrated that New Brunswick held JDIL legally responsible for performing certain silviculture and forest management, then separately reimbursed JDIL for the costs associated with its performance of those activities. The evidence of record thus sustains the USDOC's determination that New Brunswick provided funds in the form of a grant that did not involve a reciprocal obligation on the part of JDIL.

637. Canada asserts that, in finding that the silviculture and forest management payments were grants, the USDOC failed to take into account whether there was consideration and an exchange of rights and obligations within the transaction.[1157] According to Canada, JDIL performed basic silviculture and forest management in exchange for payments from New Brunswick, and this reciprocal exchange of rights and obligations demonstrates that the payments were not grants.[1158] In short, Canada argues that the silviculture and forest management payments should be considered a government purchase of services because grants do not involve a reciprocal exchange of rights and obligations.

638. By contending that JDIL performed silviculture and forest management in exchange for payments, Canada improperly commingles two distinct transactions:

- In the first transaction, JDIL agreed to purchase stumpage from New Brunswick and entered into a license that set out its rights and obligations

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[1156] Canada's First Written Submission, para. 989-1006.

[1157] Canada's First Written Submission, paras. 984-987, 990, 1006.

[1158] Canada's First Written Submission, paras. 990, 1006.

with respect to that stumpage, including the requirement to perform silviculture and forest management. "[T]he New Brunswick stumpage price does not include an amount for silviculture."[1159]

- In the second transaction, New Brunswick provided JDIL the opportunity to qualify for grants to offset the costs associated with the silviculture and forest management required by its stumpage license. The USDOC examined the evidence and considered silviculture and forest management "as a distinct program" (*i.e.*, distinct from stumpage).[1160]

Canada does not challenge the USDOC's determination that New Brunswick's silviculture and forest management grant exists as a subsidy program distinct from stumpage. Stumpage required JDIL to perform certain silviculture and forest management as part of the stumpage price. In contrast, and contrary to Canada's argument, there was no exchange of rights and obligations in respect of the grant provided by New Brunswick to JDIL for silviculture and forest management, because this grant involved the conveyance of funds from New Brunswick absent a reciprocal obligation on the part of the recipient JDIL.[1161]

639. Canada further contends that because New Brunswick owns the Crown forest, New Brunswick is responsible for the care of Crown lands, particularly when a licensee fails to carry out the legal obligation that New Brunswick imposes in respect of silviculture and forest management.[1162] According to Canada, this argument is supported by the fact that New Brunswick took numerous steps to ensure JDIL "fulfilled its license management obligations in 2015"[1163] and that the failure of a licensee to fulfil its license management obligations resulted in "no license management reimbursement payments."[1164] But as Canada itself acknowledges, the licensee is obligated to "fulfill[ ] its license management obligations" and perform silviculture and forest management as part of stumpage, and New Brunswick will only reimburse a licensee for the costs incurred for such silviculture and forest management if it performs the required tasks.

[1159] Lumber Final I&D Memo, p. 184 (Exhibit CAN-010) (underline added).

[1160] Lumber Final I&D Memo, p. 184 (Exhibit CAN-010).

[1161] *See Japan – DRAMs (Korea) (AB)*, para. 251 (finding that the provision of a loan and a subsequent interest rate reduction, for instance, should be treated as two separate transactions, each of which may constitute different forms of financial contributions).

[1162] Canada's First Written Submission, paras. 992-994.

[1163] Canada's First Written Submission, para. 993.

[1164] Canada's First Written Submission, para. 994, footnote 1680. *See also* Canada's First Written Submission, paras. 909, 994.

640. Canada then misreads the USDOC's reasoning and advocates that "Commerce suggests that because logs form part of Irving's supply chain, it would undertake license management and basic silviculture activities for free."[1165] It is indisputable that New Brunswick requires licensees to perform certain silviculture and forest management as part of stumpage. JDIL, as a licensee, must perform silviculture and forest management and incur the costs associated with those activities, whether or not it is reimbursed by New Brunswick for doing so. That said, as the USDOC rightly noted, if JDIL wants to stay in business, it would need to undertake "activities that involve the renewal and maintenance of forestry land, *i.e.*, the management of JDIL's input and supply chain, … even in the absence of the reimbursements."[1166] It is nonsensical for Canada to argue that "[t]he only reasonable explanation for the costs associated with the license management and basic silviculture is that [JDIL] is required to provide these services … and agrees to do so because New Brunswick, as owner, compensates [JDIL] for these expenses."[1167] The evidence does not support Canada's so-called "reasonable explanation," but rather demonstrates that JDIL performs silviculture and forest management because New Brunswick required JDIL to do so as part of stumpage. The evidence therefore decisively supports the USDOC's determination that New Brunswick "provides reimbursements to JDIL for costs it incurs in the course of managing its input and ensuring the efficient operation of its supply chain, *i.e.*, activities it was obligated to undertake as part of its operations …."[1168]

641. Canada similarly misrepresents the USDOC's characterization of JDIL's access to Crown stumpage as a "rent-free 25 year-long lease."[1169] JDIL (or one of its cross-owned affiliates) has held License 6 since 1962 and License 7 since 1981.[1170] The USDOC analogized JDIL's access to Crown stumpage as a "rent-free 25 year-long lease" because the Government of New Brunswick "does not charge it a fee for this long-term supply access."[1171] JDIL was required to pay stumpage fees for harvested timber and to perform other obligations, including silviculture and forest management, but JDIL was <u>not</u> required to pay a separate fee for its 25-year guaranteed access to Crown land. For this reason, the USDOC envisioned JDIL's access to Crown stumpage as comparable to a long-term, rent-free lease to illustrate that JDIL received assistance from New Brunswick with respect to its access to Crown stumpage, as well as separately for silviculture and forest management. Even if the Panel considers that the

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[1165] Canada's First Written Submission, para. 995.

[1166] Lumber Final I&D Memo, p. 185 (Exhibit CAN-010).

[1167] Canada's First Written Submission, para. 997.

[1168] Lumber Final I&D Memo, p. 186 (Exhibit CAN-010).

[1169] Canada's First Written Submission, para. 998-1001.

[1170] Lumber Final I&D Memo, p. 184 (Exhibit CAN-010).

[1171] Lumber Final I&D Memo, p. 186 (Exhibit CAN-010).

USDOC's characterization of JDIL's access to Crown stumpage is imprecise, Canada has failed to show how this characterization impairs the USDOC financial contribution finding.

642. Canada asserts that the basic silviculture and forest management payments cannot be considered grants because JDIL included harmonized sales tax charges as part of its silviculture and forest management expenses and this tax applies only to purchases of supplies of property or services.[1172] Before receiving payments from New Brunswick, JDIL submits an invoice for its completed silviculture and forest management.[1173] That JDIL includes harmonized sales tax charges in its invoices does not transform the transaction between JDIL and New Brunswick into a purchase of services. JDIL was in control of its invoicing methods and there is no evidence on the record to support the theory that New Brunswick acknowledged it was purchasing services from JDIL through its payment of the harmonized sales taxes included in JDIL's invoices. In fact, JDIL stated in its questionnaire response that licensees may enter into agreements with third parties to perform certain silviculture and forest management on the licensee's behalf,[1174] so the evidence suggests that the invoiced taxes reflected the actual expenses incurred by JDIL when it subcontracted third parties to conduct silviculture and forest management. Under such an arrangement, JDIL would invoice New Brunswick for any harmonized sales taxes that JDIL paid to third party contractors. Therefore, the inclusion of harmonized sales tax charges in JDIL's invoices for its silviculture and forest management expenses does not indicate that the grants constitute government purchases of services.

643. Canada has failed to make out its claim. None of Canada's arguments establish that the USDOC's determination regarding the grant provided by the Government of New Brunswick to JDIL for silviculture and forest management was inconsistent with Article 1.1(a)(1)(i). The USDOC's determination is such as could have been reached by an unbiased and objective investigating authority. Therefore, the United States respectfully requests that the Panel find the USDOC's determination was not inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.

b. Quebec's Reimbursement of Silviculture Involved a Direct Transfer of Funds that Did Not Involve a Reciprocal Obligation on the Part of Resolute

644. Canada argues that Quebec's reimbursement of costs related to partial cut requirements should be characterized as a purchase of services because, according to Canada, Quebec, as the owner of provincial Crown lands, is obligated to perform the silviculture that Resolute performed.[1175] This is not true. As the USDOC ascertained during its investigation, the evidence

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[1172] Canada's First Written Submission, para. 1002-1005.

[1173] JDIL QR, Exhibit SILV-01, p. 2 (Exhibit USA-012) and Exhibit LMF-01, p. 7 (Exhibit CAN-258 (BCI)).

[1174] JDIL QR, Exhibit STUMP-01, p. 12 footnote 6 (Exhibit CAN-262 (BCI)).

[1175] Canada's First Written Submission, paras. 974, 981, 987.

demonstrates that Quebec obligated Resolute – as a condition of its timber supply guarantee to access Crown stumpage – to perform partial cutting in certain harvest areas. The evidence of record thus sustains the USDOC's determination that Quebec provided funds in the form of a grant.

645. Canada further maintains that Resolute performed partial cut activities in exchange for payments from Quebec.[1176] This is also not true. As was the case with New Brunswick, the provision of stumpage and grants for silviculture constitute two distinct transactions:

- In the first transaction, Resolute purchased standing timber from Quebec provincial Crown land as a timber supply guarantee holder and was legally required to undertake partial cut prescriptions as a condition to its access to and right to harvest Quebec provincial Crown timber.[1177] The Quebec stumpage price is not adjusted for the cost difference between a partial and clear cut.[1178]

- In the second transaction, Quebec provided timber supply guarantee holders, including Resolute, the opportunity to apply for PCIP grants to offset nearly all of the costs associated with legally mandated partial cut requirements.[1179]

646. Canada does not challenge the USDOC's determination that Quebec's PCIP grant and its provision of stumpage exist as distinct transactions. In fact, Canada acknowledges that Quebec's stumpage fees did not take into account the costs of performing partial cut activities.[1180] Resolute was required to comply with partial cutting requirements as part of its agreement to purchase Crown stumpage from Quebec. There was no exchange of rights and obligations in respect of the grant provided by Quebec to Resolute for its costs to comply with partial cut requirements, because this grant involved the conveyance of funds from Quebec absent a reciprocal obligation on the part of Resolute.[1181] Additionally, that timber supply guarantee holders are required to submit an application to the MFFP for reimbursements under the PCIP

[1176] Canada's First Written Submission, paras. 984-987.

[1177] Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010).

[1178] GOQ QR, pp. QC-OTHER-18 and QC-OTHER-19 (Exhibit CAN-204).

[1179] Lumber Preliminary Decision Memorandum, p. 71 (Exhibit CAN-008); Lumber Final I&D Memo, p. 189 (Exhibit CAN-010).

[1180] Canada's First Written Submission, para. 1011.

[1181] *See Japan – DRAMs (Korea) (AB)*, para. 251 (finding that the provision of a loan and a subsequent interest rate reduction, for instance, should be treated as two separate transactions, each of which may constitute different forms of financial contributions).

further supports the USDOC's treatment of the PCIP as a transaction distinct from stumpage.[1182] Consequently, the USDOC appropriately treated Quebec's PCIP as a subsidy program distinct from stumpage.[1183]

647. Canada also argues that the payments should be considered government purchases of services because the program documents characterize the PCIP as purchasing "activities" from the participating companies and the term "activity" cannot refer to a "good."[1184] This is not true. It is clear from the program documents that the intended purpose of the PCIP is to grant financial assistance to timber supply guarantee holders that are subject to partial cut harvesting requirements. For example, according to the Treasury Board's note approving and establishing the PCIP, the program is intended "to facilitate the granting of financial assistance to ensure the realization of partial cutting on forest land in the Québec domain."[1185] Other language in the program documents similarly characterizes the program as granting financial assistance to offset the increased costs associated with partial cutting requirements.[1186] Canada's reliance on the program documents for the PCIP thus is erroneous because the documents further support the USDOC's finding that the payments constitute grants.

648. Canada has failed to make out its claim. None of Canada's arguments establish that the USDOC's determination regarding the grant provided by the Government of Quebec to Resolute for silviculture was inconsistent with Article 1.1(a)(1)(i). The USDOC's determination is such as could have been reached by an unbiased and objective investigating authority. Therefore, the United States respectfully requests that the Panel find the USDOC's determination was not inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.

4. Canada has Failed to Advance any Arguments in Support of Its Claims under Articles 19.3 and 19.4 of the SCM Agreement

649. Canada's first written submission does not include any legal arguments in support of its claims under Articles 19.3 and 19.4 of the SCM Agreement regarding the financial contributions for silviculture and forest management provided by New Brunswick to JDIL and the financial

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[1182] GOQ QR, p. QC-OTHER-18 (Exhibit CAN-204) and Exhibit QC-OTHER-13 (PCIP, section 7.4) (Exhibit CAN-208).

[1183] Lumber Preliminary Decision Memorandum, p. 71 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010).

[1184] Canada's First Written Submission, paras. 987-988.

[1185] GOQ QR, Exhibit QC-OTHER-13 (PCIP) (Exhibit CAN-208) (underline added).

[1186] GOQ QR, Exhibit QC-OTHER-15 ("The program authorizes the payment of financial assistance to offset the additional costs engendered by partial cutting work.") (Exhibit USA-011) and Exhibit QC-OTHER-18 ("This instruction seeks to explain the stages in the 2015-2016 payment process pertaining to the financial assistance granted to carry out partial cutting.") (Exhibit CAN-388).

contribution for partial cut silviculture restrictions provided by Quebec to Resolute.[1187] As the complaining party, Canada bears the burden of demonstrating that the U.S. measures within the Panel's terms of reference are inconsistent with the provisions of a WTO covered agreement. As Canada in its first written submission has not advanced any arguments in support of its claims under Articles 19.3 and 19.4 of the SCM Agreement, the United States respectfully requests that the Panel conclude that Canada has failed to make out its claims under these provisions.

B. The USDOC's Determination that Silviculture and Forest Management Payments by the Governments of New Brunswick and Quebec Conferred a Benefit Is Not Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

650. Canada argues that the silviculture and forest management payments by New Brunswick and Quebec are not countervailable because they did not confer a benefit within the meaning of Articles 1.1(b) and 14(d) of the SCM Agreement.[1188]

651. Canada's argument regarding the USDOC's benefit findings is unavailing. As demonstrated in section V.A, the USDOC found based on an unbiased and objective examination of the evidence that the silviculture and forest management payments to JDIL and Resolute provided by New Brunswick and Quebec, respectively, are financial contributions in the form of grants. The USDOC provided a reasoned and adequate explanation as to why these grants offset costs that JDIL and Resolute incurred as part of their normal business operations related to silviculture and forest management, and thus conferred a benefit on JDIL and Resolute in the amount of the grants provided.

652. Section V.B.1 summarizes the legal framework for Articles 1.1(b) and 14(d) of the SCM Agreement. Section V.B.2 explains how the investigatory record demonstrates that the USDOC evaluated the evidence in an unbiased and objective manner and provided a reasoned and adequate explanation for its conclusions that the payments by New Brunswick and Quebec conferred a benefit on JDIL and Resolute, respectively, in the amount of the grants provided. Section V.B.3 demonstrates that Canada has failed to make out its claim that the USDOC's determination is inconsistent with the obligations set out in Articles 1.1(b) and 14(d) of the SCM Agreement.

1. The Proper Legal Framework for Understanding the Obligations Set Out in Articles 1.1(b) and 14(d) of the SCM Agreement

653. Article 1.1(b) of the SCM Agreement sets out the second step of the subsidy analysis, an inquiry into whether the financial contribution identified under Article 1.1(a) confers "a benefit." The term "benefit" is not defined by the SCM Agreement. Based on the ordinary meaning of

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[1187] *See* Canada's First Written Submission, paras. 976-1006. *See also* Panel Request at 3 (C.10 and C.12).

[1188] Panel Request, p. 3 (C.11 and C.13).

this term and the context provided by Article 14, a "benefit" arises when the recipient has received from a financial contribution as defined under Article 1.1(a) of the SCM Agreement something that makes the recipient better off than it would otherwise have been absent that financial contribution.[1189] The focus of the inquiry is on the "benefit to the recipient" rather than the cost to the government.[1190]

654. Article 14 of the SCM Agreement governs the method by which an investigating authority calculates the amount of the benefit and "constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b)."[1191] The chapeau of Article 14 provides, in part, that "any method used by the investigating authority to calculate the benefit to the recipient conferred … shall be provided for in the national legislation or implementing regulations of the Member concerned …."[1192] The Appellate Body has explained that "[t]he reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[1193]

655. Article 14 further does not establish precise guidelines, covering every possible factual situation, for measuring the benefit conferred upon the recipient of a financial contribution.[1194] Subparagraphs (a) through (d) of Article 14 establish "guidelines" regarding the method for calculating the benefit to the recipient, including guidelines for calculating the benefit received from government provision of equity capital, a loan by a government, a loan guarantee by a government, and the provision of goods or services or purchase of goods by a government.[1195] Notably absent are explicit guidelines for calculating the benefit for a direct transfer of funds in the form of grants. Still, as the Appellate Body has emphasized, "the use of the term 'guidelines' in Article 14 suggests that subparagraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance."[1196]

[1189] *See supra*, section II.B.1. *See also Canada – Aircraft (AB)*, para. 157; *EC – Large Civil Aircraft (AB)*, para. 973; *US – Carbon Steel (India) (AB)*, para. 4.123.

[1190] *Canada – Aircraft (AB)*, para. 154. *See also US – Carbon Steel (India) (AB)*, para. 4.123.

[1191] *Canada – Aircraft (AB)*, para. 155.

[1192] SCM Agreement, Art. 14.

[1193] *US – Softwood Lumber IV (AB)*, para. 91.

[1194] *US – Softwood Lumber IV (AB)*, paras. 91-92; *Japan – DRAMS (Korea) (AB)*, para. 191.

[1195] SCM Agreement, Art. 14(a)-(d).

[1196] *US – Softwood Lumber IV (AB)*, para. 92.

656. For grants, under the benefit-to-the-recipient standard, "the act of identifying the 'benefit' (under Article 1.1) is normally the same as the act of measuring the 'benefit' (under Article 14)."[1197] As the panel in *EC – Large Civil Aircraft (Panel)* reasoned:

> [I]n the context of a grant, the magnitude of the subsidy is properly determined on the basis of the amount of funding actually transferred by means of the grant. In other words, where a subsidy takes the form of a grant, the amount of the financial contribution and the amount of the benefit are the same.[1198]

2. The Payments Provided by New Brunswick and Quebec for Silviculture and Forest Management Conferred a Benefit on Recipients in the Amount of the Financial Contribution

657. As explained in section V.A, the silviculture and forest management payments provided by New Brunswick to JDIL and by Quebec to Resolute constituted financial contributions in the form of grants. According to the Appellate Body, "the characterization of a transaction under Article 1.1(a) of the SCM Agreement may have implications for the manner in which the assessment of whether a benefit is conferred is to be conducted."[1199] The payments provided by the provincial governments to the recipient companies conferred a benefit because they provided funds that otherwise would not have been received and offset the costs incurred by JDIL and Resolute for their legally-obligated silviculture and forest management. In other words, JDIL and Resolute were "better off" than they otherwise would have been absent the financial contributions by New Brunswick and Quebec.[1200]

658. The benefit calculation for grants is straightforward because "the act of identifying the 'benefit' (under Article 1.1) is normally the same as the act of measuring the 'benefit' (under Article 14)."[1201] As a result, "the amount of the financial contribution and the amount of the benefit are the same."[1202] This principle is reflected in the USDOC's regulation, which the USDOC applied in the final determination to calculate the amount of the benefit.[1203] Because the USDOC found that the silviculture and forest management payments were financial

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[1197] *US – Lead and Bismuth II (Panel)*, para. 122.

[1198] *EC – Large Civil Aircraft (Panel)*, para. 7.1969, footnote 5724 (underline added).

[1199] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.130.

[1200] Lumber Final I&D Memo, p. 185 (Exhibit CAN-010). *See also Canada – Aircraft (AB)*, para. 157 (finding that Article 1.1(b) of the SCM Agreement requires assessing whether a financial contribution "makes the recipient 'better off' than it would otherwise have been, absent that contribution.").

[1201] *US – Lead and Bismuth II (Panel)*, para. 122.

[1202] *EC – Large Civil Aircraft (Panel)*, para. 7.1969, footnote 5724.

[1203] 19 C.F.R. § 351.504(a) ("In the case of a grant, a benefit exists in the amount of the grant.") (Exhibit USA-013).

contributions in the form of grants, the USDOC appropriately determined that the amount of the benefit conferred on JDIL and Resolute equaled the full amount of the grants provided by New Brunswick and Quebec, respectively.[1204] Therefore, the investigatory record demonstrates that the USDOC evaluated the evidence in an unbiased and objective manner and provided a reasoned and adequate explanation for its conclusion that the grants provided by New Brunswick and Quebec conferred a benefit on the recipients in the amount of the grants, consistent with the obligations set out in Articles 1.1(b) and 14 of the SCM Agreement.

3. Canada's Fails to Establish that the USDOC's Benefit Findings Are Inconsistent with Articles 1.1(b) and 14 of the SCM Agreement

659. Canada argues that New Brunswick's silviculture and forest management payments did not confer a benefit on JDIL and that Quebec's payments under the PCIP did not confer a benefit on Resolute.[1205] We address each of Canada's arguments below and explain that Canada has failed to demonstrate that the USDOC's benefit findings are inconsistent with Articles 1.1(b) and 14 of the SCM Agreement.

a. New Brunswick's Reimbursements of Silviculture and Forest Management Expenses Conferred a Benefit on JDIL

660. Canada argues that JDIL could not have been "better off" because JDIL's management requirements imposed a net cost, even after receiving payments from New Brunswick.[1206] This argument lacks merit. As explained by the USDOC, "[t]his notion that the payments received by JDIL from the [Government of New Brunswick] do not cover JDIL's actual expenses for both silviculture and forest management activities does not negate the benefit from the payments received."[1207] JDIL would be required to perform basic silviculture and forest management as part of its license obligations even in the absence of the government grants. As such, any amount of financial assistance that alleviated any costs incurred by JDIL in performing its licensee obligations conferred a benefit.

661. Canada argues further that the USDOC's benefit finding is "inconsistent with commercial reality" because JDIL paid stumpage fees for Crown timber and performed basic silviculture and management for the benefit of the forest owner, New Brunswick.[1208] This argument mischaracterizes the nature of the benefit by overlooking the fact that JDIL would be required to incur all expenses for silviculture and forest management in the absence of the government's

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[1204] Lumber Final I&D Memo, pp. 186, 189 (Exhibit CAN-010).

[1205] Canada's First Written Submission, paras. 1007-1016.

[1206] Canada's First Written Submission, paras. 1014-1015.

[1207] Lumber Final I&D Memo, p. 185 (Exhibit CAN-010).

[1208] Canada's First Written Submission, para. 1016.

grant. The commercial reality is that JDIL benefits from receiving a financial contribution from New Brunswick for performing legally-required silviculture and forest management.

662. Canada otherwise failed to advance any arguments whatsoever in support of its claims under Articles 14(d), 19.3, and 19.4 of the SCM Agreement relative to the benefit conferred by New Brunswick's financial contribution.[1209] As the complaining party, Canada bears the burden of demonstrating that the U.S. measures within the Panel's terms of reference are inconsistent with the provisions of a WTO covered agreement. As Canada in its first written submission has not advanced any arguments in support of its claims under Articles 14(d), 19.3, and 19.4 of the SCM Agreement, the United States respectfully requests that the Panel conclude that Canada has failed to make out its claims under these provisions.

b. Quebec's Reimbursements for Costs Incurred for Partial Cut Prescriptions Conferred a Benefit on Resolute

663. Canada argues that Resolute was not "better off" because partial cut requirements increased Resolute's harvest obligations and costs and the PCIP payments only reimbursed 90 percent of those costs.[1210] This argument lacks merit. Canada overlooks the evidence of record that establishes that Resolute, as a timber supply guarantee holder, was responsible for the increased costs associated with partial cutting requirements pursuant to the terms of a prior agreement. The PCIP payments partially offset the expenses related to this legally required activity. Absent this grant, Resolute would ultimately be responsible for paying 100 percent rather than only 10 percent of the increased costs attributable to partial cutting. Contrary to Canada's argument, the amount of expenses offset by the PCIP payments – not the cost to the government – represents the benefit to the recipient. As the USDOC stated in the final determination, "the fact that Resolute received a partial reimbursement does not negate the fact that a benefit was received."[1211]

664. Canada also argues that the USDOC failed to consider the relationship between the PCIP and stumpage fees.[1212] According to Canada, the stumpage fees "assumes a total or clear cut" and Quebec, had it chosen to do so, could have charged a different stumpage fee for areas subject to partial cut requirements.[1213] But rather than doing so, Canada asserts that Quebec chose to

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[1209] *See* Canada's First Written Submission, paras. 1007-1016. *See also* Panel Request at 3 (C.13).

[1210] Canada's First Written Submission, paras. 1010, 1012.

[1211] Lumber Final I&D Memo, p. 189 (Exhibit CAN-010).

[1212] Canada's First Written Submission, paras. 1010-1011.

[1213] Canada's First Written Submission, para. 1011.

issue PCIP payments to cover 90 percent of the cost difference between a partial and a clear cut.[1214]

665. The evidence of record does not support the pretense that Quebec established the PCIP so it could charge a different stumpage fee.[1215] Further, as explained in section V.A.3.b, Resolute's payments for stumpage and Quebec's payments under the PCIP are distinct transactions that operate independently. Resolute was aware that the stumpage fees did not account for added partial cut expenses, yet it made the business decision to purchase stumpage from Crown lands. That decision may have been influenced by the existence of the PCIP, but Resolute's reliance on PCIP payments to cover for the unadjusted stumpage fees does not mean that the PCIP payments do not confer a benefit. Similarly, that Resolute considers partial cut requirements and PCIP payments when bidding for auctioned timber does not mean that the PCIP payments do not confer a benefit.

666. Canada's argument with respect to the fact that PCIP payments are applied against outstanding stumpage fees elevates form over substance.[1216] That PCIP payments apply against outstanding stumpage does not alter the fact that these are <u>not</u> part of Resolute's stumpage fee. As the document cited by Canada demonstrates, "from a legal standpoint, the MFFP can compensate itself before making a payment to a [designated timber supply guarantee holder] <u>when the latter has already been invoiced for timber</u>."[1217] Therefore, that Quebec is exercising its legal right to protect government's revenue by first collecting all debts owed by a timber supply guarantee holder before issuing payment does not erase the benefit provided by the PCIP payments.

667. Finally, Canada failed to advance any arguments whatsoever in support of its claims under Articles 14(d), 19.3, and 19.4 of the SCM Agreement relative to the benefit conferred by Quebec's financial contribution.[1218] Again, as the complaining party, Canada bears the burden of demonstrating that the U.S. measures within the Panel's terms of reference are inconsistent with the provisions of a WTO covered agreement. As Canada in its first written submission has not advanced any arguments in support of its claims under Articles 14(d), 19.3, and 19.4 of the SCM Agreement, the United States respectfully requests that the Panel conclude that Canada has failed to make out its claims under these provisions.

[1214] Canada's First Written Submission, para. 1011.

[1215] *See supra*, sections V.A.2.b and V.A.3.b.

[1216] Canada's First Written Submission, para. 1011.

[1217] GOQ QR, Exhibit QC-OTHER-18, p. 6 (underline added) (Exhibit CAN-388).

[1218] *See* Canada's First Written Submission, paras. 1007-1016.

VI. THE USDOC'S DETERMINATIONS REGARDING PROVINCIAL ELECTRICITY SUBSIDIES ARE NOT INCONSISTENT WITH ARTICLES 1.1(A)(1)(II), 1.1(B), 10, 14(D), 19.1, 19.3, AND 19.4 OF THE SCM AGREEMENT

A. The USDOC's Measurement of the Benefit to Producers of Electricity Purchased by BC Hydro and Hydro-Quebec Is Not Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

668. Canada argues that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement because the benchmarks selected by the USDOC to measure the subsidies associated with the purchases of electricity by BC Hydro and Hydro-Quebec "did not reflect prevailing market conditions for the sale of the relevant type of electricity."[1219] Canada's argument lacks merit.

669. In section VI.A.1, the United States summarizes the proper legal framework for Articles 1.1(b) and 14(d) of the SCM Agreement. In section VI.A.2, the United States demonstrates that the USDOC's benefit determination for BC Hydro's purchase of electricity from Tolko and West Fraser is not inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. In section VI.A.3, the United States demonstrates that the USDOC's benefit determination for Hydro-Quebec's purchase of electricity from Resolute is not inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

1. The Proper Legal Framework for Understanding the Obligations Set Out in Articles 1.1(b) and 14(d) of the SCM Agreement

670. Article 1.1 of the SCM Agreement provides that a subsidy shall exist if a financial contribution by a government confers a benefit. A benefit, as suggested by Article 14 of the SCM Agreement, 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: "A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient."[1220] According to the Appellate Body, the relevant inquiry under Article 1.1(b) requires a comparison of "whether the recipient of the financial contribution has been advantaged or made 'better off' than it would otherwise have been absent that contribution."[1221] This comparison is accomplished by considering the "market [as] the appropriate benchmark in determining benefit within the meaning of Article 1.1(b)."[1222]

[1219] Panel Request, p. 3 (C.8).

[1220] *Canada – Aircraft (AB)*, para. 154.

[1221] *EC – Large Civil Aircraft (AB)*, para. 973.

[1222] *EC – Large Civil Aircraft (AB)*, para. 976.

671. Article 14 of the SCM Agreement sets out "guidelines" to be used in calculating the "benefit" conferred pursuant to Article 1.1(b). The chapeau of Article 14 provides that "any method used by the investigating authority to calculate the benefit to the recipient … shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained."[1223] Further, "any such method shall be consistent with the … guidelines" found in subparagraphs (a) through (d) of Article 14.[1224] The guideline in Article 14(d) provides as follows:

> [T]he provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made at less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).[1225]

672. The Appellate Body has explained that "[t]he reference to '*any*' method in the chapeau of Article 14 clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[1226] According to the Appellate Body, the term "guidelines" in the chapeau of Article 14 suggests that the subparagraphs that follow "should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance.'"[1227] As noted by the Appellate Body in *US – Softwood Lumber IV*, the guideline set out in Article 14(d) "does not require the use of private prices in the market of the country of provision in every situation. Rather, that guideline 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, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)."[1228]

[1223] SCM Agreement, Art. 14.

[1224] SCM Agreement, Art. 14.

[1225] SCM Agreement, Art. 14(d).

[1226] *US – Softwood Lumber IV (AB)*, para. 91 (italics in original).

[1227] *US – Softwood Lumber IV (AB)*, para. 92 (quoting U.S. Appellant Submission, para. 25).

[1228] *US – Softwood Lumber IV (AB)*, para. 96.

673. The Appellate Body has further explained the importance of "the market orientation of the inquiry under Article 14(d) of the SCM Agreement."[1229] According to the Appellate Body, it follows from the obligation set out in Article 14(d) 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."[1230] "[T]his language highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which goods or services at issue would, under market conditions, be exchanged."[1231] Such conditions "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[1232] For these reasons, the Appellate Body has "emphasize[d] that whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision."[1233]

2. The Government of British Columbia Conferred a Benefit on Tolko and West Fraser Because BC Hydro Purchased Electricity from these Companies for More than Adequate Remuneration

a. The USDOC Provided a Reasoned and Adequate Explanation for its Conclusion that the Purchase of Electricity by BC Hydro Conferred a Benefit on Tolko and West Fraser

674. BC Hydro is a provincial Crown corporation and an agent of the Government of British Columbia.[1234] BC Hydro both purchases and sells electricity.[1235] BC Hydro does not track the energy resource used to generate electricity it purchases.[1236]

675. British Columbia updated its energy plan in 2007 and 2008 so as to supply energy "solely from electricity generation facilities within British Columbia" and ensure that at "least 93

[1229] *US – Carbon Steel (India) (AB)*, para. 4.151.

[1230] *US – Carbon Steel (India) (AB)*, para. 4.151 (citing *US – Softwood Lumber IV (AB)*, para. 89). *See also US – Countervailing Measures (China) (AB)*, para. 4.46 (quoting *US – Carbon Steel (India) (AB)*, para. 4.151).

[1231] *EC – Large Civil Aircraft (AB)*, para. 975.

[1232] *US – Carbon Steel (India) (AB)*, para. 4.150.

[1233] *US – Carbon Steel (India) (AB)*, para. 4.154.

[1234] Lumber Preliminary Decision Memo, pp. 65, 84 (Exhibit CAN-008); GBC QR, BC Volume II, p. BC II-30 (Exhibit CAN-395).

[1235] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010). *See* GBC QR, BC Volume II, p. BC II-30 (Exhibit CAN-395).

[1236] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010); GBC QR, BC Volume II, p. BC II-47 (Exhibit CAN-395).

percent of the electricity generated in British Columbia is to be from clean or renewable resources ….”[1237] To achieve these goals, BC Hydro entered into Electricity Purchase Agreements (“EPAs”) with 105 operating independent power producers, including Tolko and West Fraser.[1238] Tolko had two EPAs during the period of investigation for which BC Hydro paid Tolko for electricity generated by the Kelowna sawmill (in excess of its agreed upon load requirements) and the Armstrong biomass generating station, as necessary.[1239] West Fraser also had two EPAs during the period of investigation for which BC Hydro paid West Fraser for electricity generated by the Fraser Lake and Chetwynd sawmills.[1240] The evidence reviewed by the USDOC demonstrated that Tolko and West Fraser not only sold electricity to BC Hydro during the period of investigation pursuant to their EPAs, but that they also purchased electricity from BC Hydro.[1241]

676. The USDOC examined the evidence of record for a comparison source (benchmark) by which it could ascertain whether the remuneration that BC Hydro paid Tolko and West Fraser for the electricity it purchased from them pursuant to the EPAs was adequate.[1242] The USDOC found that the prices that result from the EPA process could not be considered an appropriate benchmark or otherwise adequate, because the policy framework imposed by the Government of British Columbia on BC Hydro’s purchase of electricity “limits the sources from which BC Hydro can source electricity, [so] the prices that result from the EPA process cannot be considered market-based.”[1243]

> Furthermore, the fundamental premise underlying the GBC’s and West Fraser’s argument [that no benchmark analysis is warranted] is erroneous. The adequacy of remuneration does not exist in a vacuum; to determine whether remuneration is “adequate,” a comparison source is needed. We, thus, continue to find that it is necessary to select a benchmark to calculate the benefit under this program.[1244]

[1237] GBC QR, BC Volume II, p. BC II-31 (Exhibit CAN-395).

[1238] Lumber Final I&D Memo, p. 162 (Exhibit CAN-010); Lumber Preliminary Decision Memorandum, p. 84 (Exhibit CAN-008).

[1239] Tolko QR, pp. 136-155 (Exhibit CAN-067 (BCI)).

[1240] West Fraser QR, pp. 95-102 (Exhibit CAN-052 (BCI)).

[1241] Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[1242] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010).

[1243] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010). The USDOC also rejected a benchmark suggested by the petitioners. Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[1244] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010).

677. The USDOC continued its examination of the evidence and selected as a benchmark the tariffs that Tolko and West Fraser paid BC Hydro for electricity purchased during the period of investigation.[1245] "[D]uring the POI, the provincially-owned BC Hydro sold electricity to Tolko and West Fraser at rates approved by the GBC through the [British Columbia Utilities Commission] and purchased electricity from these respondents at the rate established under the EPAs."[1246] The USDOC considered these electricity rates the best benchmark for determining the benefit to the recipients because, for example, "if a government provides a good to a company for three dollars and then purchases the same good from the company for ten dollars, we cannot see how under the 'benefit-to-the-recipient standard' that … the benefit is anything other than seven dollars."[1247] The USDOC compared the price at which BC Hydro purchased electricity under the EPAs to this benchmark and found that British Columbia conferred a benefit on Tolko and West Fraser during the period of investigation because BC Hydro purchased electricity from these companies for more than adequate remuneration ("MTAR").[1248]

678. In considering arguments put forward by British Columbia and the respondent companies as to why the EPAs reflected market-based prices and should be used as benchmark prices, the USDOC also concluded as follows:

- "[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."[1249]

- "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. Indeed, BC Hydro itself does not track the source of the electricity that it sells to its customers."[1250]

[1245] Lumber Preliminary Decision Memorandum, p. 85 (Exhibit CAN-008); Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[1246] Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[1247] Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[1248] Lumber Final I&D Memo, p. 166 (Exhibit CAN-010). The USDOC referred to this part of its investigation as "MTAR," which stood for "More Than Adequate Remuneration." *See* Lumber Final I&D Memo, pp. 162, 270 (Exhibit CAN-010).

[1249] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010).

[1250] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010) (footnote omitted).

679. The USDOC therefore provided a reasoned and adequate explanation for its conclusion that the purchase of electricity by BC Hydro conferred a benefit on Tolko and West Fraser. The USDOC's conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

b. Canada Fails to Establish that the USDOC's Determinations About the Benefits Conferred by BC Hydro's Purchases of Electricity are Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

680. Canada argues that the USDOC identified an incorrect relevant market for its benchmarking analysis[1251] and selected the wrong benchmark.[1252] According to Canada, the USDOC should have relied on an analysis of the bidding processes conducted by BC Hydro for biomass-based electricity to determine whether BC Hydro purchased electricity for more than adequate remuneration.[1253]

681. Canada's arguments are unavailing. The USDOC defined the relevant marketplace in this investigation as the market where BC Hydro both bought electricity from Tolko and West Fraser and sold electricity to Tolko and West Fraser. In doing so, the USDOC rejected the notion that the relevant market should be limited just to the side of the market where BC Hydro bought electricity from Tolko and West Fraser, *i.e.*, the transactions for which the USDOC had to decide whether a benefit had been conferred. As the USDOC observed, "[t]he adequacy of remuneration does not exist in a vacuum; to determine whether remuneration is 'adequate,' a comparison source is needed."[1254]

682. Contrary to Canada's argument,[1255] the USDOC's definition of the relevant market for the benefit comparison does not conflict with the views expressed by the Appellate Body in *Canada – Feed in Tariff Program* regarding the selection of this market.[1256] 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.[1257] As the USDOC explained, "BC Hydro is both a purchaser of electricity [generated by Tolko and West Fraser], as well as the

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[1251] Canada's First Written Submission, paras. 1048-1054.

[1252] Canada's First Written Submission, paras. 1055-1056.

[1253] Canada's First Written Submission, paras. 1057-1062.

[1254] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010).

[1255] Canada's First Written Submission, paras. 1052-1053, 1056-1058.

[1256] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, paras. 5.168-5.171.

[1257] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.169.

entity providing electricity, or setting and approving the prices at which electricity is provided to our respondent companies."[1258]

683. The USDOC also considered both the demand-side and the supply-side of this relevant market. On the demand side, the evidence 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).[1259] "Indeed, BC Hydro itself does not track the source of the electricity that it sells to its customers."[1260] On the supply side, the evidence demonstrated that Tolko and West Fraser considered the electricity that they sold to BC Hydro completely substitutable with the electricity supplied by BC Hydro-owned generation resources.[1261] 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. As the USDOC observed, "if a government provides a good to a company for three dollars and then purchases the same good from the company for ten dollars, we cannot see how under the 'benefit-to-the-recipient' standard that … the benefit is anything other than seven dollars."[1262]

684. The proposition put forward by Canada, whereby an investigating authority determines the adequacy of remuneration by comparing the remuneration against itself,[1263] is untenable. No meaningful information can be gathered as to whether remuneration is less or more than adequate if the remuneration is compared against itself. As the Appellate Body explained in *US – Countervailing Measures (China)*, "a determination of whether the remuneration paid for a government-provided good is 'less than adequate remuneration' … requires the selection of a

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[1258] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010).

[1259] GBC QR, p. BC II-42 (Exhibit CAN-395).

[1260] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010). *See* 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.").

[1261] *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 POI," paid for "in accordance with BC Hydro's standard applicable tariff rate schedules"). *See also* Lumber Preliminary Decision Memo, p. 85 (Exhibit CAN-008).

[1262] Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[1263] Canada's First Written Submission, paras. 1057-1062.

benchmark against which the prices for the government-provided good, which was at issue under the Article 1.1(b) analysis, must be compared."[1264] The USDOC's reasoning that, "to determine whether remuneration is 'adequate,' a comparison source is needed,"[1265] accords with the Appellate Body's understanding "that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison."[1266] This is precisely what the USDOC did when it selected the price at which BC Hydro sold electricity as the benchmark to compare against the price at which BC Hydro purchased electricity from Tolko and West Fraser.

685. Canada separately argues that the USDOC's treatment of the "turn down" payments that BC Hydro granted to Tolko constituted the purchase of a good for which the USDOC should have measured the benefit to Tolko based on an adequacy-of-remuneration analysis.[1267] BC Hydro paid Tolko a "turn down fee" whenever Tolko reduced the amount of available, generated energy.[1268] The turndown rights associated with this fee allowed BC Hydro "control over the timing of energy deliveries. Turndown rights permit BC Hydro to decline energy deliveries that are surplus to its needs at any point in time, although BC Hydro still pays the supplier for having made its power generation capacity available."[1269] The turn down fees thus do not relate to the purchase of a good but, "[a]s noted by Tolko, these payments are used to compensate Tolko for its investment in fixed generation assets that relate to its sales of electricity to BC Hydro."[1270] A grant exists for purposes of Article 1.1(a)(1)(i) when the government confers something on a recipient without getting anything in return.[1271] Therefore, the USDOC correctly treated these payments as grants because BC Hydro provided a direct transfer of funds to Tolko with respect to Tolko's investment in fixed generation assets for which BC Hydro did not receive anything in return.[1272]

686. In sum, the USDOC's conclusion that BC Hydro's purchase of electricity conferred a benefit on Tolko and West Fraser is one an unbiased and objective investigating authority could

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[1264] *US – Countervailing Measures (China) (AB)*, para. 4.44 (underline added).

[1265] Lumber Final I&D Memo, p. 164 (Exhibit CAN-010).

[1266] *Canada – Aircraft (AB)*, para. 157 (finding "that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution.").

[1267] Canada's First Written Submission, paras. 1063-1065.

[1268] Tolko QR, pp. 143-144 (Exhibit CAN-067 (BCI)).

[1269] GBC QR, p. BC II-37 (Exhibit CAN-395).

[1270] Lumber Final I&D Memo, p. 159 (Exhibit CAN-010).

[1271] *See* section VI.A.1.

[1272] *See also US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 616-617.

have reached. Canada therefore has failed to establish that the United States acted inconsistent with its obligations under Articles 1.1(b) and 14(d) of the SCM Agreement.

3. The Government of Quebec Conferred a Benefit on Resolute Because Hydro-Quebec Purchased Electricity from this Company for More than Adequate Remuneration

a. The USDOC Provided a Reasoned and Adequate Explanation for its Conclusions that the Purchase of Electricity by Hydro-Quebec Conferred a Benefit on Resolute

687. Hydro-Quebec is a government-owned utility whose sole shareholder is the Government of Quebec.[1273] To meet Quebec's electricity demands, Hydro-Quebec maintains supply contracts under the Green Power Purchase Program ("PAE 2011-01") for the purchase of electricity generated from biomass at a set contractual price.[1274]

688. During the period of investigation, Resolute operated two pulp and paper mills (Dolbeau and Gatineau) for which it held PAE 2011-01 agreements with Hydro-Quebec for the purchase of electricity produced from forestry biomass during the period of investigation.[1275] In reviewing the evidence, the USDOC noted that Quebec "reported that the PAE 2011-01 is aimed at the purchase of 300 MW of energy from forest biomass cogeneration power plants."[1276] The evidence reviewed by the USDOC further demonstrated that Resolute both sold electricity to Hydro-Quebec during the period of investigation under PAE 2011-01 and purchased electricity from Hydro-Quebec.[1277]

689. The USDOC relied on the tariffs that Resolute paid Hydro-Quebec for electricity purchased during the period of investigation (Industrial L rate) to determine whether Hydro-Quebec paid Resolute more than adequate remuneration for the electricity it purchased from Resolute.[1278]

[1273] Lumber Preliminary I&D Memo, p. 85 (Exhibit CAN-008).

[1274] Lumber Preliminary Decision Memorandum, p. 85 (Exhibit CAN-008); GOQ QR, Volume III-a, p. QC-BIO-55 (Exhibit CAN-424 (BCI)).

[1275] Lumber Preliminary Decision Memorandum, p. 85 (Exhibit CAN-008).

[1276] Lumber Final I&D Memo, p. 170 (Exhibit CAN-010). Based on this evidence, the USDOC concluded that Resolute's sale of electricity under the PAE 2011-01 was not tied to producers of non-subject merchandise (like pulp and paper mills). Lumber Final I&D Memo, pp. 169-170 (Exhibit CAN-010).

[1277] Lumber Final I&D Memo, pp. 171-172 (Exhibit CAN-010).

[1278] Lumber Preliminary Decision Memorandum, p. 86 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 171-172 (Exhibit CAN-010).

> In this investigation, Resolute is not merely selling electricity to Hydro-Québec; Resolute also purchases electricity from Hydro-Québec. For an MTAR program such as this one, where the government is acting on both sides of the transaction[,] … the benefit to the respondent is the difference between the price at which the government is selling the good to the company, and the price at which the government is purchasing the good back from the company.[1279]

The USDOC compared the two rates, determined that Hydro-Quebec bought electricity from Resolute for more than it sold electricity to this company, and found that the Government of Quebec conferred a benefit on Resolute during the period of investigation because Hydro-Quebec purchased electricity from this company for more than adequate remuneration.[1280]

690. In considering arguments put forward by Quebec as to why the USDOC should have used an outside group's study of bids received in a 2009 tender under the PAE 2011-01 (the Merrimack study) as a benchmark instead of the Industrial L rate, the USDOC concluded as follows:

> [T]he GOQ failed to provide any evidence that the prevailing market conditions for the provision of electricity by Hydro-Québec is differentiated based upon the manner in which the electricity is generated. The GOQ itself reported that, when explaining how electricity rates are set, "there is no distinction between sources of electricity generated." This statement is corroborated by the tariff schedules provided by the GOQ, which indicate that there is no distinction. Within the schedules, the Industrial L rate is listed with no disclosure as to the source from which that electricity is generated. This evidence indicates that electricity is electricity regardless of the source from which it was generated.[1281]

691. The USDOC therefore provided a reasoned and adequate explanation for its conclusion that the purchase of electricity by Hydro-Quebec conferred a benefit on Resolute. The USDOC's conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

[1279] Lumber Final I&D Memo, p. 171 (Exhibit CAN-010).

[1280] Lumber Final I&D Memo, pp. 171-173 (Exhibit CAN-010).

[1281] Lumber Final I&D Memo, pp. 172-173 (Exhibit CAN-010) (footnotes omitted).

b. Canada Fails to Establish that the USDOC's Determinations About the Benefits Conferred by Hydro-Quebec's Purchases of Electricity are Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

692. Canada's arguments regarding Quebec's electricity subsidy largely parallel those it makes regarding British Columbia's electricity subsidy. Canada argues that the USDOC failed to identify the relevant market;[1282] this failure resulted in the USDOC using an incorrect benchmark;[1283] and, as a result, the USDOC incorrectly concluded that Hydro-Quebec's purchase of electricity from Resolute under the PAE 2011-01 program constituted a benefit. According to Canada, the USDOC should have used the prices reported in the Merrimack study to establish a benchmark.[1284]

693. Canada's arguments are unavailing. The evidence reviewed by the USDOC confirmed that, "[i]n this investigation, Resolute is not merely selling electricity to Hydro-Québec; Resolute also purchases electricity from Hydro-Québec."[1285] The USDOC determined that, for this type of government purchase, "where the government is acting on both sides of the transaction—*i.e.*, both selling a good to, and purchasing the good back from, a respondent—the benefit to the respondent is the difference between the price at which the government is selling the good to the company, and the price at which the government is purchasing the good back from the company."[1286] In doing so, the USDOC rejected the notion that the relevant market should be limited just to the side of the market where Hydro-Quebec bought electricity from Resolute, *i.e.*, the transactions for which the USDOC had to decide whether a benefit had been conferred.

694. Contrary to Canada's argument,[1287] the USDOC's definition of the relevant market for the benefit comparison does not conflict with the views expressed by the Appellate Body in *Canada – Feed in Tariff Program* regarding the selection of this market.[1288] The USDOC started its benefit analysis with the definition of the relevant market,[1289] finding that Hydro-Quebec is acting on both sides of this market. On the demand side of this market, the evidence

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[1282] Canada's First Written Submission, paras. 1081-1086.

[1283] Canada's First Written Submission, paras. 1087-1095.

[1284] Canada's First Written Submission, paras. 1093-1095.

[1285] Lumber Final I&D Memo, p. 171 (Exhibit CAN-010).

[1286] Lumber Final I&D Memo, p. 171 (Exhibit CAN-010).

[1287] Canada's First Written Submission, paras. 1084, 1086.

[1288] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, paras. 5.168-5.171.

[1289] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.169.

demonstrated that Hydro-Quebec considered the electricity it purchased from Resolute completely substitutable with the electricity it supplied:

> Under the applicable provisions of the *Act respecting the Régie de l'énergie* …, rates are fixed or modified by the *Régie de l'énergie* (Québec's energy board). Rates are fixed to allow recovery of approved revenue requirement, including estimates supply costs, and a reasonable rate of return. There is no distinction between sources of electricity generated.[1290]

The tariff schedules set forth the electricity rates of Hydro-Quebec in its electricity distribution activities for all power users and, as the evidence of record demonstrated, electricity was treated generally as electricity, no matter the source from which it was generated.[1291] As the Appellate Body has noted, "the fact that electricity is physically identical, regardless of how it is generated, suggests that there is high demand-side substitutability between electricity generated through different technologies."[1292]

695. On the supply side, the evidence demonstrated that Resolute considered the electricity that it sold to Hydro-Quebec completely substitutable with the electricity supplied by Hydro-Quebec.[1293] At verification, the USDOC examined the Resolute Dolbeau and Gatineau mills' Power Purchase Agreements with Hydro-Quebec, including the mills' sales of electricity to Hydro-Quebec and purchases of electricity from Hydro-Quebec.[1294] The USDOC verified the Industrial L rate per kilowatt hour that was in effect during the period of investigation and reconciled the rate identified in the tariff schedule with the rate at which each mill paid Hydro-Quebec for electricity.[1295] The USDOC also verified that the only sales of electricity to Hydro-Quebec by Resolute were made pursuant to the Power Purchase Agreements.[1296] The USDOC therefore concluded that the electricity tariffs that Hydro-Quebec charged Resolute represented the benchmark that best reflected the "benefit-to-the-recipient" standard expressly endorsed by

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[1290] GOQ QR, Volume III-a (part 15), p. QC-BIO-12 (Exhibit CAN-424 (BCI)) (underline added) (cited at Lumber Final I&D Memo, p. 172).

[1291] Lumber Final I&D Memo, p. 172.

[1292] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.170.

[1293] Lumber Final I&D Memo, p. 171 (Exhibit CAN-010) (finding that "Resolute's pulp and paper mills purchase electricity from Hydro-Québec at the Industrial L rate, which is the tariff in effect during the POI. Those same mills sell electricity to back to Hydro-Québec under the PAE 2011-01 program at an administratively-set price."). *See* Resolute Verification Report, pp. 15-16 (Exhibit CAN-174 (BCI)).

[1294] Resolute Verification Report, pp. 15-17 (Exhibit CAN-174 (BCI)).

[1295] Resolute Verification Report, pp. 16-17 (Exhibit CAN-174 (BCI)).

[1296] Resolute Verification Report, pp. 16-17 (Exhibit CAN-174 (BCI)).

the chapeau of Article 14 of the SCM Agreement, because Hydro-Quebec both purchased electricity from, and sold electricity to, Resolute.[1297]

696. Canada's argument that the USDOC should have used the Merrimack study to establish a benchmark fails to recognize that Hydro-Quebec is acting on both sides of the relevant market for the benefit comparison. The evidence demonstrated that Hydro-Quebec did not differentiate between the types of electricity generated: "Within the [tariff] schedules, the Industrial L rate is listed with no disclosure as to the source from which that electricity is generated."[1298] "The GOQ itself reported that, when explaining how electricity rates are set, 'there is no distinction between sources of electricity generated.'"[1299] The Merrimack study relied on cost data limited to electricity generated by biomass energy technology.[1300] The Merrimack study thus did not measure the rate for electricity sold by Hydro-Quebec during the period of investigation, which might be generated from sources other than biomass energy technology.[1301] Therefore, the USDOC correctly concluded that the evidence of record did not demonstrate that a benchmark based on the Merrimack study represented a better benchmark in respect of the relevant market than the Industrial L rate that Hydro-Quebec charged Resolute for electricity.

697. In sum, the USDOC's conclusion that Hydro-Quebec's purchase of electricity conferred a benefit on Resolute is one an unbiased and objective investigating authority could have reached. Canada therefore has failed to establish that the United States acted inconsistent with its obligations under Articles 1.1(b) and 14(d) of the SCM Agreement.

B. The USDOC's Determination Concerning the Benefit Conferred to Producers by the New Brunswick LIREPP Is Not Inconsistent with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement

698. Canada argues that the United States acted inconsistently with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement because the USDOC should have analyzed the New Brunswick Large Industrial Renewable Energy Purchase Program ("LIREPP") as the purchase of a good by New Brunswick Power ("NB Power") rather than as a financial contribution in the form of revenue foregone.[1302] Canada's argument lacks merit.

699. Section VI.B.1 summarizes the legal framework for Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement. Section VI.B.2 explains how the investigatory record

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[1297] Lumber Final I&D Memo, p. 172 (Exhibit CAN-010).

[1298] Lumber Final I&D Memo, pp. 172-173 (Exhibit CAN-010) (footnote omitted).

[1299] Lumber Final I&D Memo, p. 172 (Exhibit CAN-010) (quoting GOQ QR, QC Volume III-1 (part 15), p. QC-BIO-12 (Exhibit CAN-424 (BCI))).

[1300] GOQ QR,Volume III-a. Exhibit QC-BIO-18, p. 1 (Exhibit CAN-432).

[1301] *See* Lumber Final I&D Memo, pp. 172-173 (Exhibit CAN-010).

[1302] Canada's First Written Submission, paras. 1096-1118.

demonstrates that the USDOC evaluated the evidence in an objective manner and provided a reasoned and adequate explanation for its conclusion that the LIREPP credits provided by NB Power constituted a financial contribution in the form of revenue forgone. Section VI.B.3 demonstrates that USDOC's conclusion is one an unbiased and objective investigating authority could have reached, and Canada therefore has failed to establish that the USDOC's benefit calculation for the LIREPP, which follows from its determination that the Net LIREPP credits are revenue foregone by the Government of New Brunswick, is inconsistent with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement.

1. The Proper Legal Framework for Understanding the Obligations Set Out in Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement

700. Article 1.1(a)(1)(ii) of the SCM Agreement provides, in relevant part, that a financial contribution exists where "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)." The word "revenue" is defined as, *inter alia*, "[i]ncome, *spec.* from property, possessions, or investment, esp. of an extensive kind."[1303] The word "foregone," which, in the context of subparagraph (ii) is the past tense of the verb forgo (or forego), is defined as, *inter alia*, "[a]bstain or refrain from."[1304] Read together, the words "revenue foregone" thus mean the difference between the income that a government could have collected and the income that it did collect. Article 1.1(b) of the SCM Agreement provides that the benefit associated with the "revenue foregone" is the amount of revenue not collected.[1305]

701. As explained in section V.B.1, Article 14 of the SCM Agreement does not prescribe a specific methodology for calculating the benefit to the recipient, but leaves the methodology for determining the existence and amount of benefit to the Members. As the Appellate Body explained in *US – Softwood Lumber IV*, "[t]he reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[1306]

[1303] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2579 (Exhibit USA-015) (italic original).

[1304] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1005 (Exhibit USA-015).

[1305] *See US – Washing Machines (Panel)*, para. 7.303 ("Tax credits constitute subsidies because government revenue is foregone or not collected. The benefit is the amount of revenue that is foregone or not collected. That revenue foregone or not collected is equivalent to cash that [the recipient] can keep in its account, rather than spending on its tax bill.").

[1306] *US – Softwood Lumber IV (AB)*, para. 91.

2. The USDOC Provided a Reasoned and Adequate Explanation for its Conclusion that the Energy Credit Provided by the Government of New Brunswick Conferred a Financial Contribution in the Form of Revenue Foregone

702. The New Brunswick Department of Energy and Resource Development ("DERD") and NB Power (a Crown corporation under the New Brunswick Electricity Act) supply electricity and administer the LIREPP pursuant to the Electricity from Renewable Resources Regulation.[1307] The USDOC found that the two main objectives of the LIREPP are: "(1) reach NB Power's mandate to supply 40 percent of its electricity from renewable sources by the year 2020; and (2) bring New Brunswick's large industrial enterprises' net electricity costs in line with the average cost of electricity in other Canadian provinces."[1308]

703. Under the LIREPP, NB Power provides energy credits (known as "Net LIREPP" or "Net LIREPP adjustment") that appear on the electricity bills of participating customers "as a credit applicable to their total electricity charges."[1309] JDIL, through its Lake Utopia Paper Division ("LUP"), received benefits under the LIREPP during the period of investigation through a Net LIREPP credit that appeared on the monthly electricity bills of Irving Paper Limited ("IPL"), a company with which JDIL is cross-owned.[1310] Government officials from NB Power and DERD "explained [that] 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."[1311]

> In other words, the NET LIREPP adjustment is the difference between the amount of renewable electricity that NB Power will purchase from the LIREPP participant (here, the participating Irving companies), and the amount of electricity that NB Power will sell to the LIREPP participant (again, the participating Irving companies). The net LIREPP adjustment is provided to participating Irving companies, including JDIL, as credits that are applied to their monthly electricity invoices. Thus, while the program does encompass, in part, the purchase of a good or

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[1307] Lumber Preliminary Decision Memorandum, p. 79 (Exhibit CAN-008).

[1308] 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)).

[1309] Lumber Preliminary Decision Memorandum, p. 80 (Exhibit CAN-008); GNB QR, p. NBI-20 (Exhibit CAN-259 (BCI)).

[1310] Lumber Preliminary Decision Memorandum, p. 80 (Exhibit CAN-008); Lumber Final I&D Memo, p. 214 (Exhibit CAN-010).

[1311] Lumber Final I&D Memo, p. 212 (Exhibit CAN-010).

> service, the credits reduce the participating Irving Companies' monthly electricity bills, [thereby comprising revenue foregone,] and it is the amount of the monthly credits that we have determined is the countervailable benefit ….[1312]

704. The USDOC further ascertained from the evidence that NB Power determines in advance the amount of the Net LIREPP credits it plans to provide the participating Irving Companies, because "the program guarantees that the Target Discount is reached each month by adjusting the volume of NB Power's purchases of electricity from the participating Irving Companies."[1313] The evidence of record demonstrated that "NB Power applies the 'NET LIREPP' credits to the monthly electricity bill issued to IPL, a cross-owned paper producer. IPL then transfers some of the NET LIREPP credit to JDIL's LUP."[1314] The evidence also demonstrated that: (1) "[t]he participating Irving companies are eligible to participate [in] the LIREPP program because of their ability to meet the program's requirements for producing eligible renewable energy, not because the companies produce any specific products (*i.e.*, pulp and paper)"; and (2) "the terms of the LIREPP agreements signed between the participating Irving companies and NB Power do not link the bestowal of NET LIREPP credits to any specific products."[1315]

705. The USDOC therefore provided a reasoned and adequate explanation for its conclusion that the LIREPP credits provided by NB Power constituted a financial contribution in the form of revenue forgone. The USDOC's conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

3. Canada Has Failed to Establish that the USDOC's Findings with Respect to the LIREPP are Inconsistent with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement

706. Canada argues that the USDOC erroneously found that the LIREPP constitutes a financial contribution to JDIL in the form of revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement. Canada contends that the USDOC should have found that the LIREPP constitutes a financial contribution to JDIL in the form of the provision of a good under Article 1.1(a)(1)(iii) of the SCM Agreement.[1316] According to Canada, the USDOC's failure to characterize this financial contribution as a provision of a good led to an incorrect finding by the

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[1312] Lumber Final I&D Memo, pp. 212-213 (Exhibit CAN-010).

[1313] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010).

[1314] Lumber Final I&D Memo, p. 214 (Exhibit CAN-010) (footnotes omitted). *See* Lumber Final I&D Memo, p. 215 (Exhibit CAN-010) ("the LUP is not a separate entity, but rather is a sub-division of JDIL, which produces subject merchandise" (footnote omitted)).

[1315] Lumber Final I&D Memo, p. 215 (Exhibit CAN-010) (footnote omitted).

[1316] Canada's First Written Submission, paras. 1109-1115.

USDOC with respect to the existence and amount of a benefit under Articles 1.1(b) and 14(d) of the SCM Agreement.[1317]

707. Canada's arguments are unavailing. The USDOC considered the design and operation of the LIREPP and properly determined that the LIREPP constitutes a financial contribution to JDIL in the form of revenue foregone. NB Power calculates a credit, which is applied to each participant's electricity bill, equivalent to "the amount of renewable energy that NB Power will purchase from the LIREPP participant … and the amount of electricity that NB Power will sell to the LIREPP participant."[1318] This credit is separate and apart from any purchases of renewable energy from the participants and simply reduces the participant's electricity payment to NB Power. The USDOC found that, "[u]nder the LIREPP program, NB Power first determines the credit it wants to give the large industrial customers, such as JDIL; NB Power then works backwards to build up to that credit through a series of renewable energy power purchases and sales and additional credits."[1319] The credit thereby decreases the amount of NB Power's revenue as a Crown corporation and is properly considered a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement in the form of government revenue foregone.

708. The USDOC did not, as Canada alleges,[1320] ignore "key components" of the LIREPP that purportedly frame this financial contribution as the provision of a good. The USDOC considered the principal characteristics of the financial contribution and found that the credit is fixed by the Electricity Act and is not exclusively for the purchase of electricity.[1321] As was also apparent to the USDOC from the evidence of record, the Electricity Act provides the calculation that shall be used to derive the percentage of target reduction[1322] and requires NB Power to "calculate the target reduction percent for the next fiscal year."[1323] So, although the LIREPP involves the purchase of electricity, the USDOC correctly recognized that the amount of electricity that NB Power purchases from the participating Irving companies is immaterial to the Net LIREPP adjustment credit that appears on the companies' electricity bills.[1324] "In other words, NB Power has determined in advance the amount of credits it wishes to give the

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[1317] Canada's First Written Submission, paras. 1116-1118.

[1318] Lumber Final I&D Memo, p. 212 (Exhibit CAN-010).

[1319] Lumber Preliminary Decision Memorandum, pp. 79-80 (Exhibit CAN-008) (footnote omitted).

[1320] Canada's First Written Submission, para. 1112.

[1321] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010).

[1322] JDIL QR (Mar. 13, 2017), Exhibit LIREPP-09, para. 3.4 (Exhibit CAN-448 (BCI)).

[1323] JDIL QR (Mar. 13, 2017), Exhibit LIREPP-09, para. 3.4 (Exhibit CAN-448 (BCI)).

[1324] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010). *See also* Lumber Final I&D Memo, p. 212 (Exhibit CAN-010) (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").

participating Irving companies."[1325] Therefore, because this credit is 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."[1326]

709. Because the USDOC properly found the LIREPP to be a financial contribution in the form of revenue foregone under Article 1.1(a)(ii) of the SCM Agreement, the USDOC appropriately decided not to analyze the benefit as if this financial contribution constituted a purchase of a good under Article 1.1(a)(iii) of the SCM Agreement. As shown, the Net LIREPP credit constituted a financial contribution pursuant to Article 1.1(a)(ii) because government revenue is foregone. The benefit under Article 1.1(b) for revenue foregone pursuant to Article 1.1(a)(ii) is the amount of revenue that is foregone or not collected.[1327]

710. In sum, NB Power ensures that participating companies receive the Net LIREPP credit by adjusting the volume of its purchases of electricity.[1328] The revenue foregone by New Brunswick as a result of this credit thus is the cash that participating Irving companies (including JDIL) did not spend on the electricity bill they received from NB Power.[1329] Consistent with Articles 1.1(b) and 14 of the SCM Agreement, the USDOC "treat[ed] the benefit from this program as the amount of Net LIREPP credits that are provided to participating Irving companies including JDIL to reduce their monthly electricity payments from NB Power, a Crown corporation."[1330] The USDOC's determination to treat the Net LIREPP credit as revenue foregone is one an unbiased and objective investigating authority could have reached. Therefore, Canada has failed to establish that the USDOC's benefit calculation for the LIREPP, which follows from its determination that the Net LIREPP credits are revenue foregone by the Government of New Brunswick, is inconsistent with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement.

[1325] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010).

[1326] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010).

[1327] *See US – Washing Machines (Panel),* para. 7.303 ("[C]redits constitute subsidies because government revenue is foregone or not collected. The benefit is the amount of revenue that is foregone or not collected.").

[1328] *See* JDIL Questionnaire Response (Mar. 13, 2017), Exhibit LIREPP-07 (Exhibit CAN-447) (the LIREPP guarantees that participating companies will always receive a credit pursuant to the LIREPP).

[1329] *See US – Washing Machines (Panel),* para. 7.303 (finding that the benefit related to revenue foregone "is equivalent to cash that [the recipient] can keep in its account, rather than spending on its … bill.").

[1330] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010).

C. The USDOC's Attribution of Electricity Subsidies to Producers of Softwood Lumber Is Not Inconsistent with Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994

711. Canada argues that the USDOC acted inconsistently with Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it attributed the provincial electricity subsidies to the producers under investigation.[1331] Canada's argument lacks merit.

712. Section V.C.1 sets out the correct legal framework for the Panel's consideration of Canada's claims. Section V.C.2 explains why the USDOC did not act inconsistently with the relevant provisions of the SCM Agreement and the GATT 1994 when it attributed the provincial electricity subsidies to producers of softwood lumber.

1. The Legal Framework Proposed by Canada Does Not Properly Interpret the Obligations Set Out in Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement

713. Canada acknowledges that "no provision of the SCM Agreement, in and of itself, sets how to correctly attribute subsidies," but Canada nonetheless argues that "several provisions, read together, set out how benefit may be attributed to a particular product."[1332] Canada then misreads relevant provisions of the GATT 1994 and the SCM Agreement, and embellishes statements made in prior panel and Appellate Body reports, to argue that the Appellate Body has interpreted Article VI:3 of the GATT 1994 "as restricting the application of countervailing duties to subsidies that have been granted on the manufacture, production or export of a particular product."[1333] As explained below, Canada's legal analysis does not properly interpret the obligations set out in Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement.

714. Articles II:2 and VI:3 of the GATT 1994 affirm Members' authority to levy duties that "offset" subsidies, subject to the requirement that they not exceed the amount of subsidy found to exist.[1334] Article 10 of the SCM Agreement requires, in part, that Members take all necessary

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[1331] Panel Request, p. 3 (C.7).

[1332] Canada's First Written Submission, para. 1121.

[1333] Canada's First Written Submission, para. 1123 (footnote omitted).

[1334] Article II:2(b) of the GATT 1994 provides that "[n]othing in this Article shall prevent any contracting party from imposing at any time on the importation of any product … any anti-dumping or countervailing duty applied consistently with the provisions of Article VI." Article VI:3 provides:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or

steps to ensure that "imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement."[1335] Footnote 36 to Article 10 defines the term "countervailing duty" in essentially the same language as Article VI:3 of the GATT 1994 "to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994."[1336]

715. Articles II:2(b) and VI.3 of the GATT 1994 and Article 10 of the SCM Agreement recognize the varied ways in which subsidies are conferred and the authority of Members to offset them. Members may impose countervailing duties to offset subsidies that are "bestowed" or "granted" either "directly or indirectly."[1337] For instance, Members may counteract "indirect" subsidization by imposing duties on products that benefit from "upstream" subsidies conferred on other companies and products.[1338] Countervailing duties may be imposed to offset subsidies imposed on "any merchandise" (*i.e.*, without restriction as to type of product).[1339]

716. Article 19.4 of the SCM Agreement affirms the "quantitative ceiling" on the collection of countervailing duties set by Article VI:3 of the GATT 1994.[1340] The first clause of Article 19.4 makes clear that countervailing duties cannot be levied "in excess of" the "amount of the subsidy found to exist" by the investigating authority.[1341] The term "amount" is defined as "something quantitative, a number, 'a quantity or sum viewed as the total reached.'"[1342] A Member cannot

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> export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty, or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

[1335] SCM Agreement, Art. 10.

[1336] SCM Agreement, Art. 10, footnote 36.

[1337] GATT 1994, Art. VI:3.

[1338] *See US – Softwood Lumber IV (AB)*, para. 140.

[1339] GATT 1994, Art. VI:3.

[1340] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 554 ("Article 19.4 thus places a quantitative ceiling on the amount of a countervailing duty, which may not exceed the amount of the subsidization.").

[1341] Article 19.4 reads as follows: "No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." Footnote 51 of the SCM Agreement, which accompanies Article 19.4, indicates that "'levy' shall mean the definitive or final legal assessment or collection of a duty or tax."

[1342] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 552 (quoting 1 *Shorter Oxford English Dictionary* 71 (6th ed. 2007)).

levy countervailing duties greater than the quantity of subsidy found to have been granted on the manufacture, production, or export of the product in question.[1343] As such, a Member cannot collect countervailing duties on subsidies alleged but not demonstrated, or levy punitive duties.

717. The second clause of Article 19.4 calls for a calculation "in terms of subsidization per unit of the subsidized and exported product." The Appellate Body has explained that "the term 'per unit' indicates that an investigating authority is permitted to calculate the rate of subsidization 'on an aggregate basis' *i.e.* by dividing the total amount of the subsidy by the total sales value of the product to which the subsidy is attributable."[1344] The "subsidization" – in this context, the "amount of subsidy found to exist" by the investigating authority – would be expressed as a ratio, reflecting the amount of subsidy attributed to each "unit" of product.[1345] This provision suggests that both the duty and the amount of subsidy should be calculated on a per unit basis and compared so that the countervailing duty levied on any unit of imported product does not exceed the amount of subsidization attributable to that unit of product. The second clause thus reinforces the quantitative ceiling articulated in the first clause.

718. The Appellate Body has explained that further inquiry into whether a financial contribution is "tied" to a certain product is required, but neither the GATT 1994 nor the SCM Agreement limit the imposition of countervailing duties only to those countervailable subsidies directly related to, or "tied" to, the product under investigation.[1346] In *US – Washing Machines*, the Appellate Body stated that the "appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product."[1347] Nonetheless, "[b]ased on this assessment, a subsidy that does not restrict the recipient's use of the proceeds of the financial contribution may … be

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[1343] *See US – Upland Cotton (Panel)*, para. 7.1176 ("[T]he general rationale of a unilateral countervailing duty investigation is to determine whether or not a countervailable subsidy exists and, if so, to ensure that any countervailing duty levied on any import is not in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of subsidized and exported product. Logically, should a Member make an affirmative determination that a countervailable subsidy exists, these provisions in Part V necessitate calculation of the amount of the subsidy before a countervailing duty may be imposed.").

[1344] *US – Washing Machines (AB)*, para. 5.267.

[1345] *See US – Upland Cotton (Panel)*, para. 7.1176 (Article 19.4 "require[s] the calculation of [the amount of the subsidy] to be performed in a certain way: 'in terms of subsidization per unit of the subsidized and exported product.'").

[1346] *See US – Softwood Lumber IV (AB)*, para. 140 ("The phrase 'subsid[ies] bestowed … *indirectly*', as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*.").

[1347] *US – Washing Machines (AB)*, para. 5.273.

found to be tied to a particular product if it induces the recipient to engage in activities connected to that product."[1348]

719. The GATT 1994 and SCM Agreement thus both contemplate the application of countervailing duties for subsidies that may benefit more than the product under investigation. The final phrase of Article VI:3 makes clear that the countervailing duty should offset subsidization of "any product."[1349] Article VI:3 of the GATT 1994 and footnote 36 to Article 10 of the SCM Agreement refer to a subsidy bestowed "indirectly," suggesting that some subsidies could benefit more than one product or activity of a recipient. A Member may find that subsidies are essentially not tied to a particular product when calculating the rate of subsidization and divide the benefit received from the subsidy by the company's total sales value.

720. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not dictate precisely how an investigating authority should allocate the numerator to the appropriate denominator when calculating countervailing duty ratios.[1350] In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, a Member may examine a subsidy and determine that the benefits received from the countervailable subsidy are spread across all of the products manufactured by the company and cannot be linked to a particular product. Under such circumstances, it is appropriate to treat that subsidy as essentially "untied" and to divide the benefit by the company's total sales for purpose of attributing the benefits to the company. This is precisely the exercise contemplated by the Appellate Body when it indicated in *US – Washing Machines* that the "correct calculation of a countervailing duty rate requires matching the elements taken into account in the numerator with the elements taken into account in the denominator."[1351] A subsidy that benefits all products would accordingly be attributed to all sales.

721. Therefore, contrary to Canada's argument, the matching exercise does not require the investigating authority to trace subsidy benefits from receipt to the moment of actual use. Instead, as the Appellate Body has observed, "the appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product."[1352]

[1348] *US – Washing Machines (AB)*, para. 5.273.

[1349] Article VI:3 permits application of a countervailing duty to offset "any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any product" (underline added).

[1350] *See US – Washing Machines (AB)*, para. 5.269 ("Within these confines, the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, and does not specify explicitly which elements should be taken into account in the numerator and the denominator.").

[1351] *US – Washing Machines (AB)*, para. 5.267 (internal citations omitted).

[1352] *US – Washing Machines (AB)*, para. 5.273.

2. The USDOC Properly Attributed the Provincial Subsidies Associated with Electricity to All Products Manufactured by the Respondents

722. The USDOC's determinations that subsidies provided by British Columbia, Quebec, and New Brunswick are attributable to the production of softwood lumber by respondents in their respective provinces are not inconsistent with WTO obligations. The USDOC considered the design, structure, and operation of the subsidies at issue and determined that each provincial subsidy at the point of bestowal was not connected to the production or sale of a specific product. The USDOC found that the subsidies were provided to the overall operations of the respondent companies and therefore attributable to the sales of all products produced by these companies, including softwood lumber.

a. BC Hydro's Purchase of Electricity from Tolko and West Fraser for More Than Adequate Remuneration Benefited the Overall Operations of These Companies, Including Their Production of Softwood Lumber

723. Canada argues that the USDOC improperly attributed the benefits conferred by the Government of British Columbia because: (1) "the electricity that Tolko and West Fraser sell to BC Hydro are not input products into their softwood lumber production";[1353] and (2) the EPAs were expected to increase electricity generation[1354] and conditioned on the sales of biomass-based electricity.[1355] According to Canada, this means "that Tolko's and West Fraser's sales of electricity to BC Hydro were attributable to the production of electricity, and therefore cannot be attributed to the production of softwood lumber."[1356]

724. The USDOC correctly determined that the subsidy provided by British Columbia in respect of BC Hydro's purchase of electricity from Tolko and West Fraser is properly attributed over all the products manufactured by these companies. Electricity is an input utilized in every aspect of Tolko's and West Fraser's manufacturing operations, including the production of softwood lumber. "Electricity benefits the production and manufacture of the subject merchandise since electricity is required to operate the production facilities of the softwood lumber producer."[1357] British Columbia conferred a benefit on Tolko and on West Fraser during the period of investigation pursuant to their EPAs with BC Hydro, because BC Hydro purchased electricity from these companies under each of their EPAs for more than adequate

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[1353] Canada's First Written Submission, para. 1130.

[1354] Canada's First Written Submission, para. 1131.

[1355] Canada's First Written Submission, para. 1132.

[1356] Canada's First Written Submission, paras. 1129.

[1357] Lumber Final I&D Memo, p. 161 (Exhibit CAN-010).

remuneration.[1358] The design, structure, and operation of the EPAs, as well as the bestowal of payments pursuant to the agreements, is not connected to, or conditioned on, the production or sale by Tolko and West Fraser of a particular product or products.

725. For example, the evidence reviewed by the USDOC specifically demonstrated that BC Hydro designed and implemented the EPAs to advance BC Hydro's goals:

- "BC Hydro employs long-term planning in its IRP [(Integrated Resource Plan)] to ensure it will have sufficient resources to serve the future power demands of customers."[1359]

- "Through its EPAs with IPPs [(*i.e.*, independent power producers like Tolko and West Fraser)], BC Hydro secures long-term supply with long-term price certainty, avoids market price volatility, and avoids project development risks."[1360]

- "Long-term EPAs limit BC Hydro's risk of spot-market price volatility and not being able to obtain adequate transmission capacity for energy deliveries to the B.C. border."[1361]

- "The energy supplied to the BC Hydro system by IPPs is treated the same as energy supplied to the system by BC-Hydro-owned generation resources. A customer's load simply draws energy from the BC Hydro system, and BC Hydro charges the customer for the energy consumed at the applicable BCUC-approved rate. BC Hydro's electricity sales do not distinguish between electricity supply source (*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. IPP)."[1362]

Therefore, contrary to Canada's argument, the electricity that Tolko and West Fraser sold to BC Hydro during the period of investigation could very well be an input in their production of softwood lumber. Further, BC Hydro did not implement the EPAs simply to induce independent power producers to generate biomass-based electricity, but rather to advance BC Hydro's all-encompassing goal of securing a long-term supply of electricity at stable prices. For this reason,

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[1358] *See* section VI.A.2.

[1359] GBC QR, BC Volume II, p. BC-11-31 (Exhibit CAN-395).

[1360] GBC QR, BC Volume II, p. BC-11-33 (Exhibit CAN-395).

[1361] GBC QR, BC Volume II, p. BC-11-34 (Exhibit CAN-395).

[1362] GBC QR, BC Volume II, p. BC-11-42 (Exhibit CAN-395).

the USDOC determined that Tolko's and West Fraser's receipt of payments from BC Hydro under the EPAs was not connected to, or conditioned on, the production or sale of a specific product.[1363]

726. In sum, Tolko and West Fraser sold an input (electricity) used in their production processes (including the production of softwood lumber) to BC Hydro. They received more revenue from BC Hydro than they otherwise should have earned for this input. The revenue earned for this input benefited Tolko's and West Fraser's overall operations. As a result, the USDOC correctly attributed this benefit to all products manufactured by Tolko and West Fraser, including softwood lumber.[1364]

b. Hydro-Quebec's Purchase of Electricity for More Than Adequate Remuneration Benefited the Overall Operations of Resolute, Including its Production of Softwood Lumber

727. Canada argues that the USDOC's attribution determination with respect to the Government of Quebec's PAE 2011-01 program is inconsistent with the SCM Agreement because the USDOC did not conduct a proper attribution analysis to determine whether this subsidy was provided to mills that did not, and could not, produce softwood lumber.[1365]

728. The USDOC correctly determined that the subsidy provided by the Government of Quebec for the provision of electricity is properly attributed to all products manufactured by Resolute. Electricity is an input utilized in every aspect of Resolute's manufacturing operations, including the production of softwood lumber. Quebec conferred a benefit on Resolute during the period of investigation because Hydro-Quebec purchased electricity from this company for more than adequate remuneration.[1366] The design, structure, and operation of the PAE 2011-01, as well as the bestowal of payments pursuant to the PAE 2011-01, is not connected to, or conditioned on, the production by Resolute of a particular product or products.

729. For example, the evidence reviewed by the USDOC specifically demonstrated that Hydro-Quebec designed and implemented the PAE 2011-01 to advance Hydro-Quebec's goals:

[1363] *See* Lumber Final I&D Memo, pp. 161-162 (Exhibit CAN-010).

[1364] Lumber Final I&D Memo, p. 162 (Exhibit CAN-010). Additionally, with respect to Tolko's turndown payments, the USDOC determined that Tolko sells an input and receives more revenue that it would have otherwise earned. Section V.A.3.a. *See also* Lumber Final I&D Memo, p. 159 (Exhibit CAN-010). The USDOC found that "the revenue earned by Tolko on its electricity sales benefits the overall operations of the company and, therefore … attributed the benefit over all products produced by the company." Lumber Final I&D Memo, p. 162 (Exhibit CAN-010).

[1365] Canada's First Written Submission, paras. 1137-1140.

[1366] *See* section VI.A.3.

- "The fundamental purposes of The *Régie* [(*i.e.*, Québec's energy regulator)] is to ensure adequate power supply for all residents of Québec, especially during peak usage periods brought on by Québec's harsh winters."[1367]

- "Hydro-Québec Distribution is responsible for maintaining the reliability of the distribution systems and the security of the Québec market's electricity supply."[1368]

- "The *Régie* is responsible for approving the Electricity Supply Plan submitted by Hydro-Québec Distribution. Among other things, this plan presents a forecast of Québec market requirements for the next ten years, as well as the types of contracts that Hydro-Québec Distribution intends to sign in order to meet demand above 165 TWh."[1369]

- "Since 2002, Hydro-Québec Distribution has used various mechanisms … to ensure adequate supply of additional electricity … [including] the Power Purchase Program 2011-01 (PAE 2011-01) …."

- "Any prospective supplier from any industry or sector that is able to show eligibility for the PAE 2011-01 was able to submit a bid. If the PAE 2011-01 requirements were met and the target quantity or program termination date had not yet been reached, the bid would be accepted and a contract executed."[1370]

Therefore, contrary to Canada's arguments, the electricity that Resolute sold to Hydro-Quebec during the period of investigation was not tied to the production of a good other than the product under investigation. As the USDOC explained, "there is no information on the record that establishes that, at the time of approval or bestowal, the benefits from the sale of electricity under PAE 2011-11 to Hydro-Québec are tied to the production of paper."[1371]

730. Canada's reliance on the panel report for *US – Supercalendered Paper* as support for its position[1372] is misplaced. The facts in *US – Supercalendered Paper* differ from the evidence of

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[1367] GOQ QR, p. QC-BIO-40 (Exhibit CAN-424 (BCI)).

[1368] GOQ QR, p. QC-BIO-53 (Exhibit CAN-424 (BCI)).

[1369] GOQ QR, p. QC-BIO-55 (Exhibit CAN-424 (BCI)).

[1370] GOQ QR, p. QC-BIO-65 (Exhibit CAN-424 (BCI)).

[1371] Lumber Final I&D Memo, p. 170 (Exhibit CAN-010).

[1372] Canada's First Written Submission, paras. 1135-1136. The panel report in *US – Supercalendered Paper* has not yet been adopted by the DSB.

record in this investigation. In *US – Supercalendered Paper*, the panel concluded that the USDOC had found that certain subsidies received by Resolute were provided for specific projects at specific mills.[1373] Here, the USDOC found that "[t]he GOQ reported that the PAE 2011-01 is aimed at the purchase of 300 MW of energy from forest biomass cogeneration power plants.… [T]hus … there is no record evidence establishing that the sale of electricity under PAE 2011-01 is tied solely to producers of non-subject merchandise such as pulp and paper mills."[1374] As the panel noted in *US – Supercalendered Paper*, "[t]here may often be circumstances where it is reasonable for an investigating authority to attribute subsidies provided to one part of a corporate entity to products produced by other parts of that entity."[1375]

731. In sum, Resolute sold an input (electricity) used in its production processes (including the production of softwood lumber) to Hydro-Quebec. Resolute received more revenue from Hydro-Quebec than it otherwise should have earned for this input. The revenue earned for this input benefited Resolute's overall operations. As a result, the USDOC correctly attributed this benefit to all products manufactured by Resolute, including softwood lumber.[1376]

c. NB Power's Net LIREPP Credits Benefited the Overall Operations of the Irving Companies, Including JDIL's Production of Softwood Lumber

732. Canada argues that the USDOC erred in countervailing the benefit provided by the LIREPP because the Government of New Brunswick tied Net LIREPP credits to JDIL's production of paper (not its production of softwood lumber).[1377]

733. The USDOC correctly determined that the subsidy provided by the Government of New Brunswick reduced the Irving companies' electricity bills and attributed this revenue foregone over all products manufactured by the benefit recipients. Electricity is an input utilized in every aspect of the Irving companies' manufacturing operations, including JDIL's production of softwood lumber. New Brunswick conferred a benefit on the Irving companies during the period of investigation because NB Power credited participating Irving companies including JDIL, which reduced their payments to NB Power.[1378] The design, structure, and operation of the LIREPP, as well as the bestowal of Net LIREPP credits, is not connected to, or conditioned on, the production or sale by the Irving companies of a particular product or products. As the USDOC determined:

[1373] *See US – Supercalendered Paper (Panel)*, para. 7.233.

[1374] Lumber Final I&D Memo, p. 170 (Exhibit CAN-010).

[1375] *US – Supercalendered Paper (Panel)*, para. 7.235.

[1376] Lumber Final I&D Memo, pp. 169-170 (Exhibit CAN-010).

[1377] Canada's First Written Submission, paras. 1141-1149.

[1378] *See* section VI.B.

> The LIREPP's lack of tie to pulp and paper products is evident when the program is contrasted with programs which we have found to be tied to pulp and paper. For example, in the *SC Paper from Canada* investigation and in the *Preliminary Determination*, we found that the FPPGTP program is tied to pulp and paper, because the grant applicant's guide clearly states that the intent of the program was to improve the environmental performance of Canada's pulp and paper industry, and credits were only to be granted to Canadian pulp and paper companies. Additionally, in order to be eligible for the program, the projects must be capital investments at Canadian pulp and paper mills that are directly related to the mill's industrial process, and the project location must be a pulp and paper mill in Canada. Further, costs associated with lumber products are ineligible for the program. In contrast, the LIREPP program is available to large industrial companies in any industry that meets the eligibility requirements. The program was not designed to assist specific products. The GNB does not link the bestowal of the LIREPP credit to any specific industry or products. Further, the LIREPP Agreements signed between the participating Irving companies and NB Power does not place any requirement on the Irving companies to effectuate a transfer of the credit between IPL and JDIL, nor does it speak to the Irving companies' use of the LIREPP credit once it is applied to IPL's electricity bill.[1379]

734. Canada's reliance on the panel report in *US – Supercalendered Paper* as support for its position[1380] is misplaced. As the USDOC explained, unlike the program examined in *US – Supercalendered Paper*, the LIREPP program was: (1) available to large industrial companies in any industry that met the program's requirements; (2) not designed to assist specific products; and (3) did not require the Irving companies to transfer the Net LIREPP credit to JDIL, nor dictate the use of this credit.[1381] New Brunswick also did not link the bestowal of the LIREPP credit to any specific industry or products.[1382] The facts reviewed by the panel in *US – Supercalendered Paper* therefore differ from the facts here.

[1379] Lumber Final I&D Memo, p. 215 (Exhibit CAN-010) (underline added).

[1380] Canada's First Written Submission, para. 1146. The panel report in *US – Supercalendered Paper* has not yet been adopted by the DSB.

[1381] Lumber Final I&D Memo, p. 215 (Exhibit CAN-010).

[1382] Lumber Final I&D Memo, p. 215 (Exhibit CAN-010).

735. Further, as the panel in *US – Supercalendered Paper* recognized, "[t]here may often be circumstances where it is reasonable for an investigating authority to attribute subsidies provided to one part of a corporate entity to products produced by other parts of that entity."[1383] JDIL is incorporated and registered in New Brunswick and files its taxes as one corporate entity, inclusive of its subdivisions.[1384] LUP, a subdivision of JDIL, is assigned some of the Net LIREPP credit in proportion to its electricity consumption.[1385] These credits directly benefited JDIL. Therefore, the record evidence confirms the USDOC's determination that JDIL, as a corporate entity, benefited from the Net LIREPP credits.

736. In sum, the participating Irving companies provided to NB Power an input (electricity) used in the companies' production processes (including the production of softwood lumber). These companies received a credit from New Brunswick that reduced their monthly electricity bills. The credit received for this input benefited the participating Irving companies' overall operations.[1386] As a result, the USDOC correctly attributed this benefit over all products, including JDIL's production of softwood lumber.[1387]

VII. THE USDOC'S DETERMINATION TO TREAT THE ACCELERATED CAPITAL COST ALLOWANCE TAX PROGRAM AS *DE JURE* SPECIFIC IS NOT INCONSISTENT WITH ARTICLES 2.1(A) AND 2.1(B) OF THE SCM AGREEMENT

737. Canada alleges that the Accelerated Capital Cost Allowance tax benefit program allowing increased deductions for the capital cost of Class 29 assets for the producers under investigation ("ACCA Class 29 assets program") was not *de jure* specific.[1388] Canada argues that "Commerce's specificity finding is inconsistent with the ordinary meaning of Articles 2.1(a) and 2.1(b) of the SCM Agreement and ignores the manner in which Class 29 operates."[1389]

738. The USDOC's specificity finding is not inconsistent with Articles 2.1(a) and 2.1(b) of the SCM Agreement and accords with the Appellate Body's understanding of the ordinary meanings of the relevant terms of those provisions. The tax benefit for Class 29 assets provided by

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[1383] *US – Supercalendered Paper (Panel Report)*, para. 7.235.

[1384] Lumber Final I&D Memo, pp. 215-216 (Exhibit CAN-010).

[1385] JDIL QR (Mar. 15, 2017), Exhibit LIREPP-01, p. 3 (Exhibit CAN-451 (BCI)); Lumber Final I&D Memo, p. 211 (Exhibit CAN-010) (finding that IPL transfers Net LIREPP credits to JDIL).

[1386] *See* GNB QR, Exhibit NB-LIREPP-1, p. 12 (Exhibit CAN-450 (BCI)) (participants produce electricity as part of their participation in the program and the fact that "[p]resently, the only industry that qualifies is the pulp and paper industry" has no bearing on whether the LIREPP itself is tied *per se* to pulp and paper).

[1387] Lumber Final I&D Memo, pp. 215-216 (Exhibit CAN-010).

[1388] Panel Request, p. 3 (C.14).

[1389] Canada's First Written Submission, para. 1150. *See also* Panel Request, p. 3 (C.14).

Canada's *Income Tax Act* and *Income Tax Regulations* explicitly excludes certain industries from benefitting from this deduction.[1390] As such, the USDOC determined that access to the ACCA Class 29 assets program was *de jure* specific because the subsidy was explicitly limited to certain enterprises or industries under Canada's *Income Tax Act* and *Income Tax Regulations*.[1391] The USDOC also found that access to the subsidy was not based on objective criteria and conditions because the ACCA Class 29 assets program favored certain enterprises over others.[1392] The Panel should reject Canada's claim and find that the USDOC's specificity finding was not inconsistent with Articles 2.1(a) and 2.1(b) of the SCM Agreement.

739. Section VII.A below summarizes the proper legal framework for Article 2.1 of the SCM Agreement. Section VII.B explains how the investigatory record demonstrates that the USDOC evaluated the evidence in an unbiased and objective manner and provided a reasoned and adequate explanation for its conclusion that access to the ACCA Class 29 assets program was *de jure* specific as provided for under Article 2.1 of the SCM Agreement. Section VII.C demonstrates that Canada has failed to demonstrate that the United States acted inconsistently with its obligations under Article 2.1(a) or Article 2.1(b) of the SCM Agreement.

A. The Proper Legal Framework for Understanding the Obligations Set Out in Article 2.1 of the SCM Agreement

740. Article 1.2 of the SCM Agreement provides that a subsidy may be subject to countervailable measures "only if a subsidy is specific in accordance with the provisions of Article 2."[1393]

741. Article 2.1 of the SCM Agreement sets out guiding principles for determining whether a subsidy is "specific" to "an enterprise, industry, or group of enterprises or industries," referred to in the SCM Agreement as "certain enterprises."[1394] The term "certain enterprises" refers to "a single enterprise or industry or a class of enterprises or industries that are known and particularized."[1395] This term involves "a certain amount of indeterminacy at the edges," and a determination of whether a group of enterprises or industries constitute "certain enterprises" can only be made on a case-by-case basis.[1396] Although the industries and enterprises must be "known and particularized," they need not be "explicitly identified" for the subsidy to be

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[1390] Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008).

[1391] Lumber Final I&D Memo, p. 200 (Exhibit CAN-010). *See also* Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008).

[1392] Lumber Final I&D Memo, p. 199 (Exhibit CAN-010).

[1393] SCM Agreement, Art. 1.2.

[1394] SCM Agreement, Art. 2.1. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 364.

[1395] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

[1396] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

considered *de jure* specific.[1397] The "central inquiry" under Article 2.1 is to determine "whether a subsidy is specific to 'certain enterprises' within the jurisdiction of the granting authority."[1398]

742. Subparagraphs (a) through (c) of Article 2.1 articulate principles that inform this central inquiry. Article 2.1(a) identifies circumstances in which a subsidy is *de jure* specific (*i.e.*, where limitations on eligibility explicitly favor certain enterprises).[1399] Article 2.1(b) identifies circumstances in which a subsidy shall be regarded as non-specific (*i.e.*, where "objective criteria or conditions" exist that "guard against selective eligibility").[1400] Objective criteria or conditions are described in footnote 2 to Article 2.1(b) as "criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise."[1401] Subparagraphs (a) and (b) both "direct scrutiny to the eligibility requirements imposed by the granting authority or the legislation pursuant to which the granting authority operates."[1402]

743. Article 2.1(c) provides that, "notwithstanding any appearance of non-specificity" resulting from application of Articles 2.1(a) and 2.1(b), a subsidy may nevertheless be "in fact" specific.[1403] Application of Article 2.1(c) is a fact-driven, context-dependent exercise. By

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[1397] *US – Carbon Steel (India) (AB)*, para. 4.365. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

[1398] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.

[1399] SCM Agreement, Article 2.1(a) provides as follows: "Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific." *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.

[1400] SCM Agreement, Article 2.1(b) provides as follows:

> Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

Footnote omitted. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.

[1401] SCM Agreement, Art. 2.1(b), footnote 2.

[1402] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.

[1403] SCM Agreement, Article 2.1(c) provides as follows:

> If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the

providing for a *de facto* specificity analysis, Article 2.1(c) "reflects the diversity of facts and circumstances that investigating authorities may be confronted with when analysing subsidies covered by the SCM Agreement."[1404]

744. The Appellate Body has found that the principles set out in subparagraphs (a) though (c) of Article 2.1 are not rules.[1405] The principles should be applied concurrently, and although Article 2.1 suggests that the specificity analysis ordinarily will proceed sequentially, it is not necessary that it do so.[1406] Nothing in the SCM Agreement indicates that an investigating authority must examine whether a subsidy is specific under each subparagraph of Article 2.1 in every case. When the evidence under consideration unequivocally indicates specificity or non-specificity under one subparagraph of Article 2.1, further consideration under other subparagraphs of Article 2.1 may be unnecessary.[1407]

745. Where an investigating authority applies these principles and "clearly substantiates, on the basis of positive evidence, that use of a subsidy is limited to 'certain enterprises,'"[1408] the determination of specificity made by that authority is not inconsistent with the requirements of Article 2.1 of the SCM Agreement.

B. The USDOC's Specificity Finding Is Not Inconsistent with Article 2.1 of the SCM Agreement

746. Class 29 assets acquired by a taxpayer after March 18, 2007, but before 2016, can be fully depreciated under the ACCA Class 29 assets program at an accelerated rate over three years, which allows the taxpayer to claim a larger-than-normal deduction to its taxable income

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> decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

[1404] *US – Countervailing Measures (China) (Panel)*, para. 7.240.

[1405] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366. *See also US – Carbon Steel (India) (Panel)*, para. 7.118.

[1406] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 796 (explaining that "the language of Article 2.1(c) . . . indicates that the application of this provision will *normally* follow the application of the two subparagraphs of Article 2.1" (italics added)).

[1407] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371. The Appellate Body also "caution[ed] against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, *when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case*," implying that when the potential for application of other subparagraphs is *not warranted*, Article 2.1 does not require such an examination. *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371 (italics added). *See also US – Carbon Steel (India) (Panel)*, para. 7.119; *EC – Large Civil Aircraft (AB)*, para. 945; *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 754.

[1408] SCM Agreement, Art. 2.4.

based on the amount of depreciation.[1409] The evidence of record in this investigation indicated that Class 29 assets are expressly limited to machinery and equipment used in manufacturing and processing operations.[1410] Class 29 assets can be depreciated at a rate of 50 percent under the ACCA program.[1411] The tax deduction for the capital cost of property is subject to the "half-year rule," which limits a taxpayer's deduction to half the amount otherwise deductible in the tax year that the asset is first available for use.[1412] In the span of three years, a taxpayer may claim a deduction for Class 29 assets of up to 25 percent in year one (half of 50 percent pursuant to the half-year rule), up to 50 percent in year two, and the remaining 25 percent in year three.[1413] The USDOC found that, in the absence of the ACCA Class 29 Assets program, Class 29 assets "would otherwise have been included in Class 43, which is subject to normal, *i.e.*, nonaccelerated, depreciation."[1414]

747. Based on the evidence collected during the investigation, the USDOC concluded that the ACCA Class 29 assets program excludes enterprises and industries engaged in numerous activities from eligibility for a tax deduction under this program.[1415] The USDOC found that the ACCA for Class 29 assets program excludes industries engaged in:

> (a) farming or fishing; (b) logging; (c) construction; (d) operating an oil or gas well or extracting petroleum or natural gas from a natural accumulation thereof; (e) extracting minerals from a mineral resource; (f) processing of (i) ore, other than iron ore or tar sands ore, from a mineral resource to any stage that is not beyond the prime metal stage or its equivalent, (ii) iron ore from a mineral resource to any stage that is not beyond the pellet stage or its

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[1409] Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008); Lumber Final I&D Memo, 197 (Exhibit CAN-010). *See also* GOC QR (Mar. 13, 2017) ("GOC QR"), p. GOC-CRA-45 (Exhibit CAN-465). Canada's *Income Tax Act* provides for certain deductions from taxable income for the capital cost of property. *Lumber Preliminary Decision Memorandum*, p. 72 (Exhibit CAN-008); *Lumber Final I&D Memo*, p. 197 (Exhibit CAN-010). *See also* GOC QR, Exhibit GOC-CRA-ACCA-1 (*Income Tax Act*, para. 20(1)(a)) (Exhibit CAN-466). The *Income Tax Regulations* specifically provide that deductions from taxable income for Class 29 assets are permissible under the *Income Tax Act*. GOC QR, Exhibit GOC-CRA-ACCA-1 (*Income Tax Regulations*, para. 1100(1)(ta)) (Exhibit CAN-466).

[1410] Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008); Lumber Final I&D Memo, p. 197 (Exhibit CAN-010). *See also* GOC QR, p. GOC-CRA-45 (Exhibit CAN-465).

[1411] GOC QR, p. GOC-CRA-45 (Exhibit CAN-465).

[1412] GOC QR, p. GOC-CRA-45 (Exhibit CAN-465).

[1413] GOC QR, Exhibit GOC-CRA-ACCA-1 (*Income Tax Regulations*, para. 1100(1)(ta)) (Exhibit CAN-466).

[1414] Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008). *See also* GOC QR, Exhibit GOC-CRA-ACCA-4 (*ACCA Regulations*) (Exhibit USA-016).

[1415] Lumber Final I&D Memo, pp. 197-200 (Exhibit CAN-010); Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008).

> equivalent, or (iii) tar sands ore from a mineral resource to any stage that is not beyond the crude oil stage or its equivalent; (g) producing industrial materials; (h) producing or processing electrical energy or steam, for sale; (i) processing a natural gas as part of the business of selling or distributing gas in the course of operating a public utility; (j) processing heavy crude oil recovered from a natural reservoir in Canada to a stage that is not beyond the crude oil stage or its equivalent; or (k) Canadian field processing.[1416]

As a result, the evidence of record demonstrated that "access to the subsidy is expressly limited to non-excluded enterprises and industries."[1417]

748. The USDOC also found that the ACCA Class 29 assets program is not based on objective criteria because eligibility for the program favors one enterprise over another.[1418] Based on the evidence, the USDOC concluded that Canada's *Income Tax Regulations* "favors enterprises or industries that are engaged in qualifying manufacturing and processing activities, over enterprises or industries that are not."[1419] As a result, the USDOC determined "that the ACCA for Class 29 Assets program is *de jure* specific … because as a matter of law, eligibility for this tax program is expressly limited to certain enterprises or industries."[1420] The USDOC's conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

C. Canada Fails to Demonstrate that the USDOC's Specificity Finding Is Inconsistent with Article 2.1 of the SCM Agreement

749. Canada puts forward a plethora of arguments in an effort to undermine the USDOC's well-reasoned determination that the ACCA Class 29 assets program is *de jure* specific.[1421] We address each argument below and explain that Canada has failed to demonstrate that the USDOC's *de jure* specificity finding is inconsistent with Articles 2.1(a) and 2.1(b) of the SCM Agreement.

[1416] Lumber Final I&D Memo, p. 197 (Exhibit CAN-010), quoting GOC QR, Exhibit GOC-CRA-ACCA-1 (*Income Tax Regulations*, Definitions). *See* Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008).

[1417] Lumber Final I&D Memo, p. 198 (Exhibit CAN-010).

[1418] Lumber Final I&D Memo, pp. 198-199 (Exhibit CAN-010).

[1419] Lumber Final I&D Memo, p. 199 (Exhibit CAN-010).

[1420] Lumber Final I&D Memo, p. 200 (Exhibit CAN-010).

[1421] Canada's First Written Submission, paras. 1150-1174.

1. Explicit Activity-Based Exclusions Rendered the ACCA Class 29 Assets Program *De Jure* Specific

750. Canada argues that the activity-based exclusion under the *Income Tax Act* and *Income Tax Regulations* should not be treated as an explicit limitation to certain enterprises.[1422] Canada asserts that the subsidy is not limited to "certain" enterprises or industries because the USDOC failed to show that the limitation on access is to "known and particularized" enterprises or industries.[1423] In so arguing, Canada misunderstands the plain text of Article 2.1(a) of the SCM Agreement. This text states that a subsidy shall be specific where the granting authority "explicitly limits access to a subsidy to certain enterprises." "In its adverbial form, the term 'explicitly' signifies '[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested; unambiguous; clear',"[1424] and in this clause it modifies "limits." Article 2.1(a) thus identifies a situation in which the granting authority limits in a clear and detailed manner the access to a subsidy to certain enterprises. Canada simply misreads the text as if the "certain enterprises" have to be identified "explicitly."

751. Further, contrary to Canada's argument, Article 2.1(a) does not require explicit identification of the "certain enterprises" that have access to a subsidy. As the Appellate Body has explained, "the relevant enterprises must be 'known and particularized,' but not necessarily 'explicitly identified.'"[1425] A subsidy can be *de jure* specific without explicitly referencing eligible industries or enterprises by name.

752. Limiting access to a subsidy based on activity satisfies the criteria for *de jure* specificity. The chapeau of Article 2.1 defines the term "certain enterprises" as "an enterprise or industry or group of enterprises or industries."[1426] The Appellate Body has observed that the term "enterprise" means "[a] business firm, a company," and the term "industry" means "[a] particular form or branch of productive labour; a trade, a manufacture."[1427] The Appellate Body has also observed that the term "business" as in "business firm" encompasses "[t]rade and all activity relating to it … ; commercial transactions, engagements, and undertakings regarded collectively."[1428] The panel in *US – Upland Cotton* explained that an industry, or group of industries, "may be generally referred to by the type of products they produce" and that "the

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[1422] Canada's First Written Submission, paras. 1162-1164, 1168.

[1423] Canada's First Written Submission, para. 1163.

[1424] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 372 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 901).

[1425] *US – Carbon Steel (India) (AB)*, para. 4.365. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

[1426] SCM Agreement, Art. 2.1.

[1427] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

[1428] *US – Washing Machines (AB)*, para. 5.220.

concept of an 'industry' relates to producers of certain products."[1429] In short, an industry or enterprise is defined by its production of a particular product or its business activities in connection with that product. Indeed, any reference to an industry or enterprise invariably includes a reference to the product or business activities that it identifies with (*e.g.*, timber industry, steel industry). Therefore, contrary to Canada's argument, a subsidy with activity-based exclusions can be considered *de jure* specific under Article 2.1(a), because such exclusions can identify the certain enterprises or industries that have access to the subsidy.

753. It is indisputable that the ACCA Class 29 assets program limits access to this subsidy to known and particularized enterprises and industries. As explained in section VII.A.2, the evidence of record confirms that Class 29 assets are expressly limited to machinery and equipment used in manufacturing and processing operations. The evidence of record further confirms that the term "manufacturing and processing" is defined under the *Income Tax Regulations* to expressly exclude multiple enterprises or industries engaged in activities that ordinarily may be considered manufacturing and processing, including farming, logging, production of industrial materials, etc. The USDOC thus correctly concluded that Canada's *Income Tax Regulations* contain an explicit limitation on access to the ACCA Class 29 assets program.

754. The USDOC provided a reasoned and adequate explanation that the ACCA Class 29 assets program is *de jure* specific based on the numerous activities excluded from the definition of "manufacturing and processing." Canada's unsupported assertion that a company engaged in an excluded activity can purportedly gain access to this subsidy for a non-excluded activity does not support the conclusions that this subsidy is non-specific. As the USDOC determined, "enterprises and industries engaged exclusively in the excluded activities [still] are not eligible for the ACCA for Class 29 Assets program[, including] … enterprises or industries that are engaged exclusively in farming, fishing, construction, or oil or gas extraction …."[1430] Canada has failed to demonstrate that an unbiased and objective investigating authority could not have concluded that the ACCA Class 29 assets program is *de jure* specific. Therefore, Canada has failed to demonstrate an inconsistency with Articles 2.1(a) and 2.1(b) of the SCM Agreement.

2. It Was Unnecessary To Conduct a *De Facto* Analysis of the ACCA Class 29 Assets Program before Determining that It Was *De Jure* Specific

755. Canada argues that the record evidence shows that a wide range of industries used the ACCA Class 29 assets program.[1431] Article 2.1(a) of the SCM Agreement does not require an

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[1429] *US – Upland Cotton (Panel)*, para. 7.1142.

[1430] Lumber Final I&D Memo, pp. 198-199 (underline added) (Exhibit CAN-010).

[1431] Canada's First Written Submission, paras. 1165-1168. The evidence cited by Canada does not show that enterprises or industries engaged exclusively in the excluded activities received tax deductions for Class 29 assets

investigating authority to compare as part of a *de jure* specificity analysis the number of enterprises or industries that are eligible to access a subsidy to those that are not.[1432] Indeed, such a comparison collapses the concepts of *de jure* and *de facto* specificity into one, which is contrary to the text and structure of Article 2.1 of the SCM Agreement. A *de jure* specificity analysis requires determining whether, as a matter of law, access to a subsidy is limited by "consideration of legislation or of a granting authority's acts or pronouncements that explicitly limit access to the subsidy."[1433] Therefore, Canada's insistence that the USDOC should have conducted a quantitative analysis before it determined whether the ACCA Class 29 assets program was *de jure* specific has no legal basis in Articles 2.1(a) and 2.1(b) of the SCM Agreement.[1434]

3. The Eligibility Criteria for Access to the ACCA Class 29 Assets Program Were Not "Objective Criteria or Conditions" within the Meaning of Article 2.1(b) of the SCM Agreement

756. Canada argues that, even if an explicit limitation on certain enterprises exists, the ACCA Class 29 assets program is not specific pursuant to Article 2.1(b) of the SCM Agreement because "objective criteria and conditions" govern eligibility for the subsidy.[1435] Canada bases its argument entirely on conclusory statements that fail to articulate why eligibility for this subsidy is based on objective criteria or conditions. While Canada maintains that "[a]ny enterprise or industry that has assets used for the eligible activities is eligible to depreciate those assets using Class 29,"[1436] this conclusory statement simply shows that a company that meets the eligibility criteria for this subsidy will not be denied access to applicable tax benefit. This statement does not explain why the eligibility criteria are objective and do not favor certain enterprises over others. Indeed, by using the phrase "for the eligible activities," Canada recognizes that the

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[1432] *US – Carbon Steel (India) (AB)*, para. 4.376 ("[T]he meaning of 'certain enterprises', which serves as both text and context in the chapeau and each of the subparagraphs of Article 2.1, does not itself entail a precise identification or quantification exercise. When this term is viewed in conjunction with the term 'limited number' in Article 2.1(c), however, this would seem to suggest greater specification by requiring a more quantitative assessment of the users of a subsidy programme. As we understand it, this is consistent with a *de facto* exercise, which aims to identify evidence of allocation or use that provides an investigating authority or panel sufficient assurance as to the existence of specificity.").

[1433] *US – Countervailing Measures (China) (AB)*, para. 4.146.

[1434] The SCM Agreement does not establish specific numerical parameters for determining whether a subsidy is limited to certain enterprises. And the Appellate Body has confirmed that the SCM Agreement does not indicate "any numerical threshold pointing to a minimum or maximum number of things required in order to qualify as a 'group' or 'certain.'" *US – Carbon Steel (India) (AB)*, para. 4.365.

[1435] Canada's First Written Submission, para. 1169.

[1436] Canada's First Written Submission, para. 1169 (underline added).

alleged "objective criteria" do favor certain enterprises – those that engage in the eligible activities – over others.

757. Further, the SCM Agreement explicitly provides that "[o]bjective criteria or conditions … mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise."[1437] The eligibility criteria for access to the ACCA Class 29 assets program are not analogous to the objective criteria described in the SCM Agreement. Canada's *Income Tax Regulations* explicitly exclude assets that are primarily used for certain activities and by certain enterprises or industries. The *Income Tax Regulations* favor enterprises or industries that are not engaged in those activities, so the evidence of record unambiguously supports the USDOC's finding that the eligibility criteria for the Class 29 asset tax benefits are not based on "objective criteria or conditions" within the meaning of Article 2.1(b) of the SCM Agreement.[1438]

4. The ACCA Class 29 Assets Program Is Not Rendered Non-Specific by Canada's Broader Legal Framework for Other Tax Deductions and Credits

758. Canada argues that the ACCA Class 29 assets program cannot be specific when the subsidy is analyzed in the context of the broader legal framework of Canadian tax law, which shows that assets excluded from this program may be eligible for other tax deductions and credits.[1439]

759. In the context of the USDOC's investigation, such broader legal framework does not demonstrate that the USDOC's *de jure* specificity finding is inconsistent with Articles 2.1(a) and 2.1(b) of the SCM Agreement. Canada's *Income Tax Act* and *Income Tax Regulations* provide for tax deductions and credits other than the ACCA Class 29 assets program. While it is true that the legal framework of a subsidy may be relevant for a *de jure* specificity analysis in certain circumstances,[1440] these other tax provisions are different from the ACCA Class 29 assets program. They provide for different financial contributions and benefit amounts and exhibit different criteria for eligibility. A company may also take advantage of tax benefits under other

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[1437] SCM Agreement, Art. 2.1(b), footnote 2.

[1438] Lumber Final I&D Memo, p. 199 (Exhibit CAN-010).

[1439] Canada's First Written Submission, paras. 1170-1174.

[1440] As the Appellate Body has explained, "the chapeau of Article 2.1 makes it clear that the assessment of specificity is framed by the particular subsidy found to exist under Article 1.1" and "the assessment of specificity under Article 2.1 should not examine subsidies that are different from those challenged by the complaining Member." *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 751.

provisions of the *Income Tax Act* and *Income Tax Regulations* simultaneously, which confirms that the other tax provisions differ from the ACCA Class 29 assets program.

760. Finally, 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."[1441] Therefore, the USDOC correctly determined that the ACCA Class 29 assets program is not rendered non-specific by Canada's broader legal framework for other tax deductions and credits.

761. In sum, the USDOC's determination to treat the ACCA Class 29 assets program as *de jure* specific is one an unbiased and object investigating authority could have reached. Therefore, the Panel should find that the USDOC's determination that the ACCA Class 29 assets program is specific is not inconsistent with Articles 2.1(a) and 2.1(b) of the SCM Agreement.

VIII. CANADA'S "MARITIMES STUMPAGE BENCHMARK CLAIM" HAS NO BASIS IN THE SCM AGREEMENT OR THE DSU

762. Canada claims that something it calls the "Maritimes Stumpage Benchmark" is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.[1442] As demonstrated below, Canada's claim fails for a number of reasons. First, the so-called "Maritimes Stumpage Benchmark" is not susceptible to WTO dispute settlement as a measure of "present and continued application."[1443] Second, the so-called "Maritimes Stumpage Benchmark" cannot be challenged as "ongoing conduct."[1444] Third, and finally, even if the "Maritimes Stumpage Benchmark" were susceptible to WTO dispute settlement, Canada has not demonstrated that it would necessarily result in an inconsistency with Articles 1.1(b) or 14(d) of the SCM Agreement.[1445]

[1441] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 751.

[1442] *See* Canada's First Written Submission, para. 1178.

[1443] *See* Canada's First Written Submission, paras. 1184 and 1189-1200.

[1444] *See* Canada's First Written Submission, paras. 1201-1205.

[1445] *See* Canada's First Written Submission, paras. 1206-1208.

A. The So-Called "Maritimes Stumpage Benchmark" Is Not A Measure of "Present and Continued Application"

763. Canada describes the "Maritimes Stumpage Benchmark" as follows:

> The precise content of the Maritimes Stumpage Benchmark measure is that when assessing the adequacy of remuneration of stumpage prices in Alberta, Ontario, or Québec, Commerce exercises its discretion under its regulations to determine that Maritime stumpage prices constitute a preferred benchmark, and then treats Maritime stumpage prices as an in-market benchmark for those provinces.[1446]

764. Canada alleges "the present and continued application"[1447] of the foregoing and provides a list of determinations[1448] in which the USDOC (1) referred to its CVD regulations for the proposition that in-country market prices can be used to measure whether a good was provided for less than adequate remuneration; (2) found that Maritime Provinces are in the country of Canada; and (3) found that spruce, pine, and fir in certain Canadian provinces are comparable to spruce, pine, and fir in other Canadian provinces.[1449]

765. Canada's claim against what it calls the "Maritimes Stumpage Benchmark" fails because Canada has not identified a measure susceptible to WTO dispute settlement as a measure of "present and continued application."[1450] Canada has described the measure as one of "present and continued application;" accordingly, it must establish that (1) the measure is attributable to the Member in question, (2) the precise content of the measure, and (3) that the measure is presently being applied and will continue to be applied.[1451] As discussed below, Canada's arguments fail on each of these three points.

[1446] Canada's First Written Submission, para. 1190.

[1447] Canada's First Written Submission, para. 1184.

[1448] *See* Canada's First Written Submission, Table 30.

[1449] *See* Canada's First Written Submission, para. 1192, Table 30.

[1450] *See* Canada's First Written Submission, para. 1184.

[1451] *See Argentina – Import Measures (AB)*, para. 5.104 ("We observe that, in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, to the extent that such content is the object of the claims raised."); *ibid.*, para. 5.110 ("A complainant seeking to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a Member and its precise content."); *ibid.*, para. 5.146 (challenged measure had "present and continued application, in the sense that it currently applies and it will continue to be applied in the future until the underlying policy ceases to apply.").

1. The Alleged Measure Is Not Attributable to the United States Because It Does Not Exist

766. First, Canada has not established that any measure exists, so it cannot be attributable to the United States. The United States does not contest that the USDOC made the determinations cited,[1452] and that those determinations are attributable to the United States. However, Canada has not established what it means to "treat[ ] Maritime stumpage prices as an in-market benchmark for [Alberta, Ontario, and Quebec]"[1453] or that such "treat[ment]" is something the USDOC is capable of doing. Neither Article 14(d) of the SCM Agreement nor the USDOC's determinations contemplate the concept of an "in-market" benchmark as Canada conceives it. The United States does not accept Canada's premise of "an in-market benchmark."[1454] The text of Article 14(d) refers to a benchmark that reflects "prevailing market conditions . . . in the country of provision" and the USDOC's regulations refer to "transactions in the country in question."[1455] The USDOC does not "treat[ ]" any benchmark "as an in-market benchmark" because "an in-market benchmark" is not something cognizable under U.S. law or the SCM Agreement.[1456] Canada cannot establish that the alleged measure is attributable to the United States because it has not established that "treat[ment]" of "prices as an in-market benchmark" is a distinct action that can be taken in the first place.

2. Canada Has Not Established the Precise Content of the Alleged Measure

767. Canada has also failed to establish the precise content of the alleged measure. In the first place, Canada uses inconsistent descriptions of the content of the measure at different times. For example, what Canada calls "this measure" sometimes refers to "a Nova Scotia benchmark"[1457] and at other times "refers to . . . Nova Scotia and/or New Brunswick."[1458] Although Canada asserts that, in either case, "an application of the Maritimes Stumpage Benchmark measure" is at issue,[1459] Canada uses the phrase "Maritimes Stumpage Benchmark measure" to mean two different things. Canada has failed to establish the precise content as a result.

[1452] *See* Canada's First Written Submission, Table 30.

[1453] Canada's First Written Submission, para. 1190.

[1454] Canada's First Written Submission, para. 1190.

[1455] *See*, *supra*, section II.A.1.c (describing the USDOC's regulations for determining the adequacy of remuneration).

[1456] Canada's First Written Submission, para. 1190.

[1457] Canada's First Written Submission, para. 1195.

[1458] Canada's First Written Submission, para. 1175, footnote 1973.

[1459] Canada's First Written Submission, para. 1195.

768. In addition, Canada repeatedly qualifies its allegation with the phrase: "when faced with the relevant factual circumstances."[1460] In other words, the alleged measure sometimes refers to benchmarks from different provinces and how it applies depends on "the relevant factual circumstances."[1461] What are those "relevant factual circumstances remains undefined. These allegations are insufficient to establish the precise content of the alleged measure.

769. The threshold for identifying the precise content of a measure requires more than an allegation that prices from one or two or sometimes both provinces are used as benchmarks depending on the relevant factual circumstances. Canada has not even alleged what those benchmark prices consist of beyond the name (or names) of the province (or provinces). This stands in contrast to prior disputes where this question has been considered. For example, in prior disputes involving zeroing, the precise content of the measure involved a single "line of computer programming code that indicates that simple zeroing was applied."[1462]

3. Canada Has Not Shown the Alleged Measure Has Present and Continued Application

770. Canada refers to a handful of determinations, but this does not establish present and continued application of the alleged measure. Canada alleges that the USDOC "has not deviated from applying this measure since 2004 and has made its determinations in a 'consistent manner'"[1463] and describes the alleged measure as having "repeated and uninterrupted application" since 2004.[1464] However, Canada itself concedes that these assertions are in error; Canada elsewhere corrects itself and acknowledges in a footnote that:

> There were no Commerce investigations into softwood lumber from 2006 to 2015 due to the 2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America.[1465]

771. In addition, as noted above, Canada repeatedly qualifies its allegation with the phrase: "when faced with the relevant factual circumstances."[1466] For example, Canada explains that the so-called measure has had "repeated application . . . where the relevant factual circumstances

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[1460] Canada's First Written Submission, para. 1196.

[1461] Canada's First Written Submission, para. 1175, footnote 1973.

[1462] *US – Continued Zeroing (AB)*, para. 351, footnote 749.

[1463] Canada's First Written Submission, para. 1196.

[1464] Canada's First Written Submission, paras. 1175, 1196.

[1465] Canada's First Written Submission, para. 1191, footnote 1992

[1466] Canada's First Written Submission, para. 1196.

arise,"[1467] that the USDOC has consistently applied its regulations "when presented with the factual circumstances,"[1468] and that it expects the USDOC "will continue to act in the same way . . . when faced with the relevant factual circumstances."[1469] Yet what this qualifier demonstrates is that what Canada alleges is not a measure, but rather results from the application of WTO-consistent principles to the relevant factual circumstances in each instance. At most, this suggests merely that the facts determine the range of outcomes.

772. Despite Canada's use of the term "uninterrupted," it appears that Canada is referring simply to a number of instances in which different and independent determinations were reached.[1470] Canada fails to cite any evidence that suggests that the USDOC has determined to apply, in any determination, benchmark prices from one or another province, or both of them or intends to do so in the future.

773. Canada explains that it has chosen to "describe[] the measure at issue as one of 'present and continued application'" and seeks to establish its claim "[o]n the basis of this characterization device."[1471] In doing so, Canada has sought to avoid explaining how the alleged measure could constitute a "rule or norm of general and prospective application."[1472] However, notwithstanding the chosen "characterization device,"[1473] Canada's "present and continued application" claim appears much more like a rule or norm of general or prospective application claim. The approach to a rule or norm of general or prospective application claim provides useful analytical framework in any event.

774. In disputes involving allegations of a rule or norm of general or prospective application, prior reports have relied on specific statements in the relevant determinations to provide evidence that a rule or norm would continue to apply in the future. For example, in *US – Countervailing Measures (China)*, the panel found that the USDOC policy at issue "provides 'administrative guidance and creates expectations among the public and among private actors,'" and this was "evident from the declaratory style of the text" and "the consistent application" of the policy by the USDOC.[1474] The panel pointed out that the United States had admitted that "a 'policy' announcement provides 'the public with guidance as to how [the USDOC] may interpret

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[1467] *See, e.g.*, Canada's First Written Submission, paras. 1193, 1196.

[1468] Canada's First Written Submission, para. 1193.

[1469] Canada's First Written Submission, para. 1196.

[1470] *See* Canada's First Written Submission, para. 1196.

[1471] Canada's First Written Submission, para. 1184.

[1472] *See* Canada's First Written Submission, para. 1182.

[1473] Canada's First Written Submission, para. 1184.

[1474] *US – Countervailing Measures (China) (Panel)*, para. 7.111.

and apply the statute and regulations in individual cases."[1475] Likewise, the panel in that dispute found that the policy had "general and prospective application, as it is intended to apply to future investigations."[1476] The panel found evidence to support this conclusion in "the text itself," in which "the USDOC explains that this policy has been applied for some time, that the USDOC is clarifying its policy for the public through the Issues and Decision Memorandum and that the USDOC will continue applying it."[1477] The determinations Canada points to share none of these features.

775. Canada's reliance on what it describes as "consistent references to precedents" is similarly misplaced.[1478] The concept of "precedents" that actually appears in the dispute Canada cites, *US – Supercalendered Paper*, includes the panel's considerable emphasis on the fact that the USDOC itself referred to the alleged measure at issue in that dispute as a "practice."[1479] There is no such characterization in any of the determinations cited by Canada.[1480]

776. What is evident, rather, from the determinations that Canada cites, is that the USDOC has, on some occasions, decided to rely on evidence of stumpage prices from Nova Scotia or New Brunswick as a benchmark for stumpage provided by the government in countervailing duty proceedings involving stumpage in Canada. That is entirely appropriate given that the "starting point" of the analysis under Article 14(d) is private prices in the country of provision.[1481] It is not surprising that the USDOC has used private Canadian prices to value stumpage in Canada when faced with the relevant factual circumstances that Canada describes.

777. Accordingly, Canada has not established that the so-called "Maritimes Stumpage Benchmark" is a measure of present and continued application.

[1475] *US – Countervailing Measures (China) (Panel)*, para. 7.111.

[1476] *US – Countervailing Measures (China) (Panel)*, para. 7.114.

[1477] *US – Countervailing Measures (China) (Panel)*, para. 7.114.

[1478] Canada's First Written Submission, para. 1199.

[1479] *See US – Supercalendered Paper (Panel)*, para. 7.238. Note: that panel report has not yet been adopted by the DSB.

[1480] *See* Canada's First Written Submission, para. 1199, Table 31.

[1481] *US – Carbon Steel (India) (AB)*, para. 4.154 ("the *primary* benchmark, and therefore the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision.") (italics in original). *See also US – Carbon Steel (India) (AB)*, para. 4.154 ("Proper benchmark prices would normally emanate from the market for the good in question in the country of provision.").

B. Canada Has Not Identified Any So-Called "Ongoing Conduct"

778. Canada argues, in the alternative, that the Panel should analyze the so-called "Maritimes Stumpage Benchmark" as "ongoing conduct."[1482] Canada's claim fails because "ongoing conduct" is not a measure subject to dispute settlement and, even if it were, Canada has not demonstrated that "ongoing conduct," as that concept has been elaborated previously by the Appellate Body, exists in this situation.

1. Canada's "Ongoing Conduct" Claim Fails Because It Purports to Include Future Measures

779. The purported "ongoing conduct" "measure" Canada attempts to challenge is not subject to WTO dispute settlement because "conduct" is a manifestation or outward sign of action; "ongoing conduct" would result from a legal instrument or decision by a Member, and have no independent force beyond that legal instrument or decision.[1483] For example, if a Member adopted a measure setting a duty at a level in excess of its WTO binding, or if the Member decided to collect the duty at a rate in excess of its binding, one could describe the collection of the duty (colloquially) as "ongoing conduct." But that "conduct" would merely describe the effect of another measure, either the legal instrument or the unwritten decision, and the "ongoing conduct" would have no legal value or effect beyond that of the measure producing the conduct.

780. In addition, "ongoing conduct" appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment are not within a panel's term of reference under the DSU.[1484] Article 3.3 of the DSU provides that:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements <u>are being impaired</u> by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.[1485]

[1482] *See* Canada's First Written Submission, paras. 1201-1205.

[1483] *See US – Export Restraints (Panel)*, paras. 8.4-8.9 and 8.130-8.132 (rejecting Canada's claim on the basis that the alleged "policy" had no legal value beyond the decision to apply a legal instrument in a particular way).

[1484] *See, e.g., US – Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); *Indonesia – Autos (Panel)*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of a panel was not within the panel's terms of reference).

[1485] DSU, Art. 3.3 (emphasis added).

Not only would it be impossible to consult on a measure that does not exist, but a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement. As the *Upland Cotton* panel found, the legislation challenged in that dispute could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel.[1486] Similarly, in this dispute, indeterminate future measures that did not exist at the time of Canada's panel request (and may never exist) could not be impairing any benefits accruing to Canada.

781. Because the purported "measure" does not have any legal effect or status (does not *do* anything within the U.S. legal order) and consists of an indeterminate number of future measures for which no final action had been taken at the time of Canada's panel request, the United States respectfully requests that the Panel reject Canada's "ongoing conduct" claims.

2. Canada's "Ongoing Conduct" Claim Fails Because Canada Cannot Establish that "Ongoing Conduct" Exists and Will Continue in the Future

782. As support for its "ongoing conduct" claim, Canada discusses the Appellate Body report in *US – Continued Zeroing* and the panel report in *US – Orange Juice (Brazil)*.[1487] Canada's reliance on these reports is misplaced.

783. As an initial matter, the United States has serious concerns about the rationale articulated by the Appellate Body in *US – Continued Zeroing*. As explained above, an alleged "measure" that has no legal value, and merely describes the effect of another measure, is not a "measure" for purposes of a DSU challenge. Further, measures that do not and may never exist cannot be measures within a dispute settlement panel's terms of reference.

784. Assuming *arguendo*, however, that Canada's purported "ongoing conduct" claim could be subject to dispute settlement, Canada's claim fails because the facts Canada alleges here differ markedly from the facts in *US – Continued Zeroing* and *US – Orange Juice (Brazil)*. *US – Continued Zeroing* concerned "the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained."[1488] In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged, *i.e.*, where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and

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[1486] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

[1487] Canada's First Written Submission, para. 1204.

[1488] *US – Continued Zeroing (AB)*, para. 180.

sunset reviews over an extended period of time."[1489] Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings"[1490] included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

785. Where there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" or "the sunset review determination was excluded from the Panel's terms of reference," the Appellate Body found that "the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained."[1491] Consequently, the Appellate Body found that it was "unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings."[1492]

786. Similarly, in *US – Orange Juice (Brazil)*, the panel found the use of zeroing in the original antidumping investigation of orange juice from Brazil, as well as in the first, second, and third administrative reviews of the antidumping order on orange juice from Brazil.[1493] The panel highlighted that these were "successive proceedings" when it found that Brazil had established "the existence of the USDOC's 'continued use' of 'zeroing procedures' as a 'measure' in the form of 'ongoing conduct' under the orange juice anti-dumping order."[1494]

787. In this dispute, Canada has failed to establish the existence of a "string of determinations, made sequentially. . . over an extended period of time"[1495] that would be required to support its claims related to alleged "ongoing conduct,"[1496] as that purported measure has been elaborated in prior reports. Canada asserts that:

> The Maritimes Stumpage Benchmark measure has been repeatedly applied nine times in five proceedings: first, in three administrative reviews under the countervailing duty order in the *Lumber IV* investigation; second, in the current softwood lumber

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[1489] *US – Continued Zeroing (AB)*, para. 191.

[1490] *US – Continued Zeroing (AB)*, para. 191.

[1491] *US – Continued Zeroing (AB)*, para. 194.

[1492] *US – Continued Zeroing (AB)*, para. 194.

[1493] *US – Orange Juice (Brazil) (Panel)*, para. 7.191.

[1494] *US – Orange Juice (Brazil) (Panel)*, para. 7.192.

[1495] *US – Continued Zeroing (AB)*, para. 191.

[1496] *US – Continued Zeroing (AB)*, para. 191.

> investigation; and third, in the *Uncoated Groundwood* investigation.[1497]

Thus, Canada has pointed to three different countervailing duty proceedings – the softwood lumber countervailing duty proceeding in 2004, the softwood lumber countervailing duty proceeding concluded earlier this year, and the uncoated groundwood countervailing duty proceeding. In none of these three countervailing duty proceedings has Canada established the successive use of the same methodology in (1) the initial countervailing duty investigation; (2) four successive administrative reviews; and (3) a sunset review.[1498] The facts here simply are not the same as the facts in *US – Continued Zeroing*, nor even with the facts in *US – Orange Juice (Brazil)*. They are not even close. Hence, Canada cannot establish "a string of determinations, made sequentially. . . over an extended period of time."[1499]

788. For the reasons given above, the United States respectfully requests that the Panel reject Canada's "ongoing conduct" claims.

C. Canada Has Not Identified Any Inconsistency with Articles 1.1(b) or 14(d) of the SCM Agreement

789. Finally, Canada's claim fails because Canada has not identified any inconsistency with Articles 1.1(b) or 14(d) of the SCM Agreement that would necessarily result from the so-called "Maritimes Stumpage Benchmark." Canada argues that its first written submission suffices to demonstrate that using prices from Nova Scotia as a benchmark for stumpage in other Canadian provinces is inconsistent with Article 14(d).[1500] As explained above in section II, however, Canada's claims in this regard lack merit. Accordingly, the USDOC's use of a so-called "Maritime Stumpage Benchmark," even if it were a measure challengeable in WTO dispute settlement, would not be inconsistent with Articles 1.1(b) or 14(d) of the SCM Agreement.

790. For the reasons given above, Canada's claims against the so-called "Maritimes Stumpage Benchmark" fail and must be rejected.

[1497] Canada's First Written Submission, para. 1203.

[1498] In addition, the uncoated groundwood countervailing duty proceeding did not result in the imposition of countervailing duties because the U.S. International Trade Commission reached a negative determination of injury. *See Uncoated Groundwood Paper from Canada*, 83 Fed. Reg. 48,863 (Int'l Trade Comm'n Sept. 27, 2018) (Exhibit USA-018).

[1499] Canada's First Written Submission, para. 1203.

[1500] *See* Canada's First Written Submission, paras. 1206-1208.

IX. CONCLUSION

791. For the foregoing reasons, the United States respectfully requests that the Panel reject Canada's claims in their entirety.