UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

Business Confidential Information (BCI) Redacted in Double Brackets ("[[ ]]")
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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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U.S. First Written Submission	
USA-001	USDOC, Benchmark Calculation Memorandum for the Preliminary Determination, Apr. 24, 2017 ("Preliminary Benchmark Memorandum")
USA-002	USDOC, Benchmark Calculation Memorandum for the Final Determination, Nov. 1, 2017 ("Final Benchmark Memorandum")
USA-003	USDOC, 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
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USA-007	Definition of "direct" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 679
USA-008	Definition of "would" from englishpage.com
USA-009	Explanation of Present Conditionals from englishpage.com
USA-010	Petitioners, "Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada," dated November 25, 2016, Exhibits 242-257.
USA-011	Government of Quebec Questionnaire Response, Exhibit QC-Other-15 (Investment program in forests subject to partial-cutting treatment) (March 15, 2017)
USA-012	JDIL Questionnaire Response, Exhibit SILV-01 (Standard Questions and Grant Appendices) (March 15, 2017)
USA-013	19 C.F.R. § 351.504(a) ("Grants - Benefit") (USDOC Regulation)

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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)
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USA-039	Government of New Brunswick Verification Exhibit NB-VE-1
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USA-042 (BCI)	Government of Quebec Verification Minor Corrections (June 17, 2017), Exhibit QC-STUMP-MC-1 (revised table 4)
USA-043	Petitioner, Comments on Initial Questionnaire Responses (March 27, 2017) (public version) (excerpted, Vol. I, pp. 1-3) ("Petitioner Comments – Primary QNR Responses")
USA-044 (BCI)	Government of Quebec Initial Questionnaire Response at Exhibit QC-STUMP-9 (Table 18)
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USA-050	Petition Exhibit 181: Ontario Crown Timber Charges for Forestry Companies
USA-051 (BCI)	Government of Nova Scotia Verification Exhibits: Exhibit NS-VE-8A, Exhibit NS-VE-8B, Exhibit NS-VE-8C, Exhibit NS-VE-8D, Exhibit NS-VE-8E, Exhibit NS-VE-8F, Exhibit NS-VE-9A, Exhibit NS-VE-9B, Exhibit NS-VE-9C, and Exhibit NS-VE-10.
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USA-055 (BCI)	Canfor Corporation Verification Exhibit VE-3
USA-056	19 C.F.R. § 351.309(c)(2) ("Written Argument") (USDOC Regulation)
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USA-069	Resolute First Supplemental Questionnaire Response (Stumpage) (April 12, 2017)

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USA-072	USDOC Memorandum, "Hearing Transcript on CVD Issues," dated August 24, 2017
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USA-074	Supplemental Questionnaire to Resolute (issued Mar. 30, 2017)
USA-075	Government of Quebec Questionnaire Response, Exhibit QC-STUMP-22 (excerpt from *SFDA* Regulations, chapter A-18.1, r.7, section 89 of the regulation respecting standards of forest management for forests in the domain of the State (this portion of Exhibit QC-STUMP-22 is not included in Exhibit CAN-197))
USA-076	Definition of "purchase" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2418
USA-077	Government of Canada Counter-Memorial, ICSID Case No. ARB(AF)/12/3 (Aug. 22, 2014) (excerpted)
USA-078	Definition of "group" from Oxford English Dictionary Online

I. INTRODUCTION

1. The United States has demonstrated in its first written submission, oral statements, and responses to the Panel's questions[1] why there is no merit to Canada's claims under the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). As the United States has shown, Canada's claims rest on flawed interpretations of the SCM Agreement and the GATT 1994. Canada calls on the Panel to interpret those agreements 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").[2] When subjected to scrutiny, all of Canada's proposed interpretations of the SCM Agreement and the GATT 1994 simply are not supported by the ordinary meaning of the text of the agreements, read in context, and in light of the object and purpose of the agreements.

2. Ultimately, Canada calls on the Panel to reweigh the massive volume of record evidence examined by the U.S. Department of Commerce ("USDOC"), and Canada asks the Panel, in the compressed time period and format of a WTO dispute settlement proceeding, to make its own determination that Canadian softwood lumber is not subsidized. But that is not the role of WTO dispute settlement panels. As Canada is claiming a breach by the United States of its WTO obligations, it is for Canada to demonstrate that the U.S. investigating authority failed to establish the facts objectively or applied an approach contrary to the SCM Agreement. When examining such a claim, a WTO panel does not conduct a *de novo* evidentiary review, but instead fulfills a "role as *reviewer* of agency action" and not as "*initial trier of fact*."[3] The Panel should assess whether the USDOC "properly established the facts and evaluated them in an unbiased and objective manner."[4] In short, the Panel's task in this dispute is to determine whether an objective, unbiased person, looking at the same evidentiary record as the USDOC, could have – not would have – reached the same conclusions that the USDOC reached.

3. Put another way, for Canada to prevail in this dispute, the Panel would need to find that

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[1] *See* First Written Submission of the United States of America (November 30, 2018) ("U.S. First Written Submission"); Opening Statement of the United States of America on the First Day of the First Substantive Meeting of the Panel (February 26, 2019) ("U.S. First Opening Statement (Day 1)"); Opening Statement of the United States of America on the Second Day of the First Substantive Meeting of the Panel (February 27, 2019) ("U.S. First Opening Statement (Day 2)"); Opening Statement of the United States of America on the Third Day of the First Substantive Meeting of the Panel (February 28, 2019) ("U.S. First Opening Statement (Day 3)"); Closing Statement of the United States of America at the First Substantive Meeting of the Panel (February 28, 2019) ("U.S. First Closing Statement"); Responses of the United States to the Panel's First Set of Questions to the Parties (April 3, 2019) ("U.S. Responses to the First Set of Panel Questions").

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

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

[4] *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.

the USDOC was biased and not objective – a very serious finding. Canada cannot win just by presenting an alternative way of looking at the record evidence, even if such an alternative may seem appealing to the Panel. Canada must convince the Panel that the USDOC was biased and not objective. However, an examination of the USDOC's determination and the record evidence that was before the USDOC reveals that such a finding simply would not have any support.

4. In the U.S. first written submission, oral statements, and responses to the first set of Panel questions, as well as in this U.S. second written submission, the United States has demonstrated that the USDOC's determination in the countervailing duty investigation of softwood lumber products from Canada accords with the requirements of the SCM Agreement, properly interpreted pursuant to customary rules of interpretation; the USDOC provided a reasoned and adequate explanation for its determination; the USDOC's determination is based on ample evidence; and the USDOC's conclusion in the investigation is, indeed, one that an unbiased and objective investigating authority could have reached.

5. In this submission, the United States addresses arguments made by Canada since its first written submission. To a surprising degree, Canada continues to premise its claims and arguments on misrepresentations of the evidence and gross mischaracterizations of the positions of the United States and the determinations of the USDOC. The United States invests a substantial portion of this submission to responding to assertions made by Canada that plainly are not true. For example, the USDOC did not ignore reports and other documents that Canadian interested parties placed on the USDOC's administrative record, the USDOC did not take an effects-based approach to the analysis of entrustment or direction in relation to British Columbia's and Canada's log export restraints, and the United States has not ignored findings in prior panel and Appellate Body reports.

6. By making such demonstrably false assertions, Canada has imposed on the United States an obligation to demonstrate that Canada's assertions are false, and Canada has imposed on the Panel an obligation to determine for itself that Canada's assertions are false. This is not a good use of the limited resources of the WTO dispute settlement system. That being said, once the Panel has undertaken the difficult work of resolving the confusion caused by the manner in which Canada has presented its claims and arguments, it will become clear, as the United States contends, that Canada's claims are utterly without merit.

7. This submission is organized in a similar manner, and discusses the various disputed issues in the same order, as the U.S. first written submission.

II. CANADA STILL HAS FAILED TO ESTABLISH THAT THE USDOC'S BENCHMARK DETERMINATIONS ARE INCONSISTENT WITH ARTICLES 1.1(B) AND 14(D) OF THE SCM AGREEMENT

8. In this section, the United States responds to arguments concerning the USDOC's benchmark determinations that Canada has presented since it filed its first written submission. As demonstrated below, Canada's claims continue to lack merit. Canada ultimately cannot prevail because its legal position is unsupported by the text of the SCM Agreement. As the United States has demonstrated, Canada's arguments do not rely on the text of the agreement,

but rather on the premise that the investigating authority should have asked one more question with respect to each issue – no matter how thorough the investigation, and no matter how unlikely or irrelevant the question is to determining the adequacy of remuneration in accordance with the guidelines set forth in Article 14(d) of the SCM Agreement.

9. The discussion begins, in section II.A, by addressing Canada's numerous assertions that the USDOC was not sufficiently diligent in conducting its investigation, and then the United States demonstrates that Canada's argument (and its chart of reports attached as Annex A to Canada's responses to the first set of Panel questions) relies on gross mischaracterization of how the USDOC addressed the various documents and reports that Canada has identified. The record of the investigation demonstrates that the USDOC considered and addressed the full range of relevant issues raised by the parties. Canada has failed to show – and cannot show – that the USDOC's investigation was deficient. Indeed, as the massive record and the materials to which the parties have directed the Panel's attention reveal, it is difficult to imagine any investigating authority operating in the real world engaging with the evidence and arguments more than was done by the USDOC in this investigation.

10. Section II.B addresses Canada's arguments that the use of a Nova Scotia benchmark to measure the benefit of stumpage provided by Alberta, Ontario, New Brunswick, and Quebec was inconsistent with Article 14(d) of the SCM Agreement.

11. Canada's continued argument about regional markets is not supported by the text of Article 14(d), and the United States has demonstrated previously why Canada's contention is unavailing. What Canada is really arguing is that the selected benchmarks are not comparable to the input at issue. But Canada's arguments on comparability fail because the USDOC relied on benchmarks that are, in fact, comparable to the input at issue. That is, the USDOC relied on benchmarks that allowed the USDOC to determine the adequacy of remuneration in relation to prevailing market conditions for the good in question in the country of provision (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

12. In particular, section II.B addresses three arguments that Canada has continued to raise regarding (1) the comparability of Nova Scotia timber, (2) the reliability of the private stumpage survey prices, and (3) the non-stumpage benchmark adjustments the USDOC declined to make.

13. First, in section II.B.1, with respect to comparability, the United States demonstrates that Canada has failed to show that the timber in Nova Scotia is different or incomparable to timber in the other relevant provinces. Canada's argument that the harvesting process is more costly in other provinces reflects Canada's misunderstanding of the relevant inquiry under Article 14(d) of the SCM Agreement. In essence, Canada argues that a proper benchmark price should be established based on consideration of the purchaser's "willingness to pay" (*i.e.*, taking into account the subsidy recipient's full range of financial or economic circumstances) – rather than based on observed actual transaction prices that other producers paid to obtain the good in question on the market, as opposed to obtaining the good from the government. Nothing in the text of Article 14(d) of the SCM Agreement supports the approach for which Canada argues.

14. Then, in section II.B.2, with respect to the reliability of the private stumpage survey prices, the United States demonstrates that the Nova Scotia survey data is reliable. Canada has failed to demonstrate that the Nova Scotia data is unreliable.

15. Finally, in section II.B.3, the United States demonstrates that Canada has failed to demonstrate that any adjustments were necessary for the Nova Scotia benchmark.

16. Section II.C addresses Canada's arguments that the USDOC should have used in-province prices as benchmarks to measure the benefit of stumpage provided by Alberta, Ontario, New Brunswick, and Quebec, notwithstanding the distortion of prices caused by the provincial governments' overwhelming predominance as suppliers of the good in question. What Canada describes as "prevailing market conditions" are really the legal and policy conditions prescribed by governmental authorities to restrict interprovincial trade and administer prices on a provincial basis. At the same time, the government is essentially the sole supplier in each province as well. Where these two circumstances are combined (restrictive policy and pricing conditions plus predominant ownership), relying on prices in those provinces as benchmarks under Article 14(d) would result in a circular comparison. Importantly, prices for the remaining sliver of privately owned timber in those provinces are not independent of the government's influence on those conditions and prices (and private suppliers are not oblivious to the sheer scale of supply held by the government). As the United States has demonstrated for each province, Canada is wrong that the government prices are market-determined prices. The discussion in section II.C explains why Canada's arguments in this regard continue to lack merit.

17. Lastly, section II.D addresses British Columbia, demonstrating that Canada still has failed to establish that the USDOC erred in determining that prices in British Columbia are not market-determined prices. Canada's arguments regarding the government auction prices remain insufficient to establish otherwise. Likewise, Canada has failed to demonstrate that the USDOC erred in deriving a benchmark from Washington log price data. Canada's arguments regarding conversion factors, dead logs or beetle-killed logs, and utility grade logs remain unpersuasive.

A. Canada Has Failed to Demonstrate that the USDOC's Investigation Was Deficient

18. The USDOC conducted a thorough investigation and adequately addressed the evidence on the administrative record. The discussion below first addresses Canada's numerous assertions that the USDOC was not sufficiently diligent in conducting its investigation, and then demonstrates that Canada's argument (and its chart of reports attached as Annex A to Canada's responses to the first set of Panel questions) relies on gross mischaracterization of how the USDOC addressed the various documents and reports that Canada has identified. The record of the investigation demonstrates that the USDOC considered and addressed the full range of relevant issues raised by the parties. Canada has failed to show – and cannot show – that the USDOC's investigation was deficient.

1. The USDOC's Investigation Was Not Deficient

19. Canada has argued that the USDOC's investigation was deficient because, according to Canada, the USDOC failed "to 'actively seek out pertinent information.'"[5] Canada quotes from prior reports that "investigating authorities have a 'duty to seek out relevant information and to evaluate it in an objective manner'" and "the inquiry must be conducted with 'a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information.'"[6] The implication, apparently, is that Canada considers the USDOC's investigative efforts to have been deficient. However, apart from invective, Canada has failed to demonstrate how the USDOC's investigation falls short of the conduct required by the text of the SCM Agreement.[7] As explained in the U.S. first written submission and at the Panel's first substantive meeting with the parties, Canada's argument that the investigation the USDOC conducted was somehow deficient or inadequate lacks any merit.[8] 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. Moreover, 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.

20. As explained in the U.S. responses to the first set of Panel questions, Canada has taken the position that the USDOC should have asked just one more question in every instance, in every aspect of its investigation.[9] 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 the Panel will reach a new finding 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 interested parties. The DSU and the SCM

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[5] *See, e.g.*, Responses of Canada to Questions to the Parties from the Panel in Connection with the First Substantive Meeting (April 3, 2019) ("Canada's Responses to the First Set of Panel Questions"), paras. 11-12, 77-84, 297, 299.

[6] *See, e.g.*, Canada's Responses to the First Set of Panel Questions, para. 297.

[7] *See* U.S. First Closing Statement, para. 9 ("Canada focuses on the myriad details and minutia of the facts and evidence that was before the USDOC, but says nothing about the precise content of the obligations in the SCM Agreement or the GATT 1994. The analytical approach Canada proposes is an invitation to error. Respectfully, the Panel should decline that invitation.").

[8] *See* U.S. First Written Submission, para. 181.

[9] *See, e.g.*, U.S. Responses to the First Set of Panel Questions, para. 75.

Agreement do not permit a panel to re-weigh or evaluate *de novo* the evidence as Canada proposes.[10]

21. The SCM Agreement provides that an investigating authority must complete its investigation within 12 months of the initiation or, in exceptional circumstances, within 18 months.[11] Within that time frame, the USDOC conducted an exceedingly thorough and diligent investigation. Article 12 of the SCM Agreement provides for procedural safeguards to ensure due process for participants in the conduct of the investigation. The USDOC's investigation was consistent with that standard and Canada does not argue otherwise. Articles 22.3, 22.4, and 22.5 of the SCM Agreement provide that an investigating authority shall publish the essential facts and reasoning of its determination, which the USDOC did here. The USDOC's investigation was consistent with these provisions and Canada has not argued otherwise.

22. Instead, Canada relies on its own incomplete and self-serving depictions of the investigative process. However, the U.S. first written submission demonstrated that the USDOC conducted a thorough investigation, provided a reasoned explanation for its findings with respect to all relevant provinces, and in each case reached a conclusion that an objective and unbiased investigating authority could have reached.[12] 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.[13]

23. As explained in the U.S. first written submission, following the initiation of the investigation, the USDOC issued questionnaires for the respondent government and company parties to answer.[14] On January 19, 2017, the USDOC issued a countervailing duty ("CVD") questionnaire to the authorities in Canada responsible for providing the subsidies under investigation.[15] The USDOC also issued an addendum to the Initial Questionnaire regarding

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[10] *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).

[11] *See* SCM Agreement, Art. 11.11 ("Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.").

[12] *See* U.S. First Written Submission, paras. 178-181.

[13] *See* U.S. First Written Submission, para. 181 *et seq.* ("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."). *See also ibid.*, paras. 182-199 ("Investigative Process for New Brunswick"), paras. 238-244 ("Investigative Process for Quebec"), paras. 279-284 ("Investigative Process for Ontario"), paras. 315-322 ("Investigative Process for Alberta"), and paras. 346-356 ("Investigative Process for British Columbia").

[14] *See* U.S. First Written Submission, paras. 182, 238, 279, 315, and 346.

[15] *See Memorandum to Ronald K. Lorentzen from Gary Taverman Subject: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (April 24, 2017) ("Lumber Preliminary Decision Memorandum"), p. 3 (Exhibit CAN-008).

stumpage on January 31, 2017.[16] 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.

24. The USDOC requested that respondents provide extensive information in response to the questionnaires. The initial questionnaire itself spanned more than 250 pages over two sections.[17] The USDOC asked 101 questions of the provincial government of British Columbia pertaining to stumpage alone (and not counting the subparts of multi-part questions – one of which included, *e.g.*, 16 additional questions).[18] This detailed questioning was mirrored for each of the provinces. The USDOC asked 86 questions of Alberta,[19] 96 questions of Ontario,[20] and 110 questions of Quebec (again, not counting the subparts of multi-part questions).[21] The USDOC also asked 32 questions pertaining to the provision of stumpage of each company respondent to the investigation.[22] The USDOC subsequently asked an additional 13 questions of New Brunswick,[23] 20 questions of Nova Scotia,[24] 38 questions of Manitoba,[25] and 38 questions of Saskatchewan pertaining to stumpage.[26]

25. The USDOC also issued supplemental questionnaires. In the supplemental questionnaires, the USDOC again requested that respondents provide extensive information to clarify their responses to the USDOC's previous questions or to provide additional information in response to developing concerns, including:

> 10. It is the Department's understanding that bidding on TSLs are restricted to ensure that no company can hold three TSLs at one time. Please indicate where this restriction exists in the legislation

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

[17] *See* Initial Non-Stumpage Questionnaire (January 19, 2017) (Exhibit USA-062); Initial Stumpage Questionnaire (January 19, 2017) (Exhibit USA-063).

[18] *See* Initial Stumpage Questionnaire, pp. 22-38. *See also ibid.*, pp. 30-31 (Exhibit USA-063).

[19] *See* Initial Stumpage Questionnaire, pp. 7-22 (Exhibit USA-063).

[20] *See* Initial Stumpage Questionnaire, pp. 40-52 (Exhibit USA-063).

[21] *See* Initial Stumpage Questionnaire, pp. 52-73 (Exhibit USA-063). NB The questionnaire for New Brunswick had not yet been issued at that time because the USDOC had not yet selected any New Brunswick company for individual examination.

[22] *See* Initial Stumpage Questionnaire, pp. 75-77, 79-83 (Exhibit USA-063).

[23] *See* Initial Questionnaire Addendum (January 31, 2017) Section II, pp. 1-3 (Exhibit USA-064).

[24] *See* Initial Questionnaire Addendum, Section II, pp. 3-5 (Exhibit USA-064).

[25] *See* Initial Questionnaire Addendum, Section II, pp. 5-10 (Exhibit USA-064).

[26] *See* Initial Questionnaire Addendum, Section II, p. 10 (Exhibit USA-064).

or regulations governing BCTS auctions. What is the rationale for this restriction?[27]

12. We are aware of the GBC's response in its IQR to question B.8 that details each of the different tenure agreements and licenses for Crown tenure in British Columbia. Please provide more detail on the process for awarding the non-auction tenures and licenses in British Columbia. Beyond determining eligibility, how does the province determine which company should be awarded a tenure/license if there are multiple companies eligible? Outside of TFLs and TSLs, are there any tenures/licenses that require a bid or fee paid up front to obtain the tenure/license?[28]

13. Please describe the bonus bid process used in awarding TFLs. Is this a one-time fee paid up front when the TFL is awarded or must the company pay a fee multiple times over the course of the TFL? What has the province done with the money generated from the bonus bid process? The GBC notes in its response that the province has not issued a TFL for a new area of land since 1991, though some of the TFLs have been subdivided since that time. Given that TFLs are granted for a 25-year period, are there any TFLs that remain in place today?[29]

* * *

2. Instead of providing monthly 2015 private stumpage data, you provided a report from Deloitte in Exhibit NS-5, which only contains aggregated private stumpage pricing information for the period April 1, 2015 through December 31, 2015. You state that the Exhibit NS-5 is "an updated report from Deloitte" covering 2015 private stumpage transactions collected in the survey.

a. Discuss in detail how the report is updated from the original report.

b. Does the report cover the full calendar year 2015 or only for the period from April 1, 2015 through December 31, 2015?

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[27] Government of British Columbia Supplemental Questionnaire Response (May 30, 2017), p. BC-SUPP3-19 (Exhibit CAN-082).

[28] Government of British Columbia Supplemental Questionnaire Response (May 30, 2017), p. BC-SUPP3-21 (Exhibit CAN-082).

[29] Government of British Columbia Supplemental Questionnaire Response (May 30, 2017), p. BC-SUPP3-22 (Exhibit CAN-082).

c. Please provide the disaggregated data used to compile the 2015 survey contained in NS-5 of the GNS response.

d. If you state that confidentiality agreements prohibit submitting the data requested above in item 2.c, then provide a copy of the agreement and identify the provision(s) that prevents your disclosure of the information.

e. Further, if you state that confidentiality agreements prohibit submitting the data requested above in item 2.c, then provide the 2015 survey data according to the hierarchy contained in items 1.b through 1.d above.[30]

* * *

Q4: In "Cross Border Analysis of Stumpage and Log Prices in Alberta and Six Other Jurisdictions" at 42, MNP LLP (MNP) states that using the weight conversion in use in Nova Scotia, may result in the overstatement of SPF prices by up to eleven percent. Provide a more thorough description of this comparison, as well as supporting calculations.[31]

Q5: In the same study at 43, MNP states that 6.658 m^3/MBF is a more appropriate conversion than a lower conversion factor used by Nova Scotia. Explain in detail the calculation of MNP's proposed conversion. Provide supporting documentation.[32]

Q7: In Exhibit AB-S-41, in the cover letter at 1, MNP states that the TDA values not only the existing trees, but also the "land's capacity to produce additional timber." Explain how this capacity is valued in the calculation of the TDA amounts. Explain the calculation, and the assumptions on which it is based. Provide an example.[33]

Q9: The TDA Update at Exhibit 1 provides an arm's length price for standing, coniferous timber. Please confirm that this price

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[30] Government of Nova Scotia Supplemental Questionnaire Response (April 3, 2017), pp. 8-10 (Exhibit CAN-338).

[31] Alberta, "MNP's Comments in Respect of the May 12, 2017 Supplemental Questionnaire to Alberta" (Exhibit AB-S-119), p. 1 (Exhibit CAN-345).

[32] Alberta, "MNP's Comments in Respect of the May 12, 2017 Supplemental Questionnaire to Alberta" (Exhibit AB-S-119), p. 5 (Exhibit CAN-345).

[33] Alberta, "MNP's Comments in Respect of the May 12, 2017 Supplemental Questionnaire to Alberta" (Exhibit AB-S-119), p. 7 (Exhibit CAN-345).

includes any relevant Timber Dues. Provide a description of the costs associated with these types of purchases.[34]

Q10: For Exhibit 1 of the TDA Update, confirm that the three statistics presented ((1) Delivered to the Mill; (2) Logged and skidded into decks; and, (3) Standing, on the stump) are independent and do not report overlapping values. For example, is the weighted-average value of standing timber calculated only for sales of standing timber and therefore does not include the value of standing timber for timber as a component of the value reported as "logged and skidded into decks"?[35]

* * *

1. In TQR Exhibit G-68, the reconciliation table subtracts an amount for "FS Total Freight adjusted for interdivisional/intercompany freight & Export Tax," however no worksheets were provided to detail this adjustment. Please provide a worksheet explaining the calculation and the origin of the amount listed in this column, with reference to the company's audited financial statements.[36]

2. In TQR at CVD-15- CVD-16, Tolko states that it generally books sales revenue on a delivered basis and that its records do not distinguish Canadian inland freight from U.S. inland freight. Tolko describes the process used to "estimate the FOB port sales for non-Canadian sales" and "estimate the freight to the port for U.S. and other export shipments." In TQR Exhibit G-68, the reconciliation table includes a column titled "Add: Freight FOB Port Export Sales." The amount in this column [[***]] the amount listed under the "Total Freight to Port" for 2015 in TQR Exhibit G-67.

a. Do the freight amounts listed in the chart in TQR Exhibit G-67 represent the freight from the mills/factories to the port of exportation (*i.e.* Canadian inland freight)? If so, please explain

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[34] Alberta, "MNP's Comments in Respect of the May 12, 2017 Supplemental Questionnaire to Alberta" (Exhibit AB-S-119), p. 11 (Exhibit CAN-345).

[35] Alberta, "MNP's Comments in Respect of the May 12, 2017 Supplemental Questionnaire to Alberta" (Exhibit AB-S-119), p. 11 (Exhibit CAN-345).

[36] Tolko's Response to the Department's CVD Supplemental Questionnaire (May 30, 2017), p. 9 (Exhibit CAN-085 (BCI)).

why this freight amount is added back into the calculation of the F.O.B. total sales amount in the reconciliation chart?

b. Please explain how freight for domestic sales of certain softwood lumber was removed from the sales values reported and provide a worksheet showing the calculation and referencing the sources.[37]

3. Please reconcile to the financial statement the sales values reported for 2015 in the Sales of Subject Merchandise, Total Exports, Total Exports to the United States, and Exports of Subject Merchandise charts in TQR-B at CVD-15-CVD-18.[38]

26. The supplemental questionnaires included the following:[39]

Date	Short Citation	Complete Document Title
February 3, 2017	GOC Etal Primary QNR Clarification 3	Letter from the Department to the GOC, "Certain Softwood Lumber from Canada: Addressing Preliminary Issues Identified in the CVD Initial Questionnaire," dated February 3, 2017
February 6, 2017	GOC Etal Primary QNR Clarification 4	Letter from the Department to the GOC, "Certain Softwood Lumber from Canada: Addressing Preliminary Issues Identified in the CVD Initial Questionnaire," dated February 6, 2017
February 8, 2017	Canfor QNR Clarification Request 2	Letter from the Department to Canfor, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated February 8, 2017
February 8, 2017	West Fraser QNR Clarification 1	Letter from the Department to West Fraser, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated February 8, 2017

[37] Tolko's Response to the Department's CVD Supplemental Questionnaire (May 30, 2017), pp. 1-2 (Exhibit CAN-085 (BCI)).

[38] Tolko's Response to the Department's CVD Supplemental Questionnaire (May 30, 2017), p. 2 (Exhibit CAN-085 (BCI)).

[39] *See* List of Case-Related Documents (Exhibit USA-061). As noted at the first substantive meeting, this list was published in its entirety as part of the final issues and decision memorandum and spans over 45 pages. *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. 282-327 (Exhibit CAN-010).

Date	Short Citation	Complete Document Title
February 9, 2017	Resolute Supp QNR 1	Letter from the Department to Resolute, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Affiliated Companies
February 9, 2017	West Fraser Supp QNR 1	Letter from the Department to West Fraser, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated February 9, 2017
February 17, 2017	Resolute Supp QNR 2	Letter from the Department to Resolute, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Second Supplemental Questionnaire on Affiliated Companies of Resolute FP Canada Inc.," dated February 17, 2017
February 21, 2017	Resolute Supp QNR 3	Letter from the Department to Resolute, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Third Supplemental Questionnaire on Affiliated Companies of Resolute FP Canada Inc.," dated February 21, 2017
February 22, 2017	Canfor Supp QNR 1	Letter from the Department to Canfor, "Certain Softwood Lumber Products from Canada, Case No. C-122-858: Affiliated Companies Section Questionnaire Response," dated February 22, 2017.
March 21, 2017	GNS Supp QNR 1	Letter from the Department to the GNS, "Countervailing Duty Investigation of Softwood Lumber Products from Canada: Supplemental Questionnaire," dated March 21, 2017
March 22, 2017	Resolute Supp QNR 4	Letter from the Department to Resolute, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Non-Stumpage Programs – First Supplemental Questionnaire for Resolute FP Canada Inc.," dated March 22, 2017
March 24, 2017	Resolute Supp QNR 5	Letter from the Department to Resolute, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Non-Stumpage Programs – Second Supplemental Questionnaire for Resolute FP Canada Inc.," dated March 24, 2017

Date	Short Citation	Complete Document Title
March 27, 2017	GBC Supp QNR 1	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated March 27, 2017
March 27, 2017	GNS Supp QNR 2	Letter from the Department, "Letter to the Government of Canada, "Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated March 27, 2017.
March 27, 2017	GOA Supp QNR 1	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated March 27, 2017
March 27, 2017	GOC Etal Supp QNR 1	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated March 27, 2017
March 27, 2017	GOM Supp QNR 1	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated March 27, 2017
March 27, 2017	GOO Supp QNR 1	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated March 27, 2017
March 27, 2017	GOQ Supp QNR 1	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated March 27, 2017

Date	Short Citation	Complete Document Title
March 27, 2017	GOS Supp QNR 1	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated March 27, 2017
March 30, 2017	Canfor Supp QNR 2	Letter from the Department to Canfor, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for Canfor," dated March 30, 2017
March 30, 2017	GBC Supp QNR 2	Letter from the Department to the GBC, "Countervailing Duty Investigation of Certain Softwood Lumber Products From Canada: Stumpage Programs," dated March 30, 2017
March 30, 2017	Resolute Supp QNR 6	Letter from the Department to Resolute, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Stumpage Programs – First Supplemental Questionnaire for Resolute FP Canada Inc.," dated March 30, 2017
March 30, 2017	Tolko Supp QNR 1	Letter from the Department to Tolko, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for Tolko," dated March 30, 2017
April 3, 2017	GOC Etal Supp QNR 2	Letter from the Department to the GOC, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan," dated April 3, 2017
April 3, 2017	Resolute Supp QNR 7	Letter from the Department to Resolute, "Non-Stumpage Programs – Addendum to Second Supplemental Questionnaire for Resolute FP Canada Inc.," dated April 3, 2017
April 4, 2017	Canfor Supp QNR 3	Letter from the Department to Canfor, "Certain Softwood Lumber Products from Canada, Case No. C-122-858: Initial Questionnaire Response," dated April 4, 2017
April 4, 2017	West Fraser Supp QNR 2	Letter from the Department to West Fraser, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Non-Stumpage Programs – First Supplemental Questionnaire for West Fraser Mills Ltd.," dated April 4, 2017

Date	Short Citation	Complete Document Title
April 5, 2017	GBC Supp QNR 3	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Governments of Canada, British Columbia and New Brunswick," dated April 5, 2017
April 5, 2017	GNB Supp QNR 1	Letter from the Department, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Governments of Canada, British Columbia and New Brunswick," dated April 5, 2017
April 5, 2017	GOC Etal Supp QNR 3	Letter from the Department to the GOC, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for the Governments of Canada, British Columbia and New Brunswick," dated April 5, 2017
April 6, 2017	West Fraser Supp QNR 2, Addendum	Letter from the Department to West Fraser, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Addendum to First Supplemental Questionnaire for West Fraser Mills Ltd.," dated April 6, 2017
April 13, 2017	Request for Additional Sales Information	Letter from the Department to respondents, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Request for Respondents to Submit Additional Sales Data," dated April 13, 2017.

27. The USDOC took into account the responses to these questionnaires and supplemental questionnaires in reaching its preliminary determination.[40] The USDOC published its preliminary determination in the U.S. *Federal Register* on April 28, 2017. In the preliminary determination and the preliminary issues and decision memorandum, the USDOC set out its preliminary findings and the reasoning and explanation for those findings.[41] The USDOC continued to issue supplemental questionnaires after the publication of the preliminary determination. These additional supplemental questionnaires included the following:[42]

[40] *See generally Certain Softwood Lumber Products from Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 Fed. Reg. 19,657 (April 28, 2017) (Exhibit CAN-009); Lumber Preliminary Decision Memorandum (Exhibit CAN-008).

[41] *See* Lumber Preliminary Decision Memorandum (Exhibit CAN-008).

[42] *See* List of Case-Related Documents (Exhibit USA-061). As noted at the first substantive meeting, this list was published in its entirety as part of the final issues and decision memorandum and spans over 45 pages. *See* Lumber Final I&D Memo, pp. 282-327 (Exhibit CAN-010).

Date	Short Citation	Complete Document Title
May 8, 2017	GNS Supp QNR 3	Letter from the Department to the GNS, "Countervailing Duty Investigation of Softwood Lumber Products from Canada: Supplemental Questionnaire," dated May 8, 2017
May 11, 2017	Canfor Supp QNR 4	Letter from the Department to Canfor, "Certain Softwood Lumber Products from Canada, Case No. C-122-858: Supplemental Questionnaire," dated May 11, 2017
May 11, 2017	GBC Supp QNR 4	Letter from the Department to the GBC, "Countervailing Duty Investigation of Certain Softwood Lumber Products From Canada: Second Supplemental Questionnaire for the Government of British Columbia," dated May 11, 2017
May 11, 2017	JDIL Supp QNR 1	Letter from the Department to JDIL, "Certain Softwood Lumber from Canada: Supplemental Questionnaire," dated May 11, 2017
May 11, 2017	Tolko Supp QNR 2	Letter from the Department to Tolko, "Certain Softwood Lumber from Canada: Supplemental Questionnaire for Tolko," dated May 11, 2017
May 11, 2017	West Fraser Supp QNR 3	Letter from the Department to West Fraser, "Supplemental Questionnaire for West Fraser Mills Ltd. (West Fraser)," dated May 11, 2017
May 12, 2017	GNB Supp QNR 2	Letter from the Department to the GNB, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Supplemental Questionnaire for the Government of New Brunswick," dated May 12, 2017

Date	Short Citation	Complete Document Title
May 12, 2017	GOA Supp QNR 2	Letter from the Department to the GOA, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Supplemental Questionnaire for the Government of Alberta," dated May 12, 2017
May 15, 2017	GOA Supp QNR 2 Addendum	Letter from the Department to the GOA, "Addendum to May 12, 2017 Supplemental Questionnaire for the Government of Alberta," dated May 15, 2017
May 16, 2017	GOO Supp QNR 2	Letter from the Department to the GOO, "Countervailing Duty Investigation of Softwood Lumber Products from Canada: Post-Preliminary Supplemental Questionnaire," dated May 16, 2017
May 16, 2017	GOQ Supp QNR 2	Letter from the Department to the GOQ, "Countervailing Duty Investigation of Softwood Lumber Products from Canada: Post-Preliminary Supplemental Questionnaire," dated May 16, 2017
May 17, 2017	Canfor Supp QNR 4 Addendum	Letter from the Department to Canfor, "Certain Softwood Lumber from Canada: Addendum to Supplemental Questionnaire for Canfor Corporation," dated May 17, 2017
May 17, 2017	Tolko Supp QNR 2 Addendum	Letter from the Department to Tolko," Certain Softwood Lumber from Canada: Addendum to Supplemental Questionnaire for Tolko Marketing and Sales Ltd. and Tolko Industries Ltd.," dated May 17, 2017
May 18, 2017	Petitioner Supp QNR 4	Letter from the Department to Petitioner, "Supplemental Scope Questions," dated May 18, 2017

Date	Short Citation	Complete Document Title
May 18, 2017	Resolute Supp QNR 8	Letter from the Department to Resolute, "Countervailing Duty Investigation of Softwood Lumber Products from Canada: Post-Preliminary Supplemental Questionnaire," dated May 18, 2017

28. Subsequently, the USDOC advised parties that it would conduct on-site verifications to be scheduled shortly after the preliminary determination. The USDOC issued verification outlines and agendas to each party:[43]

Date	Short Citation	Complete Document Title
May 31, 2017	GOO Verification Outline	Letter from the Department, "Verification of the Government of Ontario's Questionnaire Responses submitted in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated May 31, 2017
June 5, 2017	Tolko Verification Outline	Letter from the Department, "Countervailing Duty Investigation of Certain Softwood Lumber from Canada: Tolko Verification Agenda," dated June 5, 2017
June 5, 2017	West Fraser Verification Outline	Letter from the Department, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada; Verification of West Fraser Mills Ltd.'s Questionnaire Responses," dated June 5, 2017
June 6, 2017	JDIL Verification Outline	Letter from the Department, "Countervailing Duty Investigation of Certain Softwood Lumber from Canada; Verification of J.D. Irving, Limited's Questionnaire Responses," dated June 6, 2017
June 7, 2017	GBC Verification Outline	Letter from the Department, "Verification of Government of British Columbia Questionnaire Responses submitted in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated June 8, 2017

[43] *See* List of Case-Related Documents (Exhibit USA-061). As noted at the first substantive meeting, this list was published in its entirety as part of the final issues and decision memorandum and spans over 45 pages. *See* Lumber Final I&D Memo, pp. 282-327 (Exhibit CAN-010).

Date	Short Citation	Complete Document Title
June 8, 2017	GNB Verification Outline	Letter from the Department, "Verification of Government of New Brunswick Questionnaire Responses submitted in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated June 8, 2017
June 8, 2017	GOA Verification Outline	Letter from the Department, "Verification of Government of Alberta Questionnaire Responses submitted in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated June 8, 2017
June 12, 2017	GNS Verification Outline	Letter from the Department, "Verification of Government of Nova Scotia's Questionnaire Responses submitted in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated June 12, 2017
June 12, 2017	GOQ Verification Outline	Letter from the Department, "Verification of the Government of Quebec's Questionnaire Responses Submitted in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada," dated June 12, 2017
June 16, 2017	Resolute Verification Outline	Letter from the Department, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada; Verification of Resolute FP Canada Inc.'s Questionnaire Responses," dated June 16, 2017

29. Each of these verification outlines set out in detail the procedures that the USDOC would follow in conducting the verification and identified certain areas of inquiry that would be covered during the process.[44] The verification outlines instruct, for example, that:

> In examining supporting documentation, the verifiers will need to meet with the relevant agencies at the locations where the information is stored and managed and where the subsidy program is administered. While at each location, we will need to speak to the personnel *directly* responsible for preparing the GOQ's responses (*i.e.*, not the trade authority personnel who may have coordinated the response, but the agency personnel who provided the narrative descriptions of the program, collected relevant data, and provided supporting documentation for the questionnaire responses). All databases, computer systems, etc. that were relied upon in preparing the GOQ's questionnaire responses and other

[44] *See* Complete Set of Verification Outlines Issued to Parties (Exhibit USA-065).

> information submitted on the record of the proceeding, must be available for the Department to examine and to be incorporated into verification exhibits….
>
> The officials should be prepared not only to discuss the program generally as well as with respect to the company respondents, but also to provide an on-site demonstration of how the information submitted to the Department was obtained and how its completeness and accuracy was confirmed. This verification will involve an examination of documents, records, and program usage by Resolute FP Canada and its responding cross-owned affiliates (collectively, Resolute). Please note that any deficiencies in access to documents or personnel involved will be noted for the record in the verification report and may be relevant to the Department's determination in this case. During this demonstration, Department officials may require you to demonstrate completeness by tying total values from electronic databases or hardcopy printouts to audited, public, or published documents, and may require you to demonstrate accuracy by tracing specific observations in electronic databases or hardcopy printouts to original source documents. Additionally, Department officials must be allowed to perform random queries of your electronic databases.
>
> Copies of source documents such as applicable laws, regulations, decrees, guidelines, and other related materials must be available at verification. Source documentation refers to records, including databases of electronic records, kept by the appropriate administering authority for each program and not to documents created for purposes of this investigation…. [O]riginal source documents should be available at the verification site so that we can trace the data reported in the responses to official budget and expenditure records. We will require copies of certain documents which we will collect as exhibits to our verification report.[45]

30. The USDOC then conducted 11 separate verifications *in situ*. As explained in the U.S. first written submission, the USDOC issued a separate verification report for each verification, summarizing the procedures and observations.[46] USDOC officials conducted an on-site

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[45] USDOC, "Québec Verification Outline" (June 12, 2017), pp. 2, 4-5 (Exhibit CAN-217) (italics in original).

[46] *See* U.S. First Written Submission, para. 244 (Quebec and Resolute), paras. 188-199 (New Brunswick and JDIL), para. 284 (Ontario and Resolute), para. 322 (Alberta, Canfor, Tolko, and West Fraser), and para. 356 (British Columbia).

verification of Quebec from June 19, 2017, through June 22, 2017.[47] USDOC officials conducted an onsite verification of Resolute, including its purchases of stumpage in Quebec, from June 26, 2017 through June 29, 2017.[48] From June 19, 2017, through June 23, 2017, the USDOC investigators met with representatives of J.D. Irving, Limited ("JDIL") at Saint John, New Brunswick, Canada, to conduct verification of JDIL's questionnaire responses.[49] 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.[50] USDOC officials conducted an on-site verification of Ontario from June 6, 2017, through June 8, 2017[51] and an on-site verification of Resolute, including its purchases of stumpage in Ontario, from June 26, 2017 through June 29, 2017.[52] USDOC officials conducted an on-site verification of Alberta on June 19, 2017, and June 20, 2017.[53] USDOC officials also conducted on-site verifications of Canfor, Tolko, and West Fraser, including their purchases of stumpage in Alberta and British Columbia, between June 12, 2017, and June 16, 2017.[54] USDOC officials conducted an on-site verification of British Columbia from June 19, 2017, through June 22, 2017.[55]

31. A review of the foregoing verification reports demonstrates that USDOC officials conducted these on-site verifications for a cumulative 41 days and recorded meeting with hundreds of government and company officials during that time. The USDOC collected over 300 exhibits in the process as samples of the work conducted and material examined during the course of the verifications. USDOC officials also recorded meeting with approximately 40 of the hired consultants and private legal counsel representing the interested parties during those verifications. The resulting hundreds of pages of verification reports merely summarize the far more extensive examination and inquiry that took place during the on-site verification process.

32. After the USDOC completed the verifications and issued separate verification reports for each company and province, the USDOC provided interested parties the opportunity to submit case briefs and rebuttal briefs to comment on what they viewed as the remaining issues to be

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

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

[49] *See* JDIL Verification Report, p. 1 (Exhibit CAN-241 (BCI)). The United States recalls that Canada abbreviates J.D. Irving, Ltd., or JDIL, as "Irving" in its written filings.

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

[51] *See* GOO Verification Report (Exhibit CAN-160).

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

[53] *See* GOA Verification Report (Exhibit CAN-110 (BCI)).

[54] *See* Canfor Verification Report (Exhibit CAN-357 (BCI)); Tolko Verification Report (Exhibit CAN-316 (BCI)); West Fraser Verification Report (Exhibit CAN-362 (BCI)).

[55] *See* GBC Verification Report (Exhibit CAN-088).

addressed in the final determination. The following case briefs and rebuttal briefs were submitted:[56]

Date	Short Citation	Complete Document Title
July 25, 2017	OCFP Case Brief	Letter from OCFP, "Certain Softwood Lumber Products from Canada: Case "Brief of Oregon-Canadian Forest Products Inc.," dated July 25, 2017
July 27, 2017	Canfor Case Brief	Letter from Canfor, "Certain Softwood Lumber Products from Canada, Case No. C-122-858: Case Brief," dated July 27, 2017
July 27, 2017	Central Canada Alliance Case Brief	Letter from Central Canada Alliance, "Softwood Lumber from Canada: Central Canada's Case Brief," dated July 27, 2017
July 27, 2017	GBC Case Brief	Letter from GBC Etal, Volume 5, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Government Parties' Joint Case Brief - GBC/BCLTC," dated July 27, 2017
July 27, 2017	GBC Case Brief Log Exports	Letter from GBC Etal, Volume 3, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Government Parties' Joint Case Brief - GOC/GBC Log Export Ban," dated July 27, 2017
July 27, 2017	GNB Case Brief	Letter from GNB, "GNB's Case Brief Certain Softwood Lumber Products from Canada," dated July 27, 2017
July 27, 2017	GOA Case Brief	Letter from GOA/ Etal, Volume 4, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Government Parties' Joint Case Brief - GOA/Albert Softwood Lumber Trade Counsel," dated July 27, 2017
July 27, 2017	GOC Case Brief	Letter from GOC Etal, Volume 2, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Government Parties' Joint Case Brief," dated July 27, 2017

[56] *See* List of Case-Related Documents (Exhibit USA-061). As noted at the first substantive meeting, this list was published in its entirety as part of the final issues and decision memorandum and spans over 45 pages. *See* Lumber Final I&D Memo, pp. 282-327 (Exhibit CAN-010).

Date	Short Citation	Complete Document Title
July 27, 2017	GOC Etal Common Issues Case Brief	Letter from GOC Etal, Volume 1, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Government Parties' Joint Case Brief - GOC Brief," dated July 27, 2017
July 27, 2017	GOM Case Brief	Letter from GOM, Volume 6, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Government Parties' Joint Case Brief - GOM," dated July 27, 2017
July 27, 2017	GOO Case Brief	Letter from GOO, Volume 7, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Case Brief - GOO," dated July 27, 2017
July 27, 2017	GOQ Case Brief	Letter from GOQ, Volume 8, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Case Brief - GOQ," dated July 27, 2017
July 27, 2017	GOS Case Brief	Letter from GOS, Volume 9, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Case Brief - GOS," dated July 27, 2017
July 27, 2017	JDIL Case Brief	Letter from JDIL, "Softwood Lumber Products from Canada: Case Brief," dated July 27, 2017
July 27, 2017	Petitioner Case Brief	Letter from Petitioner, "Certain Softwood Lumber Products from Canada: Case Brief," dated July 27, 2017
July 27, 2017	Resolute Case Brief	Letter from Resolute, "Softwood Lumber from Canada: Resolute's Case Brief," dated July 27, 2017
July 27, 2017	Tolko Case Brief	Letter from Tolko, "Certain Softwood Lumber Products from Canada: Tolko CVD Affirmative Case Brief," dated July 27, 2017
July 27, 2017	West Fraser Case Brief	Letter from West Fraser, "Certain Softwood Lumber Products from Canada: Case Brief of West Fraser Mills Ltd.," dated July 27, 2017

Date	Short Citation	Complete Document Title
August 4, 2017	Central Canada Alliance Rebuttal Brief	Letter from Central Canada Alliance, "Softwood Lumber from Canada: Central Canada's Case Brief on Critical Circumstances" dated August 4, 2017
August 4, 2017	GBC Rebuttal Brief	Letter from the GOC, Volume 3, "Canadian Parties Joint Rebuttal Brief," dated August 4, 2017
August 4, 2017	GNB Rebuttal Brief	Letter from GNB, "GNB's Rebuttal Brief Certain Softwood Lumber Products from Canada," dated August 4, 2017
August 4, 2017	GNS Rebuttal Brief	Letter from GNS, "Certain Softwood Lumber Products from Canada: Rebuttal Brief," dated August 4, 2017
August 4, 2017	GOC Etal Common Issues Rebuttal Brief	Letter from the GOC, Volume 1, "Canadian Parties Joint Rebuttal Brief," dated August 4, 2017
August 4, 2017	GOC Rebuttal Brief	Letter from the GOC, Volume 2, "Canadian Parties Joint Rebuttal Brief," dated August 4, 2017
August 4, 2017	GOO Rebuttal Brief	Letter from the GOC, Volume 4, "Canadian Parties Joint Rebuttal Brief," dated August 4, 2017
August 4, 2017	GOQ Rebuttal Brief	Letter from GOQ, Volume 5, "Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Rebuttal Brief - GOQ," dated August 4, 2017
August 4, 2017	JDIL Rebuttal Brief	Letter from JDIL, "Softwood Lumber Products from Canada: Rebuttal Brief," dated August 4, 2017
August 4, 2017	Resolute Rebuttal Brief	Letter from Resolute, "Softwood Lumber from Canada: Resolute's Rebuttal Brief," dated August 4, 2017

Date	Short Citation	Complete Document Title
August 4, 2017	GOC Miscellaneous Scope Comments	Letter from GOC, "Antidumping Duty Investigation of Certain Softwood Lumber GOC Miscellaneous Scope Comments Products from Canada: Scope Comments of Government of British Columbia Filed in Countervailing Duty Investigation of Softwood Lumber Products from Canada," dated August 4, 2017
August 4, 2017	West Fraser Rebuttal Brief	Letter from West Fraser, "Certain Softwood Lumber Products from Canada: Rebuttal Brief of West Fraser Mills Ltd.," dated August 4, 2017
August 7, 2017	NBLP Scope Brief	Letter from NBLP, "Certain Softwood Lumber from Canada: NBLP Case Brief on Scope Issues," dated August 7, 2017
August 7, 2017	BarretteWood and EACOM Scope Brief	Letter from BarretteWood, Inc. and EACOM Timber Corporation, "Softwood Lumber from Canada: Case Brief - Scope Issues," dated August 7, 2017
August 7, 2017	Canfor Scope Brief	Letter from Canfor, "Certain Softwood Lumber Products from Canada. Case Nos. A-122-857. C-122-158: Case Brief on Scope-Related Matters," dated August 7, 2017
August 7, 2017	GNB Scope Case Brief	Letter from GNB, "GNB's Scope Case Brief Certain Softwood Lumber Products from Canada," dated August 7, 2017
August 7, 2017	GNS Scope Brief	Letter from GNS, "Certain Softwood Lumber Products from Canada: Case Brief Concerning Product Scope Issues," dated August 7, 2017
August 7, 2017	JDIL Scope Brief	Letter from J.D. Irving, "Softwood Lumber from Canada: Scope Comments," dated August 7, 2017
August 7, 2017	Central Canada Scope Brief	Letter from Central Canada, "Softwood Lumber from Canada: Central Canada's Case Brief On Scope Issues," dated August 7, 2017
August 7, 2017	NAFP Scope Brief	Letter from NAFP, "Certain Softwood Lumber from Canada; Scope Brief of North America Forest Products Ltd.," dated August 7, 2017

Date	Short Citation	Complete Document Title
August 7, 2017	OCFP Scope Brief	See Letter from OCFP, "Certain Softwood Lumber Products from Canada (Case No. A-122-857): Case Brief of Oregon- Canadian Forest Products, Inc. on Scope Issues," dated August 7, 2017
August 7, 2017	Petitioner Rebuttal Brief	Letter from the petitioner, "Certain Softwood Lumber Products from Canada: Rebuttal Brief," dated August 7, 2017
August 7, 2017	RILA Scope Brief	Letter from RILA, "Certain Softwood Lumber Products from Canada: RILA Case Brief on Scope Issues," dated August 7, 2017
August 7, 2017	Woodtone Scope Brief	Letter from Woodtone, "Certain Softwood Lumber from Canada; Scope Brief of W.I. Woodtone, Inc. U.S. Origin Wood Subject to Minor Processing," dated August 7, 2017
August 7, 2017	Woodtone/Maibec Scope Brief	Letter from Woodone and Maibec, "Certain Softwood Lumber from Canada; Scope Brief of Woodtone and Maibec," dated August 7, 2017
August 7, 2017	Canadian Parties Joint Scope Brief	Letter from GOC, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Case Brief on Scope," dated August 7, 2017
August 14, 2017	Central Canada Scope Rebuttal	Letter from Central Canada, "Softwood Lumber from Canada: Central Canada's Rebuttal Brief On Scope Issues," dated August 14, 2017
August 14, 2017	IKEA Scope Rebuttal	Letter from IKEA, "Certain Softwood Lumber Products from Canada: IKEA Rebuttal Brief on Scope Issues," dated August 14, 2017
August 14, 2017	Petitioner Scope Rebuttal	Letter from the petitioner, "Certain Softwood Lumber Products from Canada: Scope Rebuttal Comments," dated August 14, 2017
August 14, 2017	RILA Scope Rebuttal	Letter from RILA, "Certain Softwood Lumber Products from Canada: RILA's Letter in lieu of Rebuttal Case Brief on Scope Issues," dated August 14, 2017

Date	Short Citation	Complete Document Title
August 25, 2017	UFP Scope Rebuttal	Letter from UFP, "Certain Softwood Lumber Products from Canada: Refiling of Rebuttal Comments on Scope Bed Frame/Box Spring Components and Kits Submitted by UFP Western Division, Inc. and UFP Eastern Division Inc. (A-122- 857; C-122-858)," dated August 25, 2017 (refiling UFP's August 14, 2017 scope comments at the direction of the Department)

33. After receiving the interested parties' case briefs and rebuttal briefs, the USDOC held a public hearing. The hearing participants, including counsel for Canadian interested parties, recognized that completing an investigation of this scope and complexity had required the USDOC to expend significant resources, time, and energy, to be able reach a final determination within the domestic statutory time constraints (which mirror the provisions of Article 11.11 of the SCM Agreement).

34. Unlike what Canada has argued in this dispute, counsel for one of the provincial governments stated the consensus view that the USDOC had undertaken a diligent investigation, thanking the USDOC officials "for the tremendous amount of professional work over what I think everybody in this room knows is far, far too short a time frame in which to do that work."[57] As noted above, the SCM Agreement provides that an investigating authority must complete its investigation within 12 months of the initiation or, in exceptional circumstances, within 18 months.[58] Within that time frame, the USDOC conducted an exceedingly thorough and diligent investigation.

35. The remainder of this section addresses with particularity the issues and arguments raised by Canada with respect to the conduct of the investigation. As a general matter, though, Canada's depiction of the process and Canada's characterization of the USDOC's due diligence has been incomplete, and fails to reflect any of the foregoing scope and complexity. Canada has failed to demonstrate that the USDOC's efforts in examining and soliciting relevant information were insufficient in light of these facts.

2. The USDOC's Findings Contradict Canada's Characterization of So-Called "Expert Reports"

36. Canada has continued to argue that the USDOC automatically dismissed reports and other documents submitted on behalf of Canadian interested parties by hired consultants and private legal counsel. But the United States has demonstrated that Canada's repeated assertions that the USDOC ignored or rejected these materials without discussion is unfounded.[59] As the

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[57] USDOC Memorandum, "Hearing Transcript on CVD Issues," dated August 24, 2017, pp. 169-170 (Exhibit USA-072).

[58] *See* SCM Agreement, Art. 11.11.

[59] *See* U.S. Responses to the First Set of Panel Questions, paras. 1-8. *See also ibid.*, para. 8 (explaining that "the USDOC addressed the issues in contention, consistent with its approach to addressing all the issues raised by the

United States explained in response to Panel question 1 (which specifically asks about this point), any investigating authority should evaluate all information submitted by interested parties and determine, on a case-by-case basis, what evidentiary weight to give the information, and should explain the reasons for reaching the conclusions reached.[60] That is precisely what the USDOC did in the countervailing duty investigation of softwood lumber from Canada that is at issue in this dispute.

37. Now, in its responses to the first set of Panel questions, Canada has presented a chart of reports that purports to reflect how the USDOC dismissed or ignored each one of the reports in the course of its investigation.[61] Canada's chart is incomplete and inaccurate. The USDOC addressed in the preliminary decision memorandum and the final issues and decision memorandum all of the documents and issues Canada sets out in its chart of reports (attached to Canada's responses to the first set of Panel questions at Annex A).[62] Below, the United States identifies the USDOC's actual responses and corrects the record with respect to Canada's depiction of these reports.

a. Canada Mischaracterizes the USDOC's Treatment of the Documents Listed in in Annex A of Canada's Responses to the First Set of Panel Questions

38. This section discusses each of the 36 documents identified in Canada's Annex A chart of reports, noting Canada's description of each document and explaining how and where in the record the USDOC addressed the issues in the preliminary decision memorandum and the final issues and decision memorandum.

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

39. According to Canada, the relevance of this document is that it "concludes that log prices in Alberta are not depressed as a result of the Crown stumpage system and that TDA transaction data can be used to calculate an in-jurisdiction benchmark for stumpage dues."[63] The USDOC addressed this report in the final issues and decision memorandum at pages 53-54.[64] The USDOC found that "this report was commissioned by the [government of Alberta] for the

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parties . . . . as the United States has explained throughout the panel proceeding" and referring the Panel's attention to further detailed responses on this issue that can be found in U.S. Responses to questions 25, 37, 50, 57, 75, 77, 84, 88, 98, 104, 105, and 106).

[60] *See* U.S. Responses to the First Set of Panel Questions, paras. 1-8.

[61] *See* Canada's Responses to the First Set of Panel Questions, Annex A.

[62] *See* Canada's Responses to the First Set of Panel Questions, Annex A.

[63] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-2.

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

purposes of this investigation and as such, carries only limited weight given its potential for bias, with data and conclusions that may be tailored to generate a desired result."[65] However, the USDOC also went on to address whether the report supported the Canadian interested parties' argument that "the existence of supply overhang is consistent with Crown stumpage rates being too high, rather than too low."[66] The USDOC found that "whether Crown stumpage prices are too 'high' or 'low' is not what the Department is attempting to measure in its distortion analysis. Rather, our concern, reflected above, is that private prices are 'effectively determined' by Crown stumpage prices, which renders any price comparison circular."[67]

40. Canada asserts that the USDOC "completely ignored the Brattle Report's most relevant evidence and analysis, which concluded that the observed log prices constitute an appropriate benchmark."[68] However, as discussed in the final issues and decision memorandum at page 48, the USDOC found that the appropriate benchmark for respondents' purchases of stumpage was a stumpage benchmark, not a log benchmark.[69] Therefore, the USDOC had no reason to address what Canada describes as "the Brattle Report's most relevant evidence and analysis."[70]

(2) Document 2: Brian Bustard, "The Business of Log Exports from British Columbia and Log Export Permitting Processes, Statement for the Province of British Columbia" (Bustard report) (Exhibit CAN-017)

41. According to Canada, the relevance of this document is that it "concludes that it is not economically feasible to export logs from the B.C. Interior."[71] The USDOC addressed this report in the final issues and decision memorandum at pages 147-148.[72] During the investigation, Canada and British Columbia relied on this report to assert that it is not economically feasible to export logs from much of the interior of BC.[73]

42. The USDOC addressed the findings of this report in the final issues and decision memorandum when explaining its final determination that log export restraints directly impact the interior region of BC – regardless of any ripple effect from the coast to the interior – because

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

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

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

[68] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-2 (underline added).

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

[70] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-2.

[71] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-2.

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

[73] *See* Canada and British Columbia Case Brief Vol. III (July 27, 2017) ("GOC/GBC Case Brief"), p. 23 (Exhibit USA-067).

logs can be and are exported from the interior of BC.[74] First, the USDOC accorded the report limited weight because it was prepared for the purposes of the investigation and therefore contained potential bias and conclusions tailored to reach a specific finding.[75] Furthermore, other record evidence indicated that logs are exported from different parts of the interior, including the Tidewater Interior and Southern Interior, which respectively account for eight and two percent of total exports from the entire province.[76] The record also indicates that logs are exported from the eastern interior BC.[77] Canada challenges the USDOC's conclusion that these exports from the interior were significant.[78] In making this argument, Canada misses the key point that the record evidence shows exports from multiple regions of the BC interior, which supports the USDOC's determination that it was economically feasible to export logs from the interior.[79] Although these exports were mostly from a different area than the BC interior sawmills, the record demonstrated that most of the interior mills overlap with each other and potential export markets, and the impact on the border regions of the interior would have a similar ripple effect on the interior.[80] In explaining its finding concerning overlapping mills, the USDOC cited to a map submitted by the petitioner in which a 100-mile radius is drawn around the sawmills in the BC interior, which shows that the BC mills overlap with one another.[81] The USDOC also noted that this figure is consistent with the Bustard report's finding that, "[i]n most interior areas it is economically feasible to truck export logs for up to about a 7-hour return cycle from harvest sites. This represents approximately a 228km (142 mile) [trip] each way."[82] Based on this statement from the Bustard report, the USDOC concluded that the 100-mile radius petitioner indicated was a conservative estimate of the degree to which BC sawmills overlap with each other.[83]

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

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

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

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

[78] *See* First Written Submission of Canada (October 5, 2018) ("Canada's First Written Submission"), paras. 209-210.

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

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

[81] *See* Lumber Final I&D Memo, p. 148, footnote 886 (Exhibit CAN-010) ("*See* Petitioner Comments – Primary QNR Responses at Exhibit 19. In this exhibit, the petitioner provided a map, in which a 100-mile radius is drawn around the sawmills in the BC interior, which demonstrates that the BC interior sawmills all overlap with each other. We note that this figure is consistent with the findings of the GOC/GBC's own expert, as the Bustard Report states that '[i]n most Interior areas it is economically feasible to truck export logs for up to about a 7-hour return cycle from harvest sites. This represents approximately a 228 km (142 mile) each way.'). *See* GOC Primary QNR Response Part 1 at Exhibit LEP-2 at 10. As such, we find that the 100-mile radius used by petitioner is a conservative estimate to the degree in which BC interior sawmills all overlap with each other.") (italics in original).

[82] Lumber Final I&D Memo, p. 148, footnote 886 (Exhibit CAN-010).

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

43. Therefore, the USDOC did not simply dismiss the Bustard report, but rather acknowledged its potential bias while also weighing the report's contents against both conflicting and consistent information elsewhere on the record.

(3) Document 3: Brian Bustard, "Review of Petitioner's Comments on the Feasibility of Exports from All Areas of the Interior, Including Reliance on Exhibits 20 and 21" (Exhibit CAN-529)

44. According to Canada, the relevance of this document is that it "rebuts Petitioner's claim that logs can be economically exported from the central and northern Interior of British Columbia."[84] The USDOC addressed this report in the final issues and decision memorandum at pages 148-149.[85] The document is a 7-page rebuttal that Canada and British Columbia submitted in response to petitioner's March 27, 2017, comments on the Bustard report. Petitioner submitted two reports (the Taylor reports) to reply to the conclusion of the Bustard report that it would be economically unfeasible for the respondents to export logs from their interior BC sawmills. To rebut this assertion, the Taylor reports examined business and market options for trees affected by Mountain Pine Beetle (MPB), including exportation.[86] The petitioner cited the Taylor reports to support its assertion that many types of logs could be exported from the interior regions of BC.[87]

45. Bustard's rebuttal letter contradicted the findings of the Taylor reports and examined their conclusions against his own report. In their case brief, Canada and British Columbia stated that the USDOC ignored contradictory evidence in the Bustard rebuttal when it relied on the Taylor reports to conclude that logs can be exported economically from the interior.[88]

46. In the final issues and decision memorandum, the USDOC addressed both the Bustard rebuttal and one of the Taylor reports and explained why the latter is more reliable.[89] First, the USDOC stated that the Bustard rebuttal was commissioned specifically for the investigation and therefore contained potential bias and conclusions that were tailored for a specific result.[90] In contrast, the Taylor report was commissioned for Forestry Innovation Investment Ltd., a British Columbia government agency, and not for the purposes of the investigation.[91] Furthermore, the Taylor report used information collected from extensive interviews with companies and

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[84] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-3.

[85] *See* Lumber Final I&D Memo, pp. 148-149 (Exhibit CAN-010).

[86] *See* Petitioner's Comments on Initial Questionnaire Responses (March 27, 2017), p. 3 (Exhibit USA-066).

[87] *See* Petitioner's Comments on Initial Questionnaire Responses (March 27, 2017), pp. 3-4 (Exhibit USA-066).

[88] *See* GOC/GBC Case Brief, pp. 24-25 (Exhibit USA-067).

[89] *See* Lumber Final I&D Memo, pp. 148-149 (Exhibit CAN-010).

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

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

organizations that used trees damaged by MPB, including the three mandatory respondents in the investigation that had operations in BC.[92] The processors interviewed for the report were opposed to the exportation of logs damaged by MPB, which indicated that those logs could be exported.[93] Furthermore, the USDOC emphasized that its finding was that damaged logs could be exported, not that they actually were.[94]

(4) Document 4: Jendro and Hart LLC, "Critique of Petitioner's Proposed Cross-Border Subsidy Methodology" (Exhibit CAN-020)

47. According to Canada, the relevance of this document is that it "critiques Petitioner's proposed cross-border methodology 'because it fails to account for the numerous factors that cause log prices to vary substantially between and within regions on both sides of the border.'"[95] The USDOC addressed this report in the final issues and decision memorandum at pages 63-65 and 75-76.[96] This report rebuts petitioner's suggestion that the USDOC use U.S. log prices as a benchmark for BC stumpage. In their case briefs, the Canadian parties cited the study's conclusions that log prices differ from one region to another because of local variability in physical characteristics of logs, the prevalence of MPB infestations, prevailing local market conditions, and contractual terms of sale.[97] Accordingly, the parties argued that the U.S. PNW log prices are not an adequate benchmark to measure the adequacy of remuneration in BC.[98]

48. Canada's argument in Annex A that the USDOC ignored the report's conclusions because it was commissioned for the purposes of the investigation is an incomplete portrayal of the USDOC's analysis in the final issues and decision memorandum. Although the USDOC noted that the report carries limited weight because of its potential for bias and conclusions tailored to generate a specific result, the USDOC proceeded to consider the report's substantive conclusions in its extensive explanation as to why the PNW log prices are an appropriate benchmark.[99] First, the USDOC explained in detail the benchmark cost adjustments it made, which were done with respect to market conditions in BC.[100] Because the derived market

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

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

[94] *See* Lumber Final I&D Memo, pp. 148-149 (Exhibit CAN-010).

[95] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-3.

[96] *See* Lumber Final I&D Memo, pp. 63-65 and 75-76 (Exhibit CAN-010).

[97] *See* British Columbia and the B.C. Lumber Trade Council Case Brief, Vol. V (July 28, 2017) ("GBC/BCLTC Case Brief"), pp. 30-41, 71-72 (Exhibit CAN-295); Canfor Case Brief (July 27, 2017), p. 35 (Exhibit CAN-137 (BCI)); Tolko Case Brief (July 27, 2017), p. 11 (Exhibit CAN-138 (BCI)).

[98] *See* GBC/BCLTC Case Brief, pp. 30-41, 71-72 (Exhibit CAN-295); Canfor Case Brief (July 27, 2017), p. 35 (Exhibit CAN-137 (BCI)); Tolko Case Brief (July 27, 2017), p. 11 (Exhibit CAN-138 (BCI)).

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

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

stumpages were representative of the prevailing market conditions in BC, the USDOC disagreed with the assertion of the Canadian interested parties that the differences between the prevailing market conditions in BC and the PNW were so significant as to render cross-border comparisons impossible, even with adjustments.[101]

49. Second, the USDOC explained that the Jendro and Hart report in no way undercuts the USDOC's conclusion that the timber species grown in the PNW and BC are comparable.[102] In conjunction with their arguments regarding differences in the relative distribution of species in the PNW and BC, the Canadian interested parties cited to passages in the Jendro and Hart study outlining variances in growing conditions such as soil, topography, and climate between BC and the PNW.[103] The USDOC stated that although Jendro and Hart's assertions regarding variances are unsubstantiated, even if there were support for the statements in the record, the USDOC is not required to achieve a precise match in its benchmark analysis.[104] Furthermore, in explaining why any such purported differences in growing conditions and species distribution would not make a comparison impossible, the USDOC cited its findings in *Lumber IV* that the forests in BC and the PNW are contiguous, traverse a geopolitical border, and contain the same species and growing conditions.[105] The USDOC also reiterated that, in deriving market-determined stumpage prices from U.S. log prices, it selected comparable species and made appropriate adjustments to the U.S. benchmark to account for the commercial environment of the BC timber market.[106]

50. Third, the USDOC found that because the data in the Jendro and Hart report regarding prices for blue-stained logs were not reliable, the USDOC would not incorporate blue-stained log prices into its cross-border benchmark.[107] In addition to noting that the prices were obtained for the purposes of the investigation and not in the ordinary course of business, the USDOC questioned the underlying methodology of the report.[108] Specifically, the Jendro and Hart report only surveyed 13 companies with 20 sawmills in Washington, Idaho, and Montana regarding blue-stain log prices.[109] Furthermore, the report did not explain how the participants were selected or contain the directions the participants were provided for reporting prices.[110] Consequently, the USDOC was unable to determine whether only some reported prices were

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[101] *See* Lumber Final I&D Memo, pp. 63-64 (Exhibit CAN-010).

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

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

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

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

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

[107] *See* Lumber Final I&D Memo, pp. 75-76 (Exhibit CAN-010).

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

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

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

included in the Jendro and Hart study or whether the price requests were tailored to achieve a particular result.[111] The USDOC also explained that the Canadian interested parties had not provided evidence that the U.S. PNW log price benchmarks did not already include blue-stained timber prices.[112] Therefore, including those prices would risk overstating blue-stained log prices in the benchmark.[113] As explained in the U.S. first written submission,[114] 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.[115] 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 proffered evidence, beetle-killed logs are typically of higher quality and price than utility-grade, non-sawlogs.

51. The U.S. responses to the first set of Panel questions also explain[116] that the petitioners submitted rebuttal evidence in the form of an affidavit from a representative of Idaho Forest Group, which accounted for five of the eight price quotes Jendro and Hart reported, in which the affiant stated that the lower prices for beetle-killed logs relate to those mills specializing in appearance-grade products and thus discouraging delivery of beetle-killed logs.[117] With respect to another mill, Jendro and Hart themselves state that the mill reported it pays less for lodgepole pine and spruce, the two species affected by beetle infestation, because it prefers to process certain other species.[118] This evidence is consistent with the USDOC's concern regarding whether Jendro and Hart's collection of price quotes was representative and reliable.[119]

52. Finally, the USDOC disagreed with British Columbia's argument that cross-border comparisons are complicated by such factors as differences in regulations, tax, contractual conditions, terms of sale, and supply variability.[120] If that were true, then any transactions that

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

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

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

[114] *See* U.S. First Written Submission, para. 457.

[115] *See* Canada's First Written Submission, paras. 714-715.

[116] *See* U.S. Responses to the First Set of Panel Questions, para. 319.

[117] *See* Petitioner Comments on Primary Questionnaire Responses, Exhibit 26, paras. 7-8 (Exhibit USA-052). By contrast, one of the mills in the Idaho Forest Group produced industrial studs, and thus its price offer was for beetle-killed logs was double that of other mills in the group. *See* Petitioner Comments on Primary Questionnaire Responses, Exhibit 26, para. 8 (Exhibit USA-052); GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 **(**BCI)).

[118] GBC QR, Exhibit BC-S-183, Jendro & Hart Critique of Cross-Border Methodology, p. 45, Table 12 ("The low prices reported for Tri-Pro Forest Products lodgepole pine and spruce reflect that mill's preference for other species, specifically red cedar, Douglas-fir, larch, Ponderosa pine and white fir.") (Exhibit CAN-020 **(**BCI)).

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

[120] *See* Lumber Final I&D Memo, pp. 64-65 (Exhibit CAN-010).

were not strictly within the same country or province would be impermissible benchmarks, but this is not required by Article 14(d) of the SCM Agreement, which permits the use of out-of-country benchmarks.[121] Furthermore, because not all differences in market conditions affect the comparability of goods, it would be unnecessary and, in any event, impractical to mandate adjustments for such variances.[122] Finally, the fact that there might be jurisdictional differences in regulations, taxes, contractual conditions, terms of sale, supply variability and other conditions does not mean that those differences will impact the price of goods sold.[123] The USDOC concluded that because many of those conditions existed in the PNW and BC, and British Columbia had not demonstrated how those differences would make a timber comparison impossible, the USDOC did not need to make an adjustment for such factors.[124]

53. Therefore, the USDOC considered and rebutted the salient points of the Jendro and Hart report in reaching its determination that U.S. PNW log prices were the most appropriate benchmark on the record for assessing the adequacy of remuneration of BC stumpage.[125]

(5) Document 5: Jendro and Hart, LLC, "Dual-Scale Study of the Principal Conifer Species of the Interior British Columbia Applying the BC Metric and Scribner Short Log Measurement Rules" (Exhibit CAN-020)

54. According to Canada, the relevance of this document is that it "proposes alternative conversion factors to convert U.S. benchmark prices expressed in USD per MBF to CAD per cubic meter."[126] The USDOC addressed this report in the final issues and decision memorandum at pages 59-61.[127] The USDOC's decision not to use Jendro and Hart's BC dual scale study was based on a careful examination of the report in comparison to the other alternative on the record, the USFS study.

55. The USDOC explained in detail why it deemed Jendro and Hart's BC dual scale study methodologically problematic.[128] Specifically, the study selected only 12 scaling sites, whereas evidence on the record demonstrated that there are more than 200 scaling sites in BC.[129] Furthermore, there is no evidence that these sites were selected on the basis of a statistically

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[121] *See* U.S. First Written Submission, paras. 89-94.

[122] *See* Lumber Final I&D Memo, pp. 64-65 (Exhibit CAN-010).

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

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

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

[126] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-4.

[127] *See* Lumber Final I&D Memo, pp. 59-61 (Exhibit CAN-010).

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

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

valid sampling methodology, but rather based on the "historical knowledge" of Jendro and Hart regarding the types of trees harvested at those sites.[130] The USDOC did not suggest that there was only one acceptable methodology, but rather that the study use some type of widely-accepted methodology – *e.g.* random, stratified, or composite sampling – rather than just a discretionary choice of the authors.[131] As the USDOC explained in the final issues and decision memorandum, "[t]he structure of a sampling methodology is a key decision point of any sound sampling methodology because how a sample is conducted can minimize bias, maximize the representativeness of the sample result, and inform the statistical relevance to the population."[132] Because the selection of the 12 sites was not based on a statistically valid sampling methodology, the USDOC was unable to conclude that the BC dual scale study was representative of all trees in the BC interior or throughout the entire province.[133]

56. Canada asserts in Annex A that the USDOC failed to address data in the study demonstrating that the results were representative of harvests in the BC interior. The United States addressed this allegation in the U.S. first written submission.[134] There, the United States explained that, in its first written submission, Canada asserts for the first time the BC dual scale study utilized "stratified random sampling."[135] 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."[136] 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.

57. 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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[130] Lumber Final I&D Memo, p. 59 (Exhibit CAN-010).

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

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

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

[134] *See* U.S. First Written Submission, paras. 432-436.

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

[136] Lumber Final I&D Memo, p. 60 (Exhibit CAN-010) (citing Dual Scale Study, p. 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.[137]

58. 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.

59. 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.[138] 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 as examined during verification.[139] 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.[140]

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,"[141] this statement again fails to describe the authors' methodology for ensuring that that goal was achieved.

60. Canada states that Jendro and Hart had to choose scale sites "deliberately" to "meet a predetermined set of criteria."[142] 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 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

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[137] Dual Scale Study, pp. 8-9 (Exhibit CAN-020 **(**BCI**)**).

[138] Canada's First Written Submission, para. 690.

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

[140] Verification Report of British Columbia, p. 116 (July 14, 2017) (Exhibit CAN-088).

[141] *See* Canada's First Written Submission, para. 689 (quoting GBC Verification Report, p. 16 (July 14, 2017) (Exhibit CAN-088)).

[142] Canada's First Written Submission, para. 686.

to select sample sites randomly because the "scale sites selected verifiably provided robust data."[143] 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.[144]

61. Furthermore, the USDOC determined that the conversion factor employed by the BC dual scale study would lead to inaccurate results. The benchmark used in the investigation is the price of a log in Washington state.[145] The WDNR survey log prices that the USDOC used as the benchmark are reported in U.S. dollars per thousand board feet (MBF).[146] The number of board feet in Washington is calculated by applying the Scribner Decimal C scale, which quantifies the amount of dimensional lumber that can be produced from the log.[147] Because Canada measures wood volume in cubic meters according to the BC Metric Scale, the USDOC needed to find a conversion factor to translate prices per MBF to prices per cubic meter to compare the WDNR benchmark prices to those respondents paid in BC.[148] Therefore, the Washington price would be based on the cubic meters of trees in Washington state, not in BC.[149] However, the dual scale study was based on trees in BC.[150] In contrast, the USFS study on the record was based on trees in Washington state.[151] The USDOC determined that using the conversion factor employed in the USFS study to convert Washington state benchmark prices would lead to more accurate results than the BC dual scale study.[152]

62. The USDOC's concerns regarding the sampling methodology and conversion factor in the BC dual scale study were further compounded by the fact that this report was prepared in anticipation of the investigation and therefore contained more potential for bias than a contemporaneous document prepared in the ordinary course of business.[153] However, the USDOC did not categorically dismiss the report for that reason, but also conducted a careful analysis of the methodology underlying the study. After this thorough assessment, the USDOC was unable to confirm that the sampling methodology and conversion factor led to representative

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[143] Canada's First Written Submission, para. 687.

[144] *See* Canada's First Written Submission, para. 688.

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

[146] *See* U.S. First Written Submission, para. 427.

[147] *See* U.S. First Written Submission, para. 427.

[148] *See* U.S. First Written Submission, para. 428.

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

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

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

[152] *See* Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).

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

and accurate results.[154] In contrast, the USFS study not only provided a reliable conversion factor, but was prepared in the ordinary course of business by a U.S. government entity that was not a party to the investigation.[155] Respondents raised no arguments that called into question the USDOC's assessment of the USFS study as unbiased.[156] Further, the USDOC had found it to be a reliable source in *Lumber IV* and in the recently completed *SC Paper from Canada* expedited review.[157]

(6) Document 6: Joseph P. Kalt, "An Analysis of Certain Economic Issues Relating to Petitioner's Claims About the Operation of Stumpage and Log Markets in British Columbia" (Exhibit CAN-016)

63. According to Canada, the relevance of this document is that it "discusses the local nature of the log market and the distinctions between the B.C. Coast and Interior," "analyzes British Columbia's log exporting process," and "includes a data analysis showing that export premia are a normal feature of log markets."[158] The USDOC addressed this report in the final issues and decision memorandum at pages 143-148.[159] In their case brief during the investigation, Canada and British Columbia referenced the Kalt report to argue against the USDOC's determination that log export restraints on the coast would have a ripple effect on the volume and prices of logs in the BC interior.[160] Canada and British Columbia cited the Kalt report for the proposition that log prices are inherently local and do not "ripple" across log markets.[161]

64. In the final issues and decision memorandum, the USDOC disagreed with the conclusions of the Kalt report for two reasons. First, the report was prepared for the investigation and therefore deserved limited weight given its potential for biased conclusions and data selected for the purpose of reaching a specific finding.[162] Second, the petitioner had placed several other reports on the record (market integration reports), which were not prepared for the purposes of the investigation, that concluded that log markets covering large areas and transecting international borders can be integrated.[163] The USDOC explained that these reports identified regions in which there is significant integration in a timber market covering a large

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[154] *See* Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).

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

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

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

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

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

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

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

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

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

area and including multiple jurisdictions, as well as cases in which logs follow the "law of one price."[164] In support of the proposition that log markets are not inherently local, the USDOC also cited data submitted by Quebec and New Brunswick indicating that logs harvested in those provinces are traded with other provinces and the United States.[165] The USDOC also cited a statement by the provincial government of New Brunswick that the log market in New Brunswick is integrated with the surrounding area.[166] Faced with "conflicting evidence about the nature of log markets," the USDOC determined that "it is reasonable to accord greater weight to the numerous, independent reports and other information on the record of this investigation that contradict the findings of…[the Kalt report that was] commissioned specifically for purposes of this investigation."[167]

65. Canada and British Columbia's case brief also cites the Kalt report for the proposition that because the coastal BC tree species are different from those harvested and used in the interior, any impact the LEP process had on coastal log prices would not ripple into the BC interior, in which lodgepole pine is the dominant species.[168] The USDOC directly addresses this argument by stating (in the final issues and decision memorandum, although not specifically citing the Kalt report on this point) that although the species of the BC coast and interior differ, the record shows that they are interchangeable, and therefore government action such as a log export restraint that affected one species would have an impact on the market for other species in the province.[169] Furthermore, the USDOC stated that both regions had significant volumes of balsam, cedar, fir, and hemlock.[170] Therefore, even if log export restraints only affected those four species, such restrictions would affect the volume, and consequently the price, of those species throughout the province.[171] Finally, the USDOC stated that lodgepole pine, the dominant species in the interior, falls within the SPF group of products, for which hemlock and fir are substitutable.[172] Lodgepole pine, hemlock, and fir are used in the production of similar products, including lumber.[173] Therefore, export restraints on coastal hemlock or fir, which had significant harvest volume in coastal BC during the period of investigation, would impact the interior hemlock and fir supply, as well as that of other interchangeable log species, including lodgepole pine.[174] Consequently, the USDOC directly contradicted the assertion, as stated in the Kalt

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

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

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

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

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

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

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

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

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

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

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

report and incorporated into Canada and British Columbia's case brief, that differences in coastal and interior species would render export restraints on coastal logs irrelevant to the interior.[175]

66. Canada and British Columbia's case brief also cites the Kalt report to argue that, because transportation routes between the interior and coast are limited or absent, there are no overlapping markets and consequently no ripple price effects.[176] Again, the USDOC did address the report's arguments regarding transport in the final issues and decision memorandum, although not specifically citing the Kalt report on this point. First, the USDOC stated that, because it found that the coastal and interior markets are integrated, the presence or absence of transport routes between the coast and interior does not alter the USDOC's finding of price suppression throughout the province.[177] Furthermore, the USDOC pointed to other record evidence submitted by Canada and British Columbia that contradicted their argument about lack of transport routes between the coast, including maps showing transport routes between the coast and interior, as well as statements that logs can be easily transported from the interior to the coast.[178]

67. Canada and British Columbia's case brief also relied on the Kalt report to assert that it is not economically feasible to export logs from much of the interior of BC.[179] The USDOC addressed this argument in the final issues and decision memorandum when it explained its conclusion that log export restraints directly impact the interior region of BC – regardless of any ripple effect from the coast to the interior – because logs can be and are exported from the interior of BC.[180] Furthermore, other record evidence indicated that logs are exported from different parts of the interior – particularly the tidewater interior and southern interior, and possibly the eastern BC interior.[181] Therefore, the USDOC determined that it was economically feasible to export logs from the interior.[182] Although these exports were mostly from a different area of the interior, the record demonstrated that most of the interior mills overlap with each other and potential export markets, and the impact on the border regions of the interior would have a similar ripple effect on the interior.[183]

68. Canada and British Columbia also relied on the Kalt report to argue that export premia are a typical feature of log markets in support of their broader argument that the log export

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

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

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

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

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

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

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

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

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

permitting process does not restrain log exports.[184] Although the USDOC first stated that the Kalt report might contain bias because it was commissioned for the investigation, the USDOC also analyzed the report and identified additional concerns about the methodology and data underlying the report.[185] Specifically, the Kalt report examines differences in domestic and export log prices in only three markets – New Zealand, Chile, and the U.S. PNW – to demonstrate that log export premia exist in log markets in general.[186] However, the report did not indicate how the sample was selected, and the use of only three markets did not permit the USDOC to assess the validity of the report's overall conclusions.[187] Furthermore, in reviewing the underlying data, the USDOC found that the data contradicted the Kalt report's conclusion that export premia are a normal feature of log markets because each market included cases in which the domestic price was higher than the export price.[188]

(7) Document 7: Joseph P. Kalt, Ph.D., Compass Lexecon, "Economic Analysis of Remuneration for Canadian Crown Timber: Are In-Jurisdiction Benchmarks Distorted by Crown Stumpage?" (Exhibit CAN-014)

69. According to Canada, the relevance of this document is that it "focuses on whether the government's activity as a seller of stumpage distorts in-jurisdiction benchmark prices" and "concludes that stumpage markets are not distorted, finding that 'the evidence does not support the existence of the overharvesting and resulting excess supply of timber that Petitioner's claims of distorted and suppressed in-jurisdiction benchmark market prices require.'"[189] The USDOC addressed this report in the final issues and decision memorandum at page 53.[190] The USDOC also addressed the Wilkinson affidavit (submitted as part of the Kalt report) on page 53 of the final issues and decision memorandum. Canada argues that "instead of addressing Professor Kalt's report, [the USDOC] focused on one of the report's attachments, the Wilkinson Affidavit."[191] But the USDOC focused on the Wilkinson affidavit precisely because Alberta relied upon the Wilkinson affidavit – not the general Kalt report – to support its argument.

70. The USDOC explained that "the GOA cites to an affidavit from Dan Wilkinson, Director of Markets for the Alberta Forest Products Association, to argue that the supply overhang results from a variety of causes, such as the level of harvesting and transportation costs relative to the downstream price for lumber; decisions of mixed-wood lot holders, who run pulp and oriented

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

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

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

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

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

[189] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-6.

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

[191] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-6.

strand board mills, to not harvest because it is impractical or uneconomic; First Nations and wildlife habitat considerations; and a fall in demand for oriented strand board and dimensional lumber in the market since the 2007 recession," and thus did not provide evidence of distortion in the provincial market.[192]

71. The USDOC found that "Mr. Wilkinson's statements were generated specifically for purposes of this investigation and are not supported by any evidence or empirical data on the record of this investigation."[193] Nonetheless, the USDOC went on to identify specific concerns about the affidavit. The USDOC explained that "Mr. Wilkinson does not quantify the extent to which the unused [annual allowable cut of timber on long-term tenures] is a result of these factors, and instead only uses general terms such as 'mostly' and 'partly.'"[194] The USDOC also found that the "affidavit does not account for the fact that on the margin, the tenure holder has access to additional supply from Crown lands that it can harvest rather than going to the private market, not only because there is unused volume allocation during the period of investigation, but also because mills are awarded periodic allotments that span five years. Therefore, the available supply to a particular tenure holder may be even greater in a given year because, in any year of the five-year cut control period, the tenure holder can harvest beyond one-fifth of its five-year allocation, as long as they do not exceed the allocation for the five-year period."[195]

72. Canada now argues that the Wilkinson Affidavit "was not intended to be quantitative," but rather "intended to confirm that the economics explained by Professor Kalt were supported by Mr. Wilkinson's experience."[196] That Canada did not intend the Wilkinson affidavit to be quantitative does not undermine the USDOC's evaluation of the report, which addressed both quantitative and qualitative (*e.g.*, its failure to address the 5-year supply guarantee system) deficiencies in the report.

73. To the extent that Canadian interested parties relied upon the Kalt report itself (and not the Wilkinson affidavit) to support their arguments regarding Alberta, they did so to argue that any stumpage overhang in the province is "legally irrelevant because unused allocated Crown standing timber cannot 'distort' <u>private party log prices</u>."[197] Because the USDOC found it appropriate to compare respondents' purchases of stumpage to stumpage prices, and not log prices, the USDOC did not need to address the Kalt report's conclusions regarding the relationship between Crown stumpage overhang and private log prices.

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

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

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

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

[196] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-6.

[197] Lumber Final I&D Memo, p. 47 (Exhibit CAN-010) (underline added).

74. The USDOC also addressed the Kalt report when discussing the Quebec stumpage market because Canada argued "that the Kalt Report, which it placed on the record, rebuts the assertion of market distortion and, thus, there is no reason to go outside Québec for a benchmark."[198] The USDOC found that the report did not "provide any analysis of actual prices within the Québec stumpage market," or "of the actual government presence and involvement within the Québec market as required as part of any distortion analysis."[199] Canada now asserts that "[t]he Kalt Report's analysis … was intended to apply across provincial markets, rather than address the specifics mentioned by [the USDOC]."[200] Thus, Canada now suggests that the USDOC should have overlooked province-specific evidence indicating that the market was distorted, and instead relied upon the conclusions of a report "intended to apply across provincial markets" to determine whether the Quebec stumpage market was distorted.[201] It was not unreasonable for the USDOC to find the Quebec stumpage market to be distorted based on province-specific evidence.

(8) Document 8: Professor Brian Kelly, "An Analysis of the New Brunswick Private Woodlot Survey and the New Brunswick Private Timber Market" (Exhibit CAN-265)

75. According to Canada, the relevance of this document is that it "presented evidence that New Brunswick's private stumpage market exhibits free and open market conditions, and is not distorted by Crown stumpage prices or private market forces" and "also concluded that the Forest Products Commission (NBFPC) survey was conducted in accordance with sound statistical practices and designed to recover product-specific private stumpage prices."[202] The USDOC addressed this report in the final issues and decision memorandum at pages 82-83.[203] The USDOC found the report's conclusions unreliable because it was commissioned for the purposes of the investigation and, because "the GNB was unable to provide the Department with the guidelines or parameters that it provided to Mr. Kelly," the USDOC could not confirm that no "litigation-inspired fabrication or exaggeration" existed.[204] The USDOC instead relied upon the reports commissioned in New Brunswick's ordinary course of business (the Report of the Auditor General – 2008; the Report of the Auditor General – 2015; and the 2012 PFTF report) to find the provincial stumpage market distorted.[205]

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

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

[200] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-6.

[201] Canada's Responses to the First Set of Panel Questions, Annex A.

[202] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-7.

[203] *See* Lumber Final I&D Memo, pp. 82-83 (Exhibit CAN-010).

[204] Lumber Final I&D Memo, pp. 82-83 (Exhibit CAN-010).

[205] *See* Lumber Final I&D Memo, pp. 82-83 (Exhibit CAN-010).

76. Canada asserts that the USDOC's distortion finding, after having "rejected" the Kelly report, was "conclusory."[206] However, the USDOC discussed the reasons for its finding and the reports upon which it relied over more than seven pages in the final issues and decision memorandum.[207]

77. Canada further argues that the USDOC "rejected the NBFPC Survey as a benchmark without addressing the parts of Professor Kelly's analysis that addressed [the USDOC's] concerns" about the benchmark.[208] However, the USDOC declined to rely upon the benchmark because it found that the provincial stumpage market was distorted; therefore, the USDOC did not need to address flaws with the proposed in-market benchmark.

(9) Document 9: Edward E. Leamer, "Statistical and Economic Issues Associated with Petitioner's Proposed Use of a Cross-Border Log Methodology to Measure the 'Adequacy of Remuneration' for BC Timber" (Exhibit CAN-286)

78. According to Canada, the relevance of this document is that it "presents evidence demonstrating that the 'Law of One Price' does not lead to identical prices for logs across regions, including even within the U.S. Pacific Northwest" and "refutes the premise on which [the USDOC] based its application of a cross-border log benchmark to measure adequacy of remuneration in British Columbia."[209] The USDOC addressed this report in the final issues and decision memorandum at pages 145-146.[210] Canada and British Columbia relied upon the Leamer report to argue against the USDOC's determination that log export restraints on the coast would have a ripple effect on the volume and prices of logs in the BC Interior.[211] In their case brief, Canada and British Columbia cited the Leamer report's argument that logs do not follow "the law of one price," meaning that logs of the same species and grade will have the same price in all localities.[212] Canada and British Columbia also cited the Leamer report in their case brief to argue that because log markets are inherently localized, log prices would not equalize across different markets.[213]

79. In the final issues and decision memorandum, the USDOC explained that it disagreed with the conclusions of the Leamer report for two reasons. First, the report was prepared for the

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[206] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-7.

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

[208] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-7.

[209] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-8.

[210] *See* Lumber Final I&D Memo, pp. 145-146 (Exhibit CAN-010).

[211] *See* GOC/GBC Case Brief, pp. 20-21 (Exhibit USA-067).

[212] *See* GOC/GBC Case Brief, pp. 20-21 (Exhibit USA-067).

[213] *See* GOC/GBC Case Brief, pp. 20-21 (Exhibit USA-067).

investigation and therefore deserves limited weight given its potential for biased conclusions and data selected for the purpose of reaching a specific finding.[214] Second, the market integration reports petitioner placed on the record, which were not prepared for the purpose of the investigation, concluded that log markets covering large areas and traversing international borders can be integrated.[215] These reports identified regions in which there is significant integration in a timber market covering a large area and including multiple jurisdictions, as well as cases in which logs follow the "law of one price."[216]

80. In Annex A of its responses to the first set of Panel questions, Canada argues that the market integration reports relate to Scandinavia and the EU while the Leamer report analyzes the log markets of the PNW and BC, the areas considered in this investigation.[217] Consequently, according to Canada, the market integration reports do not undermine the Leamer report.[218] Canada further asserts that the USDOC mischaracterized the Leamer report as stating that "log prices can *never* equalize across markets."[219] But Canada mischaracterizes the USDOC's conclusions and omits other pertinent facts. First, the USDOC did not rely solely on data from Europe and Scandinavia to argue that log markets are not inherently local. One of the market integration reports the USDOC considered, for example, analyzed data from the southern United States.[220] The USDOC also cited data submitted by the provincial governments of Quebec and New Brunswick indicating that logs harvested in those provinces are traded with other provinces and the United States.[221] The USDOC also cited a statement by New Brunswick that the log market in New Brunswick is integrated with the surrounding area.[222] Furthermore, the USDOC did not state that the Leamer report stands for the proposition that log prices can never equalize across different regions. Rather, the USDOC stated that the market integration reports, the Leamer report, and data submitted by other Canadian provincial governments revealed "conflicting evidence about the nature of log markets."[223] In weighing the conflicting evidence available to it on the record, the USDOC determined that "it is reasonable to accord greater weight to the numerous, independent reports and other information on the record of this

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

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

[216] *See* Lumber Final I&D Memo, pp. 145-146 (Exhibit CAN-010).

[217] *See* Canada's Responses to the First Set of Panel Questions, Annex A, p. A-8.

[218] *See* Canada's Responses to the First Set of Panel Questions, Annex A, p. A-8.

[219] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-8 (italics in original).

[220] *See* Lumber Final I&D Memo, p. 145 (Exhibit CAN-010). *See also* Petitioner's Comments on Canada's Initial Questionnaire Responses (March 27, 2017) at Exhibit 5 (Exhibit USA-019).

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

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

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

investigation that contradict the findings of … [the Leamer report that was] commissioned specifically for purposes of this investigation."[224]

(10) Document 10: John Asker, Ph.D., "Economic Analysis of Factors Affecting Cross Jurisdictional Stumpage Price Comparisons" (Exhibit CAN-015)

81. According to Canada, the relevance of this document is that it "discusses how Nova Scotia's unique characteristics . . . distinguish this province from the other provinces under investigation."[225] The USDOC addressed this report in the final issues and decision memorandum at pages 113-115.[226] The USDOC addressed, in particular, the Asker study's conclusions regarding transportation costs, finding that the report was based on assumptions rather than actual costs, and the report's conclusions were undercut by other record evidence.[227]

82. The USDOC found generally that, "[r]egarding the[] supposed dissimilarities [between Nova Scotia and the other provinces], the Canadian Parties do not provide enough information to determine the relative impact, if any, of land ownership distribution or land management policy differences as well as any lingering differences in the impact of the recession across the aggregated actual transactions."[228] Canada now argues that "much of this information was submitted to show that there are regional markets for standing timber and that Nova Scotia were [*sic*] an inappropriate benchmark for a comparison."[229] This was exactly the USDOC's point. The USDOC was tasked with evaluating whether the Nova Scotia benchmark was inappropriate for comparison to the other provinces, and the USDOC could not determine that it was incomparable (as the Canadian Parties argued) without the identified quantitative information. Based on Canada's current argument, it appears Canada wanted the USDOC simply to take Canada's conclusion as fact, notwithstanding the lack of quantitative information supporting that conclusion.

83. Moreover, the USDOC also found "that these and other arguments regarding comparability incorrectly presuppose that the Department must meet an impossible standard of finding a tier-one benchmark that accounts for every purported market condition."[230] As the United States has demonstrated previously, accounting for "prevailing market conditions" does not require re-constructing a subsidy recipient's entire commercial experience. Rather, the reference in Article 14(d) of the SCM Agreement to "prevailing market conditions" ensures that a proper comparison is made, such that it will demonstrate how much more the recipient would

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

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

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

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

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

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

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

have had to pay to obtain the good on the market. Without quantitative information supporting its conclusions – which, again, were commissioned for the purpose of the investigation – it was not unreasonable for USDOC to decline to rely on the Asker report's commentary regarding alleged differences in prevailing market conditions.

(11) Document 11: Dr. Kenneth Hendricks, "An Economic Analysis of the Ontario Timber Market and an Examination of Private Market Prices in that Competitive Market" (Exhibit CAN-019)

84. According to Canada, the relevance of this document is that it "assesses Ontario's private timber market and allegations that it is distorted" and "explains that (1) the Ontario market is competitive; (2) Ontario timber sellers are price takers; (3) Ontario Crown stumpage rates are unable to materially affect prices for downstream products; (4) Ontario private timber prices are not distorted by Crown stumpage rates; and (5) Ontario private timber prices are an appropriate benchmark for assessing the adequacy of remuneration of Ontario Crown stumpage rates."[231] The USDOC addressed this report in the final issues and decision memorandum at pages 93-94.[232] The USDOC found that the Hendricks report's conclusion "that the Ontario timber market is characterized by price takers (and, thus, results in market-based prices for private timber)" was flawed because the report "ignores the fact that there is one dominant price setter, the GOO," which "supplied 96.5 percent of the market during the [period of investigation], and, as noted above, set administered prices that do not fully consider market conditions."[233] The USDOC also found that the Hendricks report's conclusion "that conditions in the Crown market do not influence conditions in the private market" was undermined by "data from the GOO's eFAR system, which indicates that the universe of firms consuming timber from private sources in Ontario is heavily concentrated and is dominated by tenure holders," thereby "demonstrat[ing] that the private market in Ontario is not as independent and free of influence from the Crown timber market as the Hendricks Report suggests."[234]

85. Canada argues that the USDOC's conclusion that the "Hendricks Report ignores the fact that there is one dominant price setter, the GOO, in the Ontario timber market"[235] is incorrect because "Dr. Hendricks explicitly acknowledged that Ontario Crown stumpage rates are administratively set."[236] Acknowledging that Crown stumpage rates are administratively set

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[231] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-10.

[232] *See* Lumber Final I&D Memo, pp. 93-94 (Exhibit CAN-010).

[233] Lumber Final I&D Memo, pp. 93-94 (Exhibit CAN-010).

[234] Lumber Final I&D Memo, pp. 93-94 (Exhibit CAN-010).

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

[236] Canada's Responses to the First Set of Panel Questions, Annex A.

does not undermine the USDOC's conclusion that the report ignores the dominance of the Ontario government in the stumpage market.

86. Canada also now argues that the USDOC "did not cite record evidence (other than Crown market share) to support its claim that private timber prices in Ontario are distorted."[237] This is incorrect. The USDOC also discussed (1) Ontario's method of administratively setting prices (which did not take market conditions into account), (2) mills' "ability to harvest at levels greater than the short-term targets set in the AWSs and the option to transfer timber between mills," and (3) data from the Ontario government's eFAR system showing "that a majority of private origin standing timber is sold to a small number of customers, who are dominant consumers of both private and Crown timber."[238]

87. Finally, Canada asserts that the USDOC "criticized the Hendricks Report for purportedly assuming that stumpage prices in southern Ontario would be higher than in northern Ontario," but Canada contends that "Dr. Hendricks never relied on or made that assumption."[239] The Hendricks report suggests otherwise. First, the report discusses data that, it suggests, demonstrate that "stands in the northern regions are often located further away from mills, have smaller trees due to higher latitudes, and are costly to harvest, thus making some portion of the available supply uneconomical at current prices," in contrast to the southern regions where harvesting is more economical at current prices.[240] It has been Canada's argument throughout this proceeding that smaller trees, high harvesting costs, and high transportation costs have a downward effect on price, such that trees with these characteristics in Ontario (*i.e.*, trees in the northern regions) would command a lower price for stumpage than trees without those characteristics (*i.e.*, trees in the southern regions).

88. Additionally, the Hendricks report finds that "[i]n the 2014-15 period, the volume-weighted average price for SPF delivered to sawmills was $10.24 per cubic meter with an upper and lower bound confidence interval of $9.07 and $11.40, respectively. The volume-weighted average price for SPF delivered to sawmills in 2015-16 was a little lower at $9.29 per cubic meter with more dispersion. It is worth noting that the volume weighted average price for SPF delivered to pulp mills was significantly lower in both periods. <u>The reason is that these prices were much lower in the South than in the North</u>."[241]

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[237] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-10.

[238] Lumber Final I&D Memo, pp. 93-94 (Exhibit CAN-010).

[239] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-10.

[240] Hendricks Report, pp. 13-14 (Exhibit CAN-019).

[241] Hendricks Report, pp. 13-14 (Exhibit CAN-019) (underline added).

(12) Document 12: Robert C. Marshall, "Expert Report of Robert C. Marshall" (Exhibit CAN-171)

89. According to Canada, the relevance of this document is that it "analyzed the Québec's auctions [*sic*] and concluded that the prices that arise from the auctions result in valid market prices free of government-induced distortions."[242] The USDOC addressed this report in the final issues and decision memorandum at pages 102-104.[243] In addition to being prepared for the purpose of litigation, the USDOC found that: (1) the analysis failed to account for the fact that, pursuant to the USDOC's regulations, only auction prices from "open, competitively run" auctions may be used as a benchmark, and Quebec's auction was not open due to the export restraint; (2) the analysis did not compare Quebec stumpage prices to "stumpage prices from markets that have previously been found not to be distorted;" and (3) the analysis did not "analyze all of the bid prices submitted in the auction, both losing and winning bids, with a comparison between TSG-holders and non-TSG-holders."[244]

90. Canada asserts that "[e]ach of these criticisms is either irrelevant or wrong."[245] However, as the United States has explained, the export restraint exists, restraining exports of logs for processing from the province,[246] and the Marshall report unquestionably did not engage in either comparison.[247]

91. Finally, Canada faults the USDOC for not analyzing Quebec's auction data when "[a]ll of the data on which Marshall relied was provided to [the USDOC]."[248] The United States addressed this argument in paragraph 183 of the U.S. responses to the first set of Panel questions.[249] As explained there, Canada appears to refer to the raw data contained in 254 separate datasets attached to the Marshall report.[250] The 254 datasets accompanying this single report do not appear to be identified in the manner Canada suggests in paragraph 471 of Canada's first written submission, nor did the parties discuss or rely upon the data for their arguments during the investigation. The public record index for the investigation appears to contain over 1,800 electronically submitted files, many of which comprised individual filings containing hundreds of exhibits and extensive datasets for the USDOC's subsidy calculations.[251]

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[242] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-11.

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

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

[245] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-11.

[246] *See* U.S. Responses to the First Set of Panel Questions, paras. 196-199.

[247] *See* U.S. Responses to the First Set of Panel Questions, para. 182; U.S. First Written Submission, paras. 270-727.

[248] Canada's Responses to the First Set of Panel Questions, Annex A.

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

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

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

Canada's suggestion that the USDOC should have focused on these data, or *sua sponte* conducted its own analyses of these data, when even the interested parties did not do so, is unavailing.

(13) Document 13: Earle Miller, "Characteristics of Nova Scotia's Wood Fibre Market" (Exhibit CAN-303)

92. According to Canada, the relevance of this document is that it "provides evidence and analysis concerning the characteristics of the Nova Scotia market for wood fibre" and "examines Nova Scotia's forest products, lumber markets and sawmill capacity, forest characteristics, silviculture, and conversion factors."[252] The USDOC addressed this report in the final issues and decision memorandum at pages 110-111.[253] The USDOC found that "the Canadian Parties cite to the Miller Report that concludes that species present in Quebec, Ontario, or Alberta may 'tend' to be of a lower quality than in Nova Scotia, or may not be as prevalent in the Nova Scotia forest as compared to other provinces to the east of British Columbia. However, we find the report's hedged conclusions, to the extent they are accurate, are not supported by any record evidence that differences in quality or species prevalence precludes a comparison between the Nova Scotia benchmark and reported Crown stumpage in the other provinces," because "record evidence indicates the opposite."[254] Thus, the USDOC did not "dismiss[] this report's entire discussion on how SPF species differ because Mr. Miller did not quantify the effects of those differences", as Canada wrongly asserts.[255] Rather, the USDOC found the report's conclusions "hedged" and undercut by other record evidence.[256]

93. Canada asserts that the USDOC "did not consider the evidence presented in this report with respect to any of the other topics that it addressed (forest products, lumber markets and sawmill capacity, silviculture, and conversion factors)."[257] However, the Canadian interested parties did not rely on the Miller report in discussing those issues.[258] Moreover, the USDOC addressed the comparability of Nova Scotia stumpage prices to stumpage prices in the other provinces, including whether market characteristics exert "upward pressure on stumpage prices in Nova Scotia [that are] not present in Québec, Ontario, and Alberta" in the final issues and decision memorandum at pages 112-115.[259] In particular, the USDOC discussed the prevalence

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[252] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-11.

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

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

[255] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-11.

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

[257] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-11.

[258] *See* Canadian Government Parties' Joint Case Brief (July 27, 2017), pp. Vol. I-40 to Vol. I-43 (Exhibit CAN-311).

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

of pulpwood versus sawable timber (p. 114), transportation costs (p. 113-114), land management policies and land ownership distribution (p. 114-115), and forest characteristics (p. 112-113).[260]

(14) Document 14: MNP LLP, "A Survey of the Ontario Private Timber Market" (Exhibit CAN-144)

94. According to Canada, the relevance of this document is that it presents "[a] survey and analysis of Ontario's private timber market providing an in-market benchmark for assessing adequacy of remuneration."[261] The USDOC addressed this report in the final issues and decision memorandum at pages 92, 94, and 121.[262] The USDOC declined to use the MNP Survey of private stumpage purchases in Ontario as an in-province benchmark because it found the Ontario stumpage market to be distorted.[263]

95. Canada argues that the USDOC hypocritically "criticized the MNP Ontario Survey for … [having] a small sample size," but "defended the Nova Scotia Survey, which surveys a similar number of respondents and SPF timber volume as MNP's Ontario Survey."[264] Canada misrepresents the USDOC's concerns with the MNP survey and draws a false equivalence between the MNP survey and the Nova Scotia survey. The MNP survey was based on data from 8 (or, in some instances, 15) SPF sawmills. The survey itself acknowledged that it had a "relatively low number of survey responses' in comparison to previous surveys of the private timber market, which 'suggests an overall reduction in the number of loggers purchasing private timber compared to the situation ten or more years ago.'"[265] In contrast, the Deloitte survey surveyed 21 registered buyers.[266]

96. Moreover, the private stumpage market in Ontario was significantly smaller than the private stumpage market in Nova Scotia. The private stumpage market in Ontario constituted only 3.5 percent of the market;[267] in contrast, the private stumpage market in Nova Scotia constituted [[***]] percent of the Nova Scotia stumpage market (or approximately 65 percent of the Nova Scotia softwood stumpage harvest).[268] Put another way, the MNP survey covered

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

[261] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-12.

[262] *See* Lumber Final I&D Memo, pp. 92, 94, and 121 (Exhibit CAN-010).

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

[264] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-12.

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

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

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

[268] *See* U.S. Responses to the First Set of Panel Questions, para. 211.

approximately 65 percent[269] of 3.5 percent of Ontario's softwood sawable stumpage market; that is, approximately 2.275 percent of the Ontario softwood sawable stumpage market. The Deloitte survey "included approximately 36% of private softwood sawable volume purchased in Nova Scotia" during the survey period, *i.e.*, approximately 36 percent of [[***]] percent, that is, over [[***]] percent of the Nova Scotia private softwood sawable stumpage market.[270]

(15) Document 15: MNP LLP, "Timber Damage Assessment (TDA) Log Transactions Overview" (Exhibit CAN-109)

97. According to Canada, the relevance of this document is that it "provides background information on the TDA Survey and how it functions."[271] The USDOC addressed this report in the final issues and decision memorandum at pages 48-51, when it analyzed the TDA survey.[272] The USDOC rejected the TDA survey as a benchmark because only 0.3 percent of the TDA survey data by volume reflected private stumpage transactions.[273] The USDOC found that those private stumpage transactions were "relatively inconsequential as compared to the total volume of sales and unuseable as a tier-one [in-country] benchmark," and were not market-determined.[274] The USDOC found that the prices were not market-determined because (1) Crown timber represented 98.48 percent of the stumpage market; (2) a small number of tenure-holding companies dominated both the Crown-origin and private-origin standing timber harvests in the province; and (3) a supply overhang indicated that sawmills did not fully consume their allocated Crown timber, and thus would only seek private timber when it was cheaper to do so.[275]

(16) Document 16: MNP LLP, "Alberta Lumber Producer In-Kind Cost FY 2015 Survey Results" (Exhibit CAN-128)

98. According to Canada, the relevance of this document is that it "details Alberta lumber producer's in-kind costs".[276] The USDOC addressed this report in the final issues and decision memorandum at pages 113 and 135-139.[277] The USDOC found that the Nova Scotia stumpage

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[269] *See* Ontario, "MNP LLP, A Survey of the Ontario Private Timber Market" (Exhibit ON-PRIV-1), p. 2 (Exhibit CAN-144 (BCI)).

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

[271] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-12.

[272] *See* Lumber Final I&D Memo, pp. 48-51 (Exhibit CAN-010).

[273] *See* Lumber Final I&D Memo, pp. 48-51 (Exhibit CAN-010).

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

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

[276] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-12.

[277] *See* Lumber Final I&D Memo, pp. 113 and 135-139 (Exhibit CAN-010).

benchmark was a "pure" benchmark, and thus it was inappropriate to include additional costs not reflected in respondents' pure stumpage purchases.[278] This survey was of those additional costs. Accordingly, the USDOC had no reason to discuss the survey given its earlier determination that it was inappropriate to adjust respondents' stumpage purchase prices to account for those costs.

(17) Document 17: MNP LLP, "Supplement to MNP's March 10, 2017 Cross Border Analysis of Stumpage and Log Prices in Alberta and Six Other Jurisdictions" (Exhibit CAN-347)

99. According to Canada, the relevance of this document is that, "[i]n this supplemental report, MNP explained that 'there are many compelling reasons why prices for trees in Alberta and Nova Scotia should not be compared at all, including obvious differences in climate, geography, and ecology that result in significant differences in the forests and trees'."[279] The USDOC addressed this report in the final issues and decision memorandum at page 113.[280] The USDOC addressed differences in forest conditions between the Acadian forest in Nova Scotia and the boreal forest, which encompasses large areas of Alberta, in its final issues and decision memorandum at page 113.[281] The USDOC found these differences did not lead to significant differences in the forests and trees, because the resulting trees were of the same primary species mix (SPF) and of relatively similar sizes as measured by diameter at breast height ("DBH").[282]

(18) Document 18: Michael Rosenzweig, Ph.D., "An Analysis of Certain Economic Issues Relating to the Coalition's Claims about BC Hydro's Electricity Purchase Agreements" (Exhibit CAN-417)

100. According to Canada, the relevance of this document is that it "analyzed the allegation that BC Hydro paid more than adequate remuneration for biomass-based electricity that it purchased pursuant to Electricity Purchase Agreements (EPAs)" and "concluded that (1) the EPAs contained market-based prices and (2) the Coalition's comparison of prices for two different electric power products was inappropriate."[283] The United States has rebutted Canada's assertion that the USDOC failed to take into account Dr. Rosenzweig's report in the U.S. responses to the first set of Panel questions.[284]

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[278] *See* Lumber Final I&D Memo, pp. 135-139 (Exhibit CAN-010).

[279] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-13.

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

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

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

[283] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-13.

[284] *See* U.S. Responses to the First Set of Panel Questions, paras. 426-429.

101. As the United States has explained, Canada's assertion is not true. The USDOC did take into account Dr. Rosenzweig's report about BC Hydro's Bioenergy Call Phase I prices. This is, *inter alia*, evidenced by the USDOC's discussion of its consideration of arguments put forward by British Columbia and the respondent companies as to why the EPAs reflected market-based prices and should be used as benchmark prices. Those arguments discuss and rely on Dr. Rosenzweig's report.

102. Specifically, the USDOC's final determination considered the arguments of Tolko and British Columbia as set out in their case briefs, including specific arguments that relied on Dr. Rosenzweig's report.[285] The USDOC summarized and referred to pages 54-64 of Tolko's case brief,[286] which referenced Dr. Rosenzweig's report at pages 55, 56, and 64.[287] The USDOC also summarized and referred to pages 93-98 of British Columbia's case brief,[288] which discussed Dr. Rosenzweig's report extensively at pages 94-97 of its case brief and relied on it as support for its argument that the USDOC should use BC Hydro's Bioenergy Call Phase I prices as benchmark prices.[289] Therefore, even though the USDOC did not refer to Dr. Rosenzweig's report in its final determination by name, it is clear that the USDOC took the report into account when it considered the arguments of Tolko and British Columbia, which relied on the report.[290]

103. In response to the arguments made by British Columbia and the respondent companies, the USDOC explained that the selection of BC Hydro's Bioenergy Power Call Phase I bids as benchmarks would not be appropriate because "it is incongruent to select as a benchmark price the same program price for electricity that is under investigation as providing a benefit, *i.e.*, comparing an allegedly subsidized price with the same allegedly subsidized price."[291] As the USDOC further explained:

> Using rates from an investigated subsidy program to measure the benefit from that same investigated program is inconsistent with the benefit-to-the-recipient standard because, first, it does not capture the difference between the price at which the government *sold* electricity and the price at which it *purchased* electricity, and

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[285] *See, e.g.*, Lumber Final I&D Memo, p. 163 (Exhibit CAN-010).

[286] *See* Lumber Final I&D Memo, p. 163, footnote 981 (Exhibit CAN-010).

[287] *See* Tolko Case Brief, pp. 55, 56, 64 (Exhibit CAN-138 (BCI)).

[288] *See* Lumber Final I&D Memo, p. 163, footnote 983 (Exhibit CAN-010).

[289] *See* GBC Case Brief, pp. 94-97 (Exhibit CAN-295).

[290] The United States notes that Dr. Rosenzweig's report was attached as Exhibit BC-BCH-36 to the Government of Canada's Initial Questionnaire Response. The report was framed principally as a response to allegations made in the petition about BC Hydro's subsidization as it pertains to EPAs.

[291] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010). *See also ibid.*, pp. 164, 165-166 (Exhibit CAN-010).

> second, the comparison would be circular insofar as it would result in a comparison of an alleged subsidy with itself.[292]

104. 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.[293] Dr. Rosenzweig's report purportedly supported a proposition – namely, that the Bioenergy Call Phase I prices resulted from a competitive process – that was not relevant to the USDOC's ultimate conclusion. In that sense, regardless of whether or not Dr. Rosenzweig's report established that the Bioenergy Call Phase I prices resulted from a competitive process, the USDOC's conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

(19) Document 19: Dr. Mahadev Sharma, "Comparison of scaling methodology and applicability of adapting diameter distributions in provincially harvested timber from 2005 to 2015" (Exhibit CAN-153)

105. According to Canada, the relevance of this document is that it "compares extensive historic and current scaling data gathered in Ontario to evaluate the diameters of timber harvested in Ontario and sent to Ontario mills."[294] The USDOC addressed this report in the final issues and decision memorandum at pages 112-113.[295] As Canada acknowledges, the USDOC relied upon this report for data pertaining to the DBH of SPF logs destined for sawmills in Ontario.[296]

(20) Document 20: Susan Athey, "British Columbia's Market-Based Pricing System for Timber" (Exhibit CAN-023)

106. According to Canada, the relevance of this document is that it "examined the BCTS auction and MPS systems in British Columbia and concluded that these systems are designed to establish and do, in fact, produce valid market prices."[297]

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[292] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010) (italics in original).

[293] U.S. First Written Submission, paras. 674-678.

[294] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-14.

[295] *See* Lumber Final I&D Memo, pp. 112-13 (Exhibit CAN-010).

[296] *See* Lumber Final I&D Memo, pp. 112-13 (Exhibit CAN-010); *see also* Canada's Responses to the First Set of Panel Questions, Annex A.

[297] Canada's Responses to the First Set of Panel Questions, Annex A, p. 14.

107. The U.S. first written submission addresses the USDOC's treatment of the Athey report in detail.[298] As the United States explained there, Canada argues that the USDOC ignored the report prepared by Canada's consultant, Dr. Athey.[299] 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.[300] 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."[301] As such, British Columbia declined to submit evidence that would have supported Dr. Athey's objectivity.

108. 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 British Columbia retained Dr. Athey to design and implement the auction system.[302] 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.[303] Throughout the report, Dr. Athey directly responds to petitioner's arguments from this investigation.[304] Accordingly, it was reasonable for the USDOC to assign Dr. Athey's report, among other reports, less weight because of potential bias. Additionally, there was extensive evidence that contradicted Dr. Athey's report and on which the USDOC based its findings.

109. 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.[305] Canada notes Dr. Athey's opinion that market concentration "is not itself" an indicator of anti-

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[298] *See* U.S. First Written Submission, paras. 388-390.

[299] Canada's First Written Submission, paras. 140 and 150-159.

[300] *See* GBC SQR at BC-Supp3-2-3 (Exhibit CAN-082) (addressing nine expert reports commissioned by British Columbia alone).

[301] *See* GBC SQR at BC-Supp3-1 (Exhibit CAN-082).

[302] *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, pp. 6-8) (Exhibit CAN-088).

[303] Athey Report, p. 59 (Exhibit CAN-023).

[304] *See generally* Athey Report (Exhibit CAN-023).

[305] *See, e.g.,* Canada's First Written Submission, paras. 164, 171-178.

competitive behavior.[306] 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.[307] 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.[308] 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.[309]

110. The United States also addressed the USDOC's treatment of the Athey report in its responses to the first set of Panel questions.[310] There, the United States explained that the fact that the USDOC did not mention Dr. Athey's report by name does not indicate that the USDOC failed to consider that report. Again, the report featured prominently in the briefs of the interested parties to which the USDOC directly responded.[311] In particular, the joint case brief of the government of British Columbia and the British Columbia Lumber Trade Council cited extensively to Dr. Athey's report, arguing, for instance, "the record and Dr. Athey confirm that almost all the unused [annual allowable cut of timber on long-term tenures] is dead pine, which is not economic to harvest."[312] In the final issues and decision memorandum, the USDOC addressed these arguments on an issue-by-issue basis, explaining why it disagreed, or, in the case of its finding of "supply overhang" of dead pine timber, agreed and therefore reversed its preliminary finding.[313] The USDOC did not mention Dr. Athey's report by name, nor did it need to.

111. Canada's contention that an investigating authority must address every specific item of evidence by name to provide an adequate explanation of its decision is both incorrect and untenable. Dr. Athey's report was Exhibit 182 to a questionnaire response – the first of multiple questionnaire responses devoted to a single alleged subsidy provided by a single province (British Columbia's provision of stumpage) – that, with exhibits, spanned approximately 10,000

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[306] Canada's First Written Submission, para. 171.

[307] Canada's First Written Submission, para. 164. *See also* Lumber Preliminary Decision Memorandum, p. 35 (Exhibit CAN-008).

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

[309] *See* GBC QR at Ex. BC-S-182, pp. 49-50, footnote 34 (Athey Report) (Exhibit CAN-023).

[310] *See* U.S. Responses to the First Set of Panel Questions, paras. 275-278.

[311] *See* Lumber Final I&D Memo, pp. 55-58 and footnotes 332, 333 (identifying the portions of the respondents' case briefs to which the USDOC was responding) (Exhibit CAN-010).

[312] GBC/BCLTC Case Brief, pp. 19-26 (Exhibit CAN-295).

[313] Lumber Final I&D Memo, pp. 56-57 (Exhibit CAN-010).

pages.[314] Similarly, Dr. Athey's was one of nine "expert reports" submitted by the Government of British Columbia alone.[315]

112. Although Canada insists that Dr. Athey's report had unique probative value, Canada is wrong. Dr. Athey's report suffered from an obvious conflict of interest. Dr. Athey was retained to opine on whether British Columbia's "auction based pricing system is a sound market-based system,"[316] notwithstanding her role as a principal designer of that very system.[317] This conflict was known to the USDOC, which recorded in the report of its verification of the government of British Columbia that "Ministry officials noted that the BCTS auction system was designed by 'world-leading experts in auction design,' including Dr. Susan Athey, to address the concerns outlined in the [USDOC's] 2003 Policy Bulletin."[318] This conflict of interest, as well as Dr. Athey's direct responses to the petitioners' arguments in the underlying investigation and her near exclusive reliance upon her own prior work and that of Canada's other commissioned experts, make clear that her report was advocacy and not an unbiased study.[319] Notably, the USDOC sought, and the government of British Columbia refused to provide, its correspondence with Dr. Athey and other paid experts "with respect to the purpose, parameter, and/or conclusions of the study."[320]

113. With respect to the "underlying data" that Canada referenced in its opening statement, none of it merited special attention. Canada highlighted Dr. Athey's chart indicating that in some instances BCTS winning bids exceed the "expected winning bid" and that BCTS bids generally exceed the 70 percent upset rate, or required minimum bid, that is typically employed.[321] But such an analysis is circular, because the "expected winning bid" is set by the MPS equation, which itself is based upon prior BCTS auctions.[322] Similarly, Canada displayed a chart showing that BCTS auction prices roughly tracked U.S. lumber prices.[323] Of course, the USDOC did evaluate the adequacy of remuneration paid to British Columbia for its stumpage by

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[314] *See generally* GBC QR, including Exhibits 1-184 (totaling 9,990 pages) (Exhibit CAN- 018 (BCI)).

[315] GBC Supplemental QR, pp. BC-Supp3-2-3 (addressing nine expert reports commissioned by the GBC alone) (Exhibit CAN-082).

[316] Athey Report, p. 3 (Exhibit CAN-023).

[317] Athey Report, pp. 9-10 ("I and my colleague Prof. Peter Cramton were engaged in 2001 to advise the government as it planned and designed the new system.") (Exhibit CAN-023).

[318] *See* Verification of the Government of British Columbia, p. 12 (Exhibit CAN-088).

[319] *See, e.g.,* Athey Report, p. 59 (citing references) (Exhibit CAN-023).

[320] *See* GBC Supplemental QR, p. BC-Supp3-1 (Exhibit CAN-082).

[321] *See* PowerPoint Presentation accompanying Oral Statement of Canada at the First Substantive Meeting of the Panel – Day 1 (February 26, 2019) ("Canada's First Opening Statement (Day 1)"), p. 27 (citing Canada's First Written Submission, Figure 21, p. 69) (Exhibit CAN-525).

[322] *See* GBC QR, pp. I-138-39 (Exhibit CAN-018 (BCI)).

[323] PowerPoint Presentation accompanying Canada's First Opening Statement (Day 1), p. 28 (citing Canada's First Written Submission, Figure 22, p. 70) (Exhibit CAN-525).

comparing those prices to U.S. log prices, undertaking a far more detailed analysis than that presented in the single chart included in Dr. Athey's report. Moreover, consistent with Canada's arguments regarding U.S. lumber prices, the Canadian parties could have proposed their own benchmarks for a cross-border comparison of stumpage prices that, taking Canada's premise as true, could demonstrate that no subsidy benefit, or a minimal subsidy benefit, was conferred. However, the Canadian parties did not do so, as their premise is unsound.

(21) Document 21: Mark Berkman et al., "Response to the DOC Supplemental Questionnaire Question 3" (Exhibit CAN-249)

114. According to Canada, the relevance of this document is that it "responds to [the USDOC's] inquiry regarding why Crown timberland ownership differs from private ownership."[324] The USDOC addressed this report in the final issues and decision memorandum at pages 48-49.[325] Mark Berkman of the Brattle Group responded to the USDOC's supplemental questionnaire as part of Alberta's May 30, 2017 filing.[326] The parties subsequently relied upon this response only once, for the proposition that the USDOC should rely on a log benchmark, rather than a private stumpage benchmark.[327] The USDOC explained that it found it more appropriate to rely upon a stumpage benchmark than a log benchmark to measure the adequacy of remuneration for the respondents' purchases of stumpage in Alberta.[328]

(22) Document 22: Canadian Forest Service, Natural Resources Canada, titled "Some Notes on The Forests of The Maritimes" (Exhibit CAN-156)

115. According to Canada, the relevance of this document is that it "presents information on the forests of the Maritime Region with a specific emphasis on New Brunswick and Nova Scotia."[329] The USDOC addressed concerns regarding the Maritimes Region in the final issues and decision memorandum at pages 112-115.[330] This is a 2004 report that was submitted by the Government of Ontario as Exhibit ON-ADEQ-4.[331] The Canadian interested parties did not rely on this report to support any of their arguments following submission of the report to the

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[324] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-15.

[325] *See* Lumber Final I&D Memo, pp. 48-49 (Exhibit CAN-010).

[326] *See* Government of Alberta Supplemental Questionnaire Response (May 30, 2017), Question 3 (Exhibit CAN-209 (BCI)).

[327] *See* Alberta et al., "Case Brief of the Government of Alberta and the Alberta Softwood Lumber Trade Council," (July 27, 2017) ("Alberta Case Brief"), p. Vol. IV-13 (Exhibit CAN-092).

[328] *See* Lumber Final I&D Memo, pp. 48-49 (Exhibit CAN-010).

[329] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-15.

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

[331] Government of Ontario Initial Questionnaire Response at Exhibit ON-ADEQ-4 (Exhibit CAN-156).

USDOC.[332] Accordingly, the USDOC did not specifically identify this report in its final issues and decision memorandum.

116. Nonetheless, the USDOC did address the forests of the Maritime Region and their comparability to the forests in Ontario (and Alberta and Quebec) in its final issues and decision memorandum at pages 112-115.[333]

(23) Document 23: George C. Eads, Ph.D., "Application of Québec's Transposition Equation to Ontario" (Exhibit CAN-335)

117. According to Canada, the relevance of this document is that it "generates an estimate of Ontario's timber price for FY 2015-2016 using Québec's transposition equation based on the characteristics of Ontario forests, timber market, and other criteria."[334] The USDOC addressed this report in the final issues and decision memorandum at pages 96-97.[335] The USDOC considered whether to use this proposed benchmark and declined to do so.[336] Specifically, the USDOC found that its regulation expressed a clear preference for the use of prices from actual transactions as a benchmark. In contrast, the timber prices in the Eads report were derived applying Quebec's transposition equation to Ontario purchases.[337] Because the USDOC found that it had a benchmark reflecting prices from actual market-based transactions (*i.e.*, the Deloitte survey), it did not discuss the derivation of those prices in the Eads report.[338] Canada continues to emphasize that this proposed benchmark was not composed of prices from actual transactions, but, rather, was an "estimated stumpage price … that the report calculated."[339]

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[332] *See, e.g.*, Canadian Government Parties' Joint Case Brief (July 27, 2017) (Exhibit CAN-311) (not mentioning either the title of the report or the exhibit number); Ontario Case Brief (July 27, 2017) (not mentioning either the title of the report or the exhibit number) (Exhibit USA-070).

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

[334] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-15.

[335] *See* Lumber Final I&D Memo, pp. 96-97 (Exhibit CAN-010).

[336] *See* Lumber Final I&D Memo, pp. 96-97 (Exhibit CAN-010).

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

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

[339] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-15 (underline added).

(24) Document 24: Jasen Golding, RPF, MFE, "A Comparison Between the Acadian Forest Region in Nova Scotia and New Brunswick and the Boreal Forest Region" (Exhibit CAN-149)

118. According to Canada, the relevance of this document is that it "contrasts Ontario's Boreal Forest Region with Nova Scotia's Acadian Forest."[340] The USDOC addressed this report in the final issues and decision memorandum at page 113.[341] The USDOC addressed, in particular, the differences in forest conditions between the Acadian forest in Nova Scotia and the boreal forest in Ontario.[342] The USDOC found these differences did not lead to significant differences in the forests and trees, because the resulting trees were of the same primary species mix (SPF) and of relatively similar sizes as measured by DBH.[343] In light of that evidence, the USDOC found that this and other reports relied upon by the Canadian parties failed to "demonstrat[e] that the growing conditions in the Acadian and boreal forests are so different as to render trees from the two forests incomparable to one another."[344]

(25) Document 25: Jendro and Hart LLC, "Comments on 'US Log Market Prices to be used for Evaluating Timber Sold by the British Columbia Government,'" EX. GBC-1 (Exhibit CAN-297)

119. According to Canada, the relevance of this document is that it "expresses concerns that the study submitted by Petitioner and conducted by Mason, Bruce & Girard 'contains substantial errors, particularly regarding its reliance on unsubstantiated and invalid data'."[345] The USDOC addressed the points raised in Jendro and Hart's comments in the final issues and decision memorandum at pages 61-62.[346] British Columbia filed these 14 pages of comments from Jendro and Hart, which relate to the USDOC's determination to base BC benchmark log prices on published WDNR prices, rather than on price data reported by Forest2Market and contained in the Mason, Bruce and Girard study submitted by the petitioner in its March 27, 2017, benchmark comments.[347] On April 6, 2017, British Columbia filed the Jendro and Hart comments, which criticized the Forest2Market data as containing errors, lacking transparency, unsubstantiated, and unreliable.

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[340] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-15.

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

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

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

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

[345] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-16.

[346] *See* Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010).

[347] *See* Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010).

120. In the final issues and decision memorandum, the USDOC declined to use the Forest2Market data, reasoning:

> [S]ince the data and search parameters underlying the prices reported by Forest2Market (for a study conducted specifically for this investigation) are not on the record of this investigation and are otherwise unverifiable, we cannot find those reported U.S. log prices to be complete, representative, or reliable.[348]

121. The final issues and decision memorandum also summarized the comments contained in rebuttal briefing from British Columbia and the British Columbia Lumber Trade Coalition ("BCLTC"), namely the contention that the Forest2Market data "are unsubstantiated, non-transparent summary data, and there is no evidence that the data are representative of U.S. PNW log price transactions during the [period of investigation], or that they include log prices for salvage or beetle-killed wood. Furthermore, the data do not include cull or utility log."[349] This cited section of the British Columbia rebuttal brief itself references the Jendro and Hart comments and restates Jendro and Hart's concerns regarding the Forest2Market data.[350] Therefore, although the USDOC may not have directly mentioned Jendro and Hart by name in the final issues and decision memorandum as the source of these concerns, the USDOC identified the concerns derivatively by citing the rebuttal brief filed by British Columbia and the BCLTC and its discussion of Jendro and Hart's comments. Furthermore, the USDOC and Jendro and Hart considered the same data – the Forest2Market pricing – and expressed similar concerns regarding the Forest2Market report's underlying data.

122. By including this item in Annex A, Canada appears to criticize the USDOC for not considering Jendro and Hart's comments, even though the USDOC reached the same conclusions advanced by Jendro and Hart, British Columbia, and the BCLTC. While Canada acknowledges that the USDOC "largely adopted [Jendro and Hart's] conclusion,"[351] it is inaccurate to suggest that the USDOC did not consider the issues raised by Jendro and Hart, merely because their comments are not specifically referenced by name in the final issues and decision memorandum.

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

[349] Lumber Final I&D Memo, p. 61 (Exhibit CAN-010).

[350] *See* British Columbia and the B.C. Lumber Trade Council Rebuttal Brief Vol. III (August 4, 2017) ("GBC/BCLTC Rebuttal Brief"), pp. 4-9 (Exhibit USA-068).

[351] Canada's Responses to the First Set of Panel Questions, Annex A.

(26) Document 26: Joseph P. Kalt, Ph.D., "Response to Petitioner Claims of March 24, 2017 About the Operation of Stumpage and Log Markets in British Columbia" (Exhibit CAN-090)

123. According to Canada, the relevance of this document is that it "refutes Petitioner's claims that the threat of 'blocking' constitutes a meaningful impediment to export by demonstrating that Petitioner's claims are based on misunderstandings and misstatements as to the operation of the LEP process" and "critiques reports provided by Petitioner purporting to show that timber markets are integrated"[352] The USDOC addressed the subjects of this report in the final issues and decision memorandum at pages 139-141 and 144-149.[353] Kalt's response is a rebuttal to comments the petitioner submitted on March 27, 2017, including reports from the Canada Institute of the Wilson Center and documents from BC log exporters, which explain how blocking restrains log exports in BC.[354] The petitioner had also submitted nine academic articles that support the proposition that timber markets can be integrated across wide areas containing multiple jurisdictions.[355] Kalt's comments respond to these market integration reports and the ripple effect through the BC interior, and petitioner's argument that blocking under the LEP system decreases exports and log prices.[356]

124. In their case briefs during the investigation, Canada and British Columbia, Canfor, Tolko, and West Fraser argued that the LEP process does not constrain exports, but they do not mention blocking or the Kalt rebuttal.[357] In contrast, the petitioner's rebuttal brief addressed blocking and cited the Wilson Center report and statements of BC log exporters to argue that the log export permitting process does, in fact, restrain exports.[358] Accordingly, when the USDOC addressed blocking in the final issues and decision memorandum, it mainly cited the evidence proffered by the petitioner – including the Wilson Center report and statements of BC log exporters – to reach the conclusion that the blocking system forces log sellers into informal agreements that lower export volumes and domestic prices.[359]

125. In Annex A of its responses to the first set of Panel questions, Canada also asserts that the USDOC ignored Kalt's rebuttal criticism of the market integration reports when it found in the

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[352] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-16.

[353] *See* Lumber Final I&D Memo, pp. 139-141 and 144-149 (Exhibit CAN-010).

[354] *See* Petitioner's Comments on Initial Questionnaire Responses (March 27, 2017), pp. 2-3 (Exhibit USA-066).

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

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

[357] *See* GOC/GBC Case Brief, pp. 9-19 (Exhibit USA-067); Canfor Case Brief (July 27, 2017), pp. 36-37 (Exhibit CAN-137 (BCI)); Tolko Case Brief (July 27, 2017), p. 31 (Exhibit CAN-138 (BCI)); West Fraser Case Brief (July 27, 2017), p. 52 (Exhibit CAN-139 (BCI)).

[358] *See* Petitioner Rebuttal Brief (August 7, 2017), pp. 98-101 (Exhibit USA-071).

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

final determination that log export restraints have a ripple effect from the BC coast to the interior.[360] However, similar to the issue of blocking, the case briefs of Canada and British Columbia, Canfor, Tolko, and West Fraser did not address Kalt's rebuttal of the market integration reports in the sections arguing against the existence of a ripple effect.[361] As explained in addressing documents 6 and 9 of Annex A,[362] the USDOC addressed the market integration arguments of the Kalt and Leamer reports, which the Canadian parties did cite in their case briefs.[363] Furthermore, in the final issues and decision memorandum, the USDOC provided a detailed analysis of why market integration does exist to the extent that log export restraints affect the entire province, including the BC interior.[364] Therefore, the USDOC addressed Kalt's rebuttal critiques of market integration, even if not referencing them specifically by name.

126. In contrast to the Canadian parties, the petitioner did address Kalt's rebuttal comments regarding market integration in its rebuttal brief, challenging Kalt's criticism of the map petitioner provided showing that log markets of all BC sawmills overlap with each other and potential export markets.[365] The petitioner relied on this map to argue that even if log export restrictions had their most direct effect on log prices near the BC border, there still would be a ripple effect throughout the province because of the overlapping log markets of the BC mills.[366] In its rebuttal brief, the petitioner challenges Kalt's criticism of the map by arguing that his arguments lack independent evidentiary support because Kalt simply cites his own prior work.[367] In the final issues and decision memorandum, the USDOC relied on the petitioner's map to support the conclusion that log export restraints on the border regions of the interior would have a ripple effect on the BC interior.[368] The USDOC determined that the map was reliable, in part because it was consistent with other record evidence – namely the Bustard report.[369] Therefore,

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[360] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-16 (citing Lumber Final I&D Memo, pp. 145-146 (Exhibit CAN-010)).

[361] *See* GOC/GBC Case Brief, pp. 19-22 (Exhibit USA-067); Canfor Case Brief (July 27, 2017), p. 37 (Exhibit CAN-137 (BCI)); Tolko Case Brief (July 27, 2017), p. 31 (Exhibit CAN-138 (BCI)); West Fraser Case Brief (July 27, 2017), pp. 52-53 (Exhibit CAN-139 (BCI)).

[362] *See* Canada's Responses to the First Set of Panel Questions, Annex A, p. A-5 (Joseph P. Kalt, "An Analysis of Certain Economic Issues Relating to Petitioner's Claims About the Operation of Stumpage and Log Markets in British Columbia" (Exhibit CAN-016)) and p. A-8 (Edward E. Leamer, "Statistical and Economic Issues Associated with Petitioner's Proposed Use of a Cross-Border Log Methodology to Measure the 'Adequacy of Remuneration' for BC Timber" (Exhibit CAN-286)).

[363] *See* Lumber Final I&D Memo, pp. 145-146 (Exhibit CAN-010).

[364] *See* Lumber Final I&D Memo, pp. 144-149 (Exhibit CAN-010).

[365] *See* Petitioner Rebuttal Brief (August 7, 2017), pp. 93-94 (Exhibit USA-071).

[366] *See* Petitioner's Comments on Initial Questionnaire Responses (March 27, 2017), p. 4 (Exhibit USA-066).

[367] *See* Petitioner Rebuttal Brief (August 7, 2017), pp. 93-94 (Exhibit USA-071).

[368] *See* Lumber Final I&D Memo, p. 148, footnote 886 (Exhibit CAN-010).

[369] *See* Lumber Final I&D Memo, p. 148, footnote 886 (Exhibit CAN-010).

unlike Kalt, the USDOC examined the map against independent sources and also implicitly addressed Kalt's criticism of the map, even if it did not explicitly reference Kalt's comments.

127. Similarly, in the final issues and decision memorandum, the USDOC cites the market integration reports submitted by the petitioner as reliable record evidence that log markets can be integrated over large areas divided by international borders.[370] The USDOC found these reports to be reliable, in part because they were from independent sources and not prepared for the purpose of the investigation.[371] Therefore, the USDOC again implicitly addressed Kalt's criticism of the market integration reports even if it did not cite his comments specifically.

(27) Document 27: Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017" (Attachment 1 in Exhibit CAN-292)

128. According to Canada, the relevance of this document is that it "rebuts the articles that Petitioner relies on to support its approach to evaluating the adequacy of remuneration for stumpage in B.C."[372] The USDOC addressed this concern in the final issues and decision memorandum at pages 145-146.[373] Leamer's response is a seven-page letter submitted by the BCLTC on April 6, 2017, in response to the market integration reports that the petitioner submitted on March 27, 2017.[374] The petitioner submitted the market integration reports, in part, to rebut the assertion Leamer made in the Leamer report (document 9 above[375]) that timber markets typically have wide price gaps across two jurisdictions.[376] The petitioner submitted the market integration reports to support its argument that there is substantial integration of timber markets across multiple jurisdictions and large geographical distances.[377]

129. Leamer's first main argument in his April 6, 2017, letter is that co-integration does not mean equal average prices in different regions.[378] Leamer argues that the market integration reports do not support the petitioner's proposed method of measuring adequacy of remuneration

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

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

[372] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-17.

[373] *See* Lumber Final I&D Memo, pp. 145-146 (Exhibit CAN-010).

[374] *See*, Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017" (Attachment 1 in Exhibit CAN-292).

[375] *See* Canada's Responses to the First Set of Panel Questions, Annex A, p. A-8 (Edward E. Leamer, "Statistical and Economic Issues Associated with Petitioner's Proposed Use of a Cross-Border Log Methodology to Measure the 'Adequacy of Remuneration' for BC Timber" (Exhibit CAN-286))

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

[377] *See* Petitioner's Comments on Initial Questionnaire Responses (March 27, 2017), p. 12 (Exhibit USA-066).

[378] *See* Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017", p. 1 (Attachment 1 in Exhibit CAN-292).

for BC stumpage by using PNW log benchmark prices.[379] Leamer argues that such comparisons require the average log prices of species to be the same in different areas, and the market integration reports do not establish that such a condition exists.[380] Leamer also explains that the reports examine "if there was a technical relationship between average prices in different regions known as 'co-integration,' which is defined as the existence of a stable long-term relationships between the series."[381] According to Leamer, co-integration does not mean that prices are the same, and the "law of one price" is not synonymous with co-integration because prices moving together do not equate to identical prices.[382] Consequently, Leamer argues that the market integration reports addressing co-integration do not support petitioner's methodology, which requires the same average price levels over time.[383]

130. Leamer's second main argument in his April 6, 2017, letter is that the market integration reports support his argument in the Leamer report that price analyses must include multiple factors that cause log prices to vary across regions – *e.g.* distance between markets, timber output, mill count, structural breaks, salvage operations, and changes in policy.[384] Finally, Leamer argues that the petitioner's market integration reports are based on studies of the Southern United States and European countries – regions not relevant to this investigation – and for different time periods than the period of investigation.[385] Leamer argues that his original paper demonstrated large price differences between sub-regions of the PNW and BC caused by factors the petitioner does not take into account – including quality differences and market conditions – meaning that one cannot establish accurate overall prices in the PNW to be used as a benchmark for average overall prices in BC.[386]

131. The USDOC addresses the market integration reports and the Leamer report – both of which are the subject of Leamer's April 6, 2017, letter – in the final issues and decision memorandum. The USDOC addressed the Leamer report's arguments against the existence of

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[379] *See* Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017", p. 1 (Attachment 1 in Exhibit CAN-292).

[380] *See* Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017", p. 1 (Attachment 1 in Exhibit CAN-292).

[381] Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017", p. 1 (Attachment 1 in Exhibit CAN-292).

[382] *See* Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017", p. 2 (Attachment 1 in Exhibit CAN-292).

[383] *See* Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017", p. 2 (Attachment 1 in Exhibit CAN-292).

[384] *See* Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017", pp. 5-6 (Attachment 1 in Exhibit CAN-292).

[385] *See* Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017", p. 6 (Attachment 1 in Exhibit CAN-292).

[386] *See generally* Edward E. Leamer, "Response to Petitioner's Filing of March 27, 2017" (Attachment 1 in Exhibit CAN-292).

the "law of one price" for species and grades of logs across different localities.[387] Like Leamer does in his letter, the USDOC analyzed the Leamer report against the market integration reports and found the contents of the market integration reports to provide more persuasive and reliable support for the existence of the "law of one price" and integrated timber markets spanning wide geographic areas and national borders.[388] With respect to Leamer's argument that the market integration reports focus on areas not pertinent to this investigation, the USDOC considered all relevant evidence on the record and found that there was "conflicting evidence about the nature of log markets."[389] In weighing all the record evidence, the USDOC determined that the market integration reports were the most reliable in drawing the general conclusion that log markets can be integrated across wide geographic areas and multiple jurisdictions.[390] Therefore, even if the USDOC did not specifically cite Leamer's April 6, 2017, letter, the USDOC addressed the subjects raised and the sources examined in the letter, as reflected in the final issues and decision memorandum.

(28) Document 28: MNP LLC, "Comments in Respect of the May 12, 2017 Supplemental Questionnaire to Alberta" (Exhibit CAN-345)

132. According to Canada, the relevance of this document is that it "address[es] [the USDOC's] inquiries about several of MNP's previous reports (Exhibits CAN-096, CAN-102, CAN-109)."[391] The USDOC addressed these issues in the final issues and decision memorandum in several places.[392] First, to recall the context of this document, MNP provided responses to several of the questions in the USDOC's supplemental questionnaire, and submitted that response as part of Alberta's May 30, 2017, filing.[393] These answers discussed the conversion factor used by Nova Scotia[394] and TDA values.[395] The Canadian interested parties subsequently relied upon this response for (1) the proposition that red spruce is more prevalent in

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[387] *See* Lumber Final I&D Memo, pp. 145-146 (Exhibit CAN-010).

[388] *See* Lumber Final I&D Memo, pp. 145-146 (Exhibit CAN-010).

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

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

[391] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-17.

[392] *See, e.g.*, Lumber Final I&D Memo, pp. 48-52, 110-111, 119-120, 126, and 135-139 (Exhibit CAN-010).

[393] *See* Government of Alberta Supplemental Questionnaire Response (May 30, 2017), Questions 4, 5, 7, 9, and 10 (Exhibit CAN-209 (BCI)); Alberta, "MNP's Comments in Respect of the May 12, 2017 Supplemental Questionnaire to Alberta" (Exhibit AB-S-119), p. 1 (Exhibit CAN-345).

[394] *See* Government of Alberta Supplemental Questionnaire Response (May 30, 2017), pp. 1-6 (Exhibit CAN-209 (BCI)).

[395] *See* Government of Alberta Supplemental Questionnaire Response (May 30, 2017), pp. 7-11 (Exhibit CAN-209 (BCI)).

Nova Scotia than Alberta,[396] (2) their challenge to the use of the Nova Scotia conversion factor,[397] and (3) additional costs paid by tenure holders.[398]

133. The USDOC explained that it found it more appropriate to rely upon the prevalence of the SPF basket, rather than particular SPF species, discussing the issue in its final issues and decision memorandum at pages 110-111.[399] The USDOC also specifically referenced Alberta's argument regarding the prevalence (or lack thereof) of red spruce in the two provinces.[400]

134. The USDOC explained that the Deloitte survey relied upon a reasonable method when converting the survey data into a common unit of measure, using a conversion factor used in Nova Scotia's ordinary course of business, discussing the issue in the final issues and decision memorandum at pages 119-120 and 126.[401]

135. The USDOC also explained its decision not to rely upon the TDA survey.[402] The USDOC analyzed the TDA survey at pages 48-51 of the final issues and decision memorandum.[403] The USDOC rejected the TDA survey as a benchmark because only 0.3 percent of the TDA survey data by volume reflected private stumpage transactions.[404] The USDOC found that those private stumpage transactions were "relatively inconsequential as compared to the total volume of sales and unusable as a tier-one [in-country] benchmark," and were not market-determined.[405] The USDOC found that the prices were not market-determined because (1) Crown timber represented 98.48 percent of the stumpage market; (2) a small number of tenure-holding companies dominated both the Crown-origin and private-origin standing timber harvests in the province; and (3) a supply overhang indicated that sawmills did not fully consume their allocated Crown timber, and thus would only seek private timber when it was cheaper to do so.[406]

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[396] *See* Alberta et al., "Case Brief of the Government of Alberta and the Alberta Softwood Lumber Trade Council," (July 27, 2017) ("Alberta Case Brief"), pp. Vol. IV-33 and 38 (Exhibit CAN-092).

[397] *See* Alberta et al., "Case Brief of the Government of Alberta and the Alberta Softwood Lumber Trade Council," (July 27, 2017) ("Alberta Case Brief"), pp. Vol. IV-42 and 43 (Exhibit CAN-092).

[398] *See* Alberta et al., "Case Brief of the Government of Alberta and the Alberta Softwood Lumber Trade Council," (July 27, 2017) ("Alberta Case Brief"), pp. Vol. IV-47 and 59 (Exhibit CAN-092).

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

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

[401] *See* Lumber Final I&D Memo, pp. 119-120, 126 (Exhibit CAN-010).

[402] *See* Lumber Final I&D Memo, pp. 48-51 (Exhibit CAN-010).

[403] *See* Lumber Final I&D Memo, pp. 48-51 (Exhibit CAN-010).

[404] *See* Lumber Final I&D Memo, pp. 48-51 (Exhibit CAN-010).

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

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

136. Finally, the USDOC explained its determination not to adjust the respondents' stumpage prices to account for additional costs in the final issues and decision memorandum at pages 135-139.[407]

(29) Document 29: MNP LLP, "Cross Border Analysis of Stumpage and Log Prices in Alberta and Six Other Jurisdictions" (Exhibit CAN-096)

137. According to Canada, the relevance of this document is that it "examines the species, timber characteristics and other attributes of timber harvested in Alberta and in six other jurisdictions, including Nova Scotia" and "concludes that Nova Scotia would be an inappropriate benchmark because of its remote geography, different climate, longer growing season, distinct species, larger trees, and superior infrastructure" and "that Nova Scotia lacks the accurate data needed to make a comparison."[408] The USDOC addressed these concerns in the final issues and decision memorandum at page 113.[409] This report is the predecessor to the MNP's "Supplement to MNP's March 10, 2017 Cross Border Analysis of Stumpage and Log Prices in Alberta and Six Other Jurisdictions."[410]

138. The USDOC addressed, in particular, the differences in forest conditions between the Acadian forest in Nova Scotia and the boreal forest, which encompasses large areas of Alberta, in its final issues and decision memorandum at page 113.[411] The USDOC found these differences did not lead to significant differences in the forests and trees, because the resulting trees were of the same primary species mix (SPF) and of relatively similar sizes as measured at DBH.[412]

(30) Document 30: MNP LLP, "Alberta Sawmill Survey Report" (Exhibit CAN-442 (BCI))

139. According to Canada, the relevance of this document is that it "addresses the percentage of Alberta logs used for lumber products and the percentage used for non-lumber products" and "demonstrates that the Nova Scotia survey did not capture prices for goods of comparable quality to those provided in Alberta."[413] The USDOC addressed this very issue – the comparability of Alberta timber to Nova Scotia timber based on size and DBH – in the final issues and decision

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[407] *See* Lumber Final I&D Memo, pp. 135-139 (Exhibit CAN-010).

[408] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-17.

[409] *See* Lumber Final I&D Memo, p. 134 (Exhibit CAN-010).

[410] *See* MNP "Supplement to MNP's March 10, 2017 Cross Border Analysis of Stumpage and Log Prices in Alberta and Six Other Jurisdictions" (Exhibit CAN-347).

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

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

[413] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-18.

memorandum at pages 110-112, while not citing to this survey report.[414] The interested parties in the investigation did not make any arguments with respect to this report,[415] and there was no reason for the final issues and decision memorandum to specifically discuss this report.

(31) Document 31: MNP LLP, "Cost Survey Overview and FY 2015 Survey of Costs for Alberta Sawmills Summary" (Exhibit CAN-126 (BCI))

140. According to Canada, the relevance of this document is that it "details Alberta lumber producers' costs and revenue."[416] The USDOC addressed this report in the final issues and decision memorandum at pages 135-139.[417] As explained there, the USDOC found that the Nova Scotia stumpage benchmark was a "pure" benchmark, and thus it was inappropriate to include additional costs not reflected in respondents' pure stumpage purchases.[418] This survey was of those additional costs. The USDOC had no reason to discuss the survey given its earlier determination that it was inappropriate to adjust respondents' stumpage purchase prices to account for those costs.

(32) Document 32: MNP LLP, "Lumber Transportation Costs to U.S. Markets" (Attachment 1 of Exhibit CAN-301 (BCI))

141. According to Canada, the relevance of this document is that it "compares lumber shipping rates from the B.C. Interior to certain U.S. markets in comparison to rates from certain PNW locations."[419] The USDOC addressed the issue of freight data in the final issues and decision memorandum at page 158 and continued to use the freight data it relied on the in preliminary determination.[420] The final issues and decision memorandum does not specifically discuss this report because the Canadian parties did not raise it in their case briefs.

142. On March 27, 2017, the BCLTC submitted certain "factual information", including the MNP report (Attachment 1 of the submission), which contained published freight rates from the BC interior to U.S. destinations, and from the PNW to U.S. locations.[421] In the same submission,

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[414] *See* Lumber Final I&D Memo, pp. 110-112 (Exhibit CAN-010).

[415] *See* Alberta et al., "Case Brief of the Government of Alberta and the Alberta Softwood Lumber Trade Council," (July 27, 2017) ("Alberta Case Brief") (Exhibit CAN-092) (no reference of report title or AB-S-25); Canadian Government Parties' Joint Case Brief (July 27, 2017) (Exhibit CAN-311) (no reference of report title or AB-S-25).

[416] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-18.

[417] *See* Lumber Final I&D Memo, pp. 135-139 (Exhibit CAN-010).

[418] *See* Lumber Final I&D Memo, p. 135-139 (Exhibit CAN-010).

[419] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-18.

[420] *See* Lumber Final I&D Memo, p. 158 (Exhibit CAN-010).

[421] MNP, "Lumber Transportation Costs to U.S. Markets" (Exhibit CAN-301 (BCI)).

the BCLTC also included tables (Attachment 2 of the submission) of its member companies indicating their actual average freight cost during the period of investigation to all of their U.S. customers from each of their mills in the BC Interior and U.S. PNW.[422] In the preliminary determination, the USDOC used the data from the tables in Attachment 2 to "[construct] an international freight cost using the international freight costs associated with shipping lumber from mills in British Columbia to customers in the PNW as a surrogate for log transportation costs from the PNW to British Columbia."[423] The USDOC further explained that "[t]hese freight costs are representative of log freight and are the best and most reasonable data we have on the record to include in our benchmark and make it representative of a delivered price."[424]

143. In their case briefs, Canada and British Columbia, Canfor, Tolko, and West Fraser did not discuss the MNP report. Rather, they primarily made the general argument that, because there is no indication that companies would actually pay the log transport costs or transport logs between the BC interior and the United States, the USDOC should not add international freight charges to the benchmark.[425] Canada and British Columbia argued in their case brief that if the USDOC were to continue applying a cross-border benchmark, "it should compare the U.S. log prices on a delivered basis *in the United States* with the mandatory respondents' all-in delivered log costs."[426] Therefore, the main arguments raised by the Canadian interested parties at the final determination stage of the investigation centered not around what the international freight charges should be, but whether they should be applied at all. The petitioner urged the continued use of the international freight costs the USDOC used in the preliminary determination.[427] In the final determination, the USDOC continued to use the freight data it relied on the in preliminary determination.[428]

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[422] MNP, "Lumber Transportation Costs to U.S. Markets" (Exhibit CAN-301 (BCI)).

[423] Canfor Preliminary Calculation Memorandum (April 24, 2017), pp. 10-11 (Exhibit USA-045 (BCI)); Tolko Preliminary Calculation Memorandum (April 24, 2017), p. 7 (Exhibit USA-048 (BCI)); West Fraser Preliminary Calculation Memorandum (April 24, 2017), p. 9 (Exhibit USA-047 (BCI)).

[424] Canfor Preliminary Calculation Memorandum (April 24, 2017), pp. 10-11 (Exhibit USA-045 (BCI)); Tolko Preliminary Calculation Memorandum (April 24, 2017), p. 7 (Exhibit USA-048 (BCI)); West Fraser Preliminary Calculation Memorandum (April 24, 2017), p. 9 (Exhibit USA-047 (BCI)).

[425] *See* GOC/GBC Case Brief, p. 28 (Exhibit USA-067); Canfor Case Brief (July 27, 2017), pp. 37-38 (Exhibit CAN-137 (BCI)); Tolko Case Brief (July 27, 2017), pp. 31-32 (Exhibit CAN-138 (BCI)); West Fraser Case Brief (July 27, 2017), pp. 54-55 (Exhibit CAN-139 (BCI)).

[426] GOC/GBC Case Brief, p. 29 (Exhibit USA-067) (italics in original).

[427] *See* Petitioner Rebuttal Brief (August 7, 2017), p. 109 (Exhibit USA-071).

[428] *See* Lumber Final I&D Memo, p. 158 (Exhibit CAN-010).

(33) Document 33: MNP LLP, "MNP Survey Overview of Alberta Sawmills Harvest and Production Statistics" (Exhibit CAN-101)

144. According to Canada, the relevance of this document is that it "provides an overview of a survey undertaken by MNP to gather information on the profile and characteristics of the 2015 calendar year timber harvest, and of timber harvesting and hauling costs and sawmill productivity."[429] The USDOC addressed these concerns in the final issues and decision memorandum at pages 135-139.[430] This letter from MNP documents the process of collecting data for the broader MNP survey[431] by Alberta. As characterized by Alberta, this letter "outlines the methodology that was used to collect information from Alberta forest companies on the total and weighted average costs of logging and decking, loading and hauling as well as haul distance, and also provides summarized results."[432]

145. Because this letter does not reach conclusions independent of the broader MNP sawmill survey, it is unclear why Canada is now characterizing this as an "expert report." In any event, no party premised arguments on this letter before the USDOC in the investigation.[433]

146. As discussed above with regard to document 31,[434] the USDOC found that the Nova Scotia stumpage benchmark was a "pure" benchmark, and thus it was inappropriate to include additional costs not reflected in respondents' pure stumpage purchases.[435] This survey was of those additional costs. The USDOC had no reason to discuss the survey given its earlier determination that it was inappropriate to adjust respondents' stumpage purchase prices to account for those costs.

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[429] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-19.

[430] *See* Lumber Final I&D Memo, pp. 135-139 (Exhibit CAN-010).

[431] *See* Alberta, "MNP Cost Survey Overview and FY2015 Survey of Costs for Alberta Sawmills Summary," (Exhibit CAN-126 (BCI)).

[432] Government of Alberta Initial Questionnaire Response (January 17, 2017), p. ABIV-118 (Exhibit CAN-097).

[433] *See, e.g.,* Alberta et al., "Case Brief of the Government of Alberta and the Alberta Softwood Lumber Trade Council," (July 27, 2017) ("Alberta Case Brief") (Exhibit CAN-092) (no reference of report title or AB-S-25); Canadian Government Parties' Joint Case Brief (July 27, 2017) (Exhibit CAN-311) (no reference of report title or AB-S-25).

[434] *See* Canada's Responses to the First Set of Panel Questions, Annex A, p. A-18 (MNP LLP, "Cost Survey Overview and FY 2015 Survey of Costs for Alberta Sawmills Summary" (Exhibit CAN-126)).

[435] Lumber Final I&D Memo, pp. 135-139 (Exhibit CAN-010).

(34) Document 34: MNP LLC, "Supplement #2 to MNP's March 10, 2017 Cross Border Analysis of Stumpage and Log Prices in Alberta and Six Other Jurisdictions" (Exhibit CAN-141)

147. According to Canada, the relevance of this document is that, "[i]n its second supplemental report, MNP continues to discuss why Nova Scotia would be an inappropriate benchmark, and the adjustments that would need to be made if it were (inappropriately) used as a benchmark."[436] The USDOC addressed these concerns in the final issues and decision memorandum at pages 135-139, where the USDOC explained its reasoning for declining to adjust the Nova Scotia benchmark, and at pages 48-54, where the USDOC explained its reasoning for declining to rely upon the TDA survey.[437]

(35) Document 35: E.W. Ted Robak, P.Eng, RPF, BScFE, et al., titled "An Examination of Road Construction and Other Logging Costs on Private Woodlots in New Brunswick and Nova Scotia" (Exhibit CAN-531)

148. According to Canada, the relevance of this document is that it "examines road construction and other costs in the Maritimes and is relevant to demonstrating the incomparability of the Nova Scotia benchmark."[438] The USDOC addressed alleged differences in road construction costs between Nova Scotia and other provinces, including Ontario, at pages 113-114 of the final issues and decision memorandum.[439] The Canadian interested parties did not rely on the 2004 report that was submitted by the Government of Ontario (as Exhibit ON-ADEQ-3) to support any of their arguments following the report's submission to the USDOC.[440] Accordingly, the final issues and decision memorandum did not specifically discuss this document.

149. Nonetheless, the USDOC did address alleged differences in road construction costs between Nova Scotia and other provinces, including Ontario, in its final issues and decision memorandum at pages 113-114.[441] In particular, the USDOC found that, "to the extent such differences in hauling distance and infrastructure development exist, we find that the Canadian

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[436] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-19.

[437] *See* Lumber Final I&D Memo, pp. 48-54 and 135-139 (Exhibit CAN-010).

[438] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-19.

[439] *See* Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[440] *See, e.g.*, Canadian Government Parties' Joint Case Brief (July 27, 2017) (Exhibit CAN-311) (not mentioning either the title of the report or the exhibit number); Ontario Case Brief (July 27, 2017) (same) (Exhibit USA-070).

[441] *See* Lumber Final I&D Memo, pp. 113-114 (Exhibit CAN-010).

Parties have not adequately substantiated and quantified the extent of the purported differences or that any differences are reflected in Nova Scotia stumpage prices."[442]

(36) Document 36: Michael Rosenzweig, Ph.D., "An Analysis of Certain Factual Information Submitted by the Coalition for Purposes of Measuring the Adequacy of Remuneration for Electricity," EX GBC-2 (Exhibit CAN-297)

150. According to Canada, the relevance of this document is that "[t]his analysis responds to Petitioner's proposed alternative electricity benchmarks. It includes a restatement of Dr. Rosenzweig's arguments."[443] The USDOC addressed the proposed electricity benchmark at page 166 of the final issues and decision memorandum.[444] As Canada acknowledges, this second report by Dr. Rosenzweig was prepared to respond to proposed electricity benchmark data placed on the record by the petitioner. Because the USDOC did not rely upon those data for benchmark purposes, it was not necessary for the USDOC to parse or address critiques of those data. Moreover, in its written argument, the petitioner did not advocate using those data sources as benchmarks, but instead emphasized use of electricity sales prices from one of Tolko's plants to FortisBC, a private investor-owned utility. The USDOC explained why it did not select the petitioner's preferred electricity benchmark at page 166 of the final issues and decision memorandum.[445]

151. To the extent Dr. Rosenzweig restated arguments regarding BC Hydro from his initial report, the USDOC addressed those arguments, as the United States has explained in the U.S. responses to the first set of Panel questions[446] and in the discussion above concerning document 18.[447] The United States refers the Panel to those earlier U.S. explanations.

b. Canada's Arguments, Which Are Premised on Canada's Gross Mischaracterization of the Documents in Annex A of Canada's Responses to the First Set of Panel Questions, Utterly Lack Merit

152. The foregoing discussion demonstrates that Canada's chart in Annex A of its responses to the first set of Panel questions has no support in the USDOC's record, and presents a gross mischaracterization of the USDOC's determination. For all the reasons given above, Canada's

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

[443] Canada's Responses to the First Set of Panel Questions, Annex A, p. A-20.

[444] *See* Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[445] *See* Lumber Final I&D Memo, p. 166 (Exhibit CAN-010).

[446] *See* U.S. Responses to the First Set of Panel Questions, paras. 426-429.

[447] *See* Canada's Responses to the First Set of Panel Questions, Annex A, p. A-13 Michael Rosenzweig, Ph.D., "An Analysis of Certain Economic Issues Relating to the Coalition's Claims about BC Hydro's Electricity Purchase Agreements" (Exhibit CAN-417)).

arguments, which are premised on Canada's gross mischaracterization of the USDOC's determination, utterly lack merit.

B. Canada Has Failed to Demonstrate that the USDOC Erred in Using a Private Market Benchmark from Nova Scotia

153. In its statements during the first substantive meeting and in its responses to the first set of Panel questions, Canada has, for the most part, repeated arguments made in Canada's first written submission without engaging in the counterarguments presented in the U.S. first written submission. Canada continues to advance arguments regarding (1) the comparability of Nova Scotia timber, (2) the reliability of the private stumpage survey prices, and (3) the non-stumpage benchmark adjustments the USDOC declined to make. As demonstrated below, Canada's arguments continue to lack merit.

1. Canada Has Failed to Demonstrate that Nova Scotia Timber Is Not a Comparable Benchmark

a. Canada Has Failed to Demonstrate that Nova Scotia SPF Timber Is Not Comparable to SPF Timber in Other Provinces

154. Canada argues that the "treatment of any coniferous timber in the 'SPF basket' as comparable cannot be reconciled with the evidence of significant quality differences among species defined as 'SPF'."[448] Canada further argues that "[t]he basket of SPF species in Nova Scotia simply cannot be compared to the SPF basket in other provinces."[449] However, with respect to species, Canada acknowledges that "SPF" is a useful shorthand for "species that can be used to produce SPF lumber."[450] The USDOC explained that the provinces themselves rely on SPF as a single category when setting stumpage prices.[451] Indeed, as demonstrated in the U.S. first written submission,[452] 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.[453] In Alberta, Ontario, and Quebec, the provincial governments charge a single, "basket" price for Crown-origin

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[448] Canada's First Opening Statement (Day 1), para. 247.

[449] Canada's First Opening Statement (Day 1), para. 247.

[450] Canada's First Opening Statement (Day 1), para. 248.

[451] *See* U.S. First Written Submission, para. 118 (citing Lumber Final I&D Memo, pp. 110-111, 113 (citing GOA QR at ABIV-73 and Exhibit AB-S-15, p. 73; GNB QR at NBII-6 to NBII-9; GOO QR at Exhibit ON-TEN-34; GOQ QR Vol. 1, p. 53) (Exhibit CAN-010)).

[452] *See* U.S. First Written Submission, paras. 118-119.

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

standing timber that falls within the SPF species category.[454] 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.[455] 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.

155. Similarly, Canada's contention that certain species within the SPF basket exhibit different characteristics that affect their commercial value[456] 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 pricing among SPF species.[457]

156. Canada nevertheless continues to press its argument that differences and variations will always be found when comparing two or more trees:

> Species are a useful proxy for understanding how the physical characteristics of trees differ from province to province. Quality varies among species, and the distribution and proportion of species differs significantly among provinces.
>
> In particular, different species grow to different heights, have different diameters, and produce wood with different characteristics.
>
> The height and diameter of a tree can affect the size, value, and amount of lumber that can be recovered from that tree. As we see here, making lumber is the act of extracting a rectangular product from a circular natural resource.[458]

157. Canada's general observations say nothing about the findings reached by the USDOC on the record of this investigation. Yet Canada repeatedly deploys these lists of differences that may be found to exist: "different species," "different heights," "different diameters," "wood with different characteristics," differences in "size," "value," "amount of lumber," and variations among "species," "[q]uality," "distribution," and "proportion" that "differs . . . among

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[454] 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).

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

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

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

[458] Canada's First Opening Statement (Day 1), paras. 249-251 (no sources cited).

provinces."[459] Canada discusses these differences at length,[460] but never establishes that any categorical distinction exists between provinces. As noted, Canada acknowledges that SPF "is used as shorthand to describe species that can be used to produce SPF lumber."[461] Thus, Canada acknowledges from the start that, even with all the differences and variations one might be able to identify between groupings of trees, in the end, SPF is treated interchangeably, and this is accepted as a matter of industry practice.

158. Canada's argument about the existence of minor variations among trees does not support Canada's claim that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement. An objective and unbiased investigating authority could have concluded, as the USDOC did here, that it would be reasonable to rely on the accepted industry practice of treating SPF interchangeably, as described above.

159. Canada argues that evidence on the record shows that distinctions can be made between species on a commercial basis,[462] but the possibility that a particular mill may prefer spruce over fir at a particular moment in time does not undermine the reality that SPF stumpage is priced together in the first place. A mill may prefer one species over the other for any number of its own reasons. As explained during the USDOC's hearing with the interested parties:

> a lot of the problem that comes from . . . looking at offer prices, which is why transaction prices are better, as we said this morning. . . . [Canadian parties] say, here's the same company, they have two mills in the same state, offering different prices for the same logs. Same species, same size, they're offering different prices. How can this be? Does that mean that one of them is subsidized and the other is not? . . . . [W]ell, you see, what was happening was that one mill was processing one species at that time and we wanted to focus on that. The mill was focusing at that time on a different species. And so, reflecting one mill's preferences, we did have a lower price for the logs that we really didn't want at that mill because we would have had to transport them over to the other mill. So, we offered at that time a lower price specifically so that we wouldn't buy any, or that we would buy as few as possible. And people who had those logs to sell would either wait for a different time or sell them to someone else. But they purchased logs that they were interested in at that mill and a different mill purchased the logs that they were interested in. And when you

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[459] Canada's First Opening Statement (Day 1), paras. 249-251.

[460] *See, e.g.*, Canada's First Opening Statement (Day 1), paras. 249-262.

[461] Canada's First Opening Statement (Day 1), para. 248.

[462] Canada's First Opening Statement (Day 1), para. 262 (citing an example of a mill that did not want to purchase spruce).

> take all of the sawmills in a given market together, everybody is purchasing the logs that they particularly are interested in. And if you look at the actual transaction prices that are paid by the mills that are actually purchasing the logs, you get a much better sense of what the actual price is. And so, if you're just looking at offer prices, yes, you can see a difference in the offer price with one mill versus another mill, or maybe what's available in one particular location at one particular time, versus another particular time.[463]

160. Canada's argument that distinctions can be made between species on a commercial basis[464] only illustrates that, in a given instance, a particular purchaser may have a particular preference for any reason. The variability and unpredictability of such preferences is merely a part of the prevailing market conditions in the industry, but not evidence that different species within the SPF basket must be treated as having different prevailing market conditions than other species that are also within the SPF basket.

b. Canada Misunderstands the Meaning of the Term "Prevailing Market Conditions" in Article 14(d) of the SCM Agreement

161. Canada alternatively argues that Nova Scotia SPF timber is not comparable to SPF timber in other provinces because, according to Canada, the shared characteristics of species and size (*i.e.*, DBH) are insufficient to establish comparability for the purposes of Article 14(d) of the SCM Agreement.[465] Canada argues that, by focusing on whether the product itself was comparable, the USDOC's "approach did not allow for an analysis of each provincial market."[466] Canada argues that an analysis of "each provincial market" is relevant because, according to Canada, "the prevailing market conditions in Nova Scotia bear little or no relationship to those in Alberta, Ontario, and Québec."[467] Canada concludes on this basis, therefore, that the USDOC could not rely on a comparison of like products without also adjusting to reflect the respondent's entire commercial experience as a lumber producer.[468]

162. Canada's argument fails because it relies on an overly expansive interpretation of "prevailing market conditions" that is not supported by the text of Article 14(d) of the SCM Agreement. Determining the adequacy of remuneration "in relation to prevailing market conditions" does not require re-constructing a subsidy recipient's entire commercial experience.

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[463] USDOC Memorandum, "Hearing Transcript on CVD Issues," dated August 24, 2017, pp. 225-228 (Exhibit USA-072).

[464] Canada's First Opening Statement (Day 1), para. 262 (citing an example of a mill that did not want to purchase spruce).

[465] *See* Canada's First Opening Statement (Day 1), para. 247.

[466] Canada's First Opening Statement (Day 1), para. 236.

[467] Canada's First Opening Statement (Day 1), para. 246.

[468] *See* Canada's First Opening Statement (Day 1), para. 246.

Rather, reference to the "prevailing market conditions" by an investigating authority ensures that a proper comparison is made, such that it will demonstrate how much more the recipient would have had to pay to obtain the good on the market. Here, the United States has explained that 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 the eastern SPF species basket in Nova Scotia were also the primary and most commercially significant species reported in the species groupings for Alberta, Ontario, and Quebec; [469] and (2) the average DBH of SPF standing timber in Nova Scotia and New Brunswick was comparable to the same measurement in Alberta, Ontario, and Quebec.[470]

163. Canada argues further that "the United States attempts to reframe Canada's arguments with respect to market differences between Nova Scotia and the other provinces as a request for adjustments by Canada."[471] Canada misrepresents the U.S. argument. The U.S. first written submission does not "attempt[] to reframe" Canada's arguments as "a request for cost adjustments."[472] Rather, the U.S. first written submission highlights that (1) SPF stumpage is the relevant good in question that mills across the provinces use to produce softwood lumber; (2) SPF in Nova Scotia is the same as (or similar to) SPF in the other relevant provinces; and (3) SPF is the most prevalent and most commercially significant species grouping in the forests across those provinces.[473] The U.S. first written submission separately "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."[474] Moreover, the USDOC addressed the alleged differences in conditions between the provinces, finding that, to the extent differences in hauling distance and infrastructure development existed between Nova Scotia and Alberta, Ontario, and Quebec, those differences were not 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.[475]

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[469] 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).

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

[471] Canada's First Opening Statement (Day 1), para. 237 (citing U.S. First Written Submission, paras. 114-129).

[472] Canada's First Opening Statement (Day 1), para. 237 (citing U.S. First Written Submission, paras. 114-129).

[473] *See* U.S. First Written Submission, paras. 117-120 and 124.

[474] U.S. First Written Submission, para. 113 (underline added).

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

164. Canada, however, conflates these concepts. Canada cites an introductory paragraph from Canada's first written submission in an attempt to clarify Canada's original argument.[476] But the statement that Canada cites shows that Canada views "prevailing market conditions" as a vehicle for requesting cost adjustments. Canada explains, at paragraph 744 of its first written submission, that what it describes as "prevailing market conditions" should, "at a minimum", be treated as cost adjustments.[477] Canada's first written submission speaks for itself:

> [S]ubsection i) explains that Nova Scotia being part of Canada is irrelevant, as it contains an entirely different regional market for timber than the regional markets of Alberta, Ontario, or Québec. The critical differences in prevailing market conditions between the Nova Scotia market and the markets in these other provinces are discussed in subsection ii). Subsection iii) shows that, <u>at a minimum</u>, [the USDOC] was required to adjust its benchmark to reflect the differences in prevailing market conditions in each regional market, despite the near impossibility of making such adjustments accurately.[478]

165. Canada's argument for a categorical distinction between provinces, however, is unsubstantiated. Canada argues that each mill takes into account its own circumstances (*e.g.*, the exact distance between the mill and the harvest site) and, on that basis, argues that those circumstances are not the exact same circumstances found in Nova Scotia (*e.g.*, because Nova Scotia mills are not located the exact same distance from particular harvest sites). Canada has taken the position, essentially, that no two mills face the same circumstances. But this position is based on the considerations of individual mills, not based on any categorical difference between <u>provinces</u>.

166. Further, the corollary of Canada's position is that while no two mills face identical circumstances, <u>all mills</u> take into account the <u>same kinds of considerations</u>. It follows from Canada's logic, therefore, that the actual transaction prices observed in Nova Scotia also reflect the same universe of considerations faced by lumber producers in other provinces. While the USDOC established that the good in question is the same as the good in Nova Scotia, Canada <u>has not</u> established that the prices in Nova Scotia are determined on any basis that deviates from the <u>kinds</u> of considerations mills take into account, and which are prevalent in the lumber industry. Absent any categorical distinction between provinces, the prices for SPF in Nova Scotia, therefore, are prices that reflect the prevailing market conditions for SPF across the other provinces (in contrast, a categorical distinction was established between eastern SPF and British Columbia SPF). Therefore, even by Canada's own reasoning, the actual transaction prices in Nova Scotia reflect the prevailing market conditions for the good in question. Canada has no

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[476] Canada's First Opening Statement (Day 1), para. 238 (citing Canada's First Written Submission, paras. 744 and 820).

[477] Canada's First Written Submission, paras. 744 and 820 (footnote omitted; underline added).

[478] Canada's First Written Submission, paras. 744 and 820 (footnote omitted; underline added).

basis for arguing that this comparison fails to comport with the provisions of Article 14(d) of the SCM Agreement.

167. As noted, even if no two mills face identical circumstances, all mills take into account the same kinds of considerations. But Canada conflates this point with arguments about the characteristics of individual trees or particular circumstances faced by individual mills. Canada's first written submission illustrates Canada's error. Canada argues:

> Nova Scotia also has a favourable terrain and climate that allows for year-round harvesting access. These conditions result in different (and lower) harvesting costs in Nova Scotia than in the northern boreal forest. For example, in northern Alberta, Tolko can only harvest standing timber on its FMU in the winter, after the construction of ice roads by water spray trucks, and the entire harvesting season is typically only 88 days long. Similarly, in northern Québec, Resolute can only access some Crown forests via winter ice bridge.[479]

168. In this example, Canada describes "a favourable terrain" and "year-round harvesting access" as "conditions [that] result in different (and lower) harvesting costs" in Nova Scotia.[480] But Canada does not explain precisely what it means by "conditions" here. Canada's argument only illustrates that infinitely unique circumstances may characterize each particular harvest. Taken to its logical (but absurd) conclusion, Canada's argument appears to be that each tree (or each purchase) has its own prevailing market conditions.

169. To the extent Canada's position really is that each tree (or each purchase) must be evaluated as if it had its own prevailing market conditions, what Canada would really be arguing is that the good in question has different characteristics that make it unlike the benchmark good. But Canada has not – and could not – make that case. The USDOC searched the record, evaluated the evidence, and concluded that the relevant distinction to be made was the distinction between eastern SPF and British Columbia SPF. Canada's approach is circular and fails to establish a categorical distinction between provinces that translates to a difference in prevailing market conditions for the good in question.

c. Canada Has Failed to Demonstrate the Impact of Considerations Other than Species and Size

170. Canada argues that the USDOC "also ignored a number of other factors that significantly affected stumpage prices, such as harvesting costs, transportation costs, and the demand for

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[479] Canada's First Written Submission, para. 783 (footnotes omitted).

[480] Canada's First Written Submission, para. 783.

residual products and the supply of softwood timber relative to demand."[481] Although Canada asserts that these factors "significantly affected stumpage prices," Canada's assertion is not supported by the record or relevant to the analysis under Article 14(d) of the SCM Agreement.[482] The USDOC addressed the arguments Canada now makes in the final issues and decision memorandum, and the U.S. first written submission addresses these arguments as well.[483]

171. As explained, none of the 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 Canada points to no record evidence quantifying this alleged effect on costs.[484]

172. In contrast, 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."[485] Thus, the USDOC found that assertions concerning differences in hauling distance and infrastructure development between Nova Scotia and Alberta, Ontario, and Quebec were not substantiated (or quantified in their effect on timber prices), and the Nova Scotia stumpage market did not fail to reflect the prevailing market conditions in the other three provinces.[486]

173. Canada argues that the USDOC did not "take into account evidence that timber is classified, processed, and priced differently in the different provincial markets."[487] Canada suggests that the reported transaction prices therefore do not reflect the prices for the same kind of good. Canada also argues that the USDOC did not "carry out an objective inquiry" of "Nova Scotia's unique forest region, species mix, the diameter of the trees it was comparing, and the effects of differences in growing and harvesting conditions."[488] Canada is wrong. The U.S. first written submission, the U.S. oral statements during the substantive meeting, and the U.S. responses to the first set of Panel questions explain exactly how the USDOC took these

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[481] Canada's First Opening Statement (Day 1), para. 75.

[482] Canada's First Opening Statement (Day 1), para. 75.

[483] *See, e.g.*, U.S. First Written Submission, paras. 131-135.

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

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

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

[487] Canada's First Written Submission, para. 784.

[488] Canada's First Written Submission, para. 784.

considerations into account.[489] For example, the USDOC considered "growing conditions" in assessing the comparability of the Nova Scotia benchmark on page 113 of the final issues and decision memorandum:

> We also disagree with the Canadian Parties that there are fundamental differences between the Acadian forest (which encompasses Nova Scotia) and the boreal forest (which encompasses Québec, Ontario, and large areas of Alberta). As discussed in the *Preliminary Determination*, we find that species and DBH are the two most critical elements when assessing whether prices for private-origin standing timber in Nova Scotia are comparable to Crown-origin standing timber in New Brunswick, Québec, Ontario, and Alberta. While Nova Scotia is not located in the same forest as Québec, Ontario, and Alberta, as discussed above, the two forests are comparable in terms of species and DBH in that both forest regions are dominated by SPF-based species and the DBH of the forests' standing timber are in line with one another. We also find that the Canadian Parties have not cited any evidence demonstrating that growing conditions in the Acadian and boreal forests are so different as to render trees from the two forests incomparable to one another.[490]

174. The basis of Canada's "growing conditions" argument has been that growing conditions are relevant because different growing conditions produce different trees that cannot be considered comparable. But the USDOC compared the characteristics of trees grown in these allegedly different growing conditions and found that the timber that grows in Nova Scotia is, in fact, physically comparable to the timber of the same species that grows in New Brunswick, Quebec, Ontario, and Alberta.[491] Despite alleged differences in growing conditions, the provincial forests produced similar trees.[492] As documented in the U.S. responses to the first set of Panel questions,[493] the USDOC found that the diameter at breast height of the trees grown in these forests was similar and the forests were dominated by SPF-based species.[494] Moreover, the

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[489] *See* U.S. First Written Submission, paras. 131-138; U.S. First Opening Statement (Day 1), paras. 11-16; U.S. Responses to the First Set of Panel Questions, paras. 12-17, 24-27, 28-30, 31, 37, 39, 41-44, and 47-50 (discussing, respectively in U.S. responses to questions 3, 6, 7, 8, 10, 12, 14, and 15, the same physical characteristics, quality, and growing conditions for SPF that are found across these five provinces).

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

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

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

[493] *See* U.S. Responses to the First Set of Panel Questions, paras. 12-17, 24-27, 28-30, 31, 37, 39, 41-44, and 47-50 (discussing, respectively in U.S. responses to questions 3, 6, 7, 8, 10, 12, 14, and 15, the same physical characteristics, quality, and growing conditions for SPF that are found across these five provinces).

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

USDOC found that Canada had not "cited any evidence demonstrating that growing conditions in the Acadian and boreal forests are so different as to render trees from the two forests incomparable to one another."[495] The USDOC therefore considered "growing conditions" in assessing whether the Nova Scotia benchmark was comparable to the other provinces at issue.

175. Canada has proposed a number of competing theories about differences in market conditions, differences in geographical conditions, differences in provincial government conditions, differences in conditions of sale, differences in conditions of transportation, differences in terrain, differences between woodlots, differences between trees, and so forth. But Canada has failed to identify any parameters that would allow for a valid comparison under its approach. At the same time, Canada emphasizes that a comparison between identical goods is not necessary under Article 14(d) of the SCM Agreement, but rather that a comparison of the "same or similar" goods will also suffice.[496] In Canada's words, "assessment of adequacy of remuneration normally involves a comparison to a market-determined price, for the same or similar goods."[497]

176. Regardless of whether Canada describes the foregoing differences as differences in market conditions or differences requiring adjustments, Canada has failed to show that the USDOC did not determine the adequacy of remuneration based on a comparison to a market-determined price for the same or similar goods. The Nova Scotia stumpage prices provided a comparable benchmark for the stumpage transactions under investigation and none of the alternatives Canada sought out would have been free from the myriad differences that fuel Canada's objections here.

177. Although Canada asserts (without support) that "Nova Scotia private standing timber is higher value than Alberta, Ontario, or Quebec Crown-origin standing timber,"[498] Canada has not pointed to anything non-comparable about the timber itself nor the products that are made from the timber. Canada is simply saying that logging is more costly in other provinces. The USDOC addressed these points in its final determination.[499] But Article 14(d) does not require that the benchmark purchaser's experience be the same as the respondent's experience, only 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. Some producers are more efficient than others, some have higher costs of doing business than others, but those circumstances are not the prevailing market conditions; they are the circumstances of individual producers.

178. The USDOC properly looked at the price paid for the sawable SPF fiber stumpage in Nova Scotia where the observed transaction prices were private, market-determined prices. The stumpage is not of a different quality, not of a different species, not of a different size, and not

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

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

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

[498] Canada's First Written Submission, para. 784.

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

used for a different purpose. It is not relevant to the inquiry to know why the private market actors priced their sale the way that they did. But it is relevant to know that a Canadian producer would have to pay that much more to get stumpage on the open market rather than from its massive government suppliers. We know this because we know how much producers have to pay in Nova Scotia (where the government is not the predominant supplier) to obtain on the open market the very same good that respondents obtain when they purchase sawable SPF fiber stumpage in the other provinces.

d. Canada's Pulpwood Arguments Are Misleading

179. Canada argues that, because the benchmark prices include only sawable fiber stumpage prices (and not pulpwood prices), the USDOC did not "account for the fact that its Nova Scotia benchmark was based on only a fraction of the logs produced from trees in the province, and importantly only the higher value logs."[500] Canada argues that this means that the USDOC "ignored the lower-quality and therefore lower-priced half of the market in Nova Scotia, while including lower-quality, and less valuable, timber in other provinces."[501] Canada also argues that the USDOC's "use of a benchmark that excluded Nova Scotia pulpwood meant that it included generally larger logs in the benchmark."[502] Canada's assertions are false and misleading.

180. Canada ignores that the purchaser gets value from the entirety of the tree, but in doing so, assigns the appropriate values to the appropriate parts – *i.e.*, sawlog value for the parts used/usable for sawlogs, and roadside value for the parts used/usable for other purposes that the mill is not interested in consuming itself (and thus can sell for value to another entity that is interested in consuming those parts, *e.g.*, pulpwood to a paper company). This makes sense, and this is what happens in practice. The purchaser values stumpage for the purpose that is relevant to the purchaser (*e.g.*, a mill purchasing for sawlogs) and transfers the remainder for value on the open market to another purchaser who values the size and type of those other parts of the tree. The USDOC addressed this in the final issues and decision memorandum.[503]

> Canadian Parties argue this fact demonstrates that the survey data do not, as the GNS claims, reflect use-based definitions for log types and that the survey data do not contain prices for standing timber but instead reflect prices paid for only part of the harvested tree. We disagree with the Canadian Parties' arguments. In discussing how sawmills use sawlogs and studwood logs in their production process and the types of mills that use softwood logs and studwood logs, the GNS stated the following:

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[500] Canada's First Opening Statement (Day 1), paras. 263-267.

[501] Canada's First Opening Statement (Day 1), para. 268 (footnote omitted). *See also ibid.*, paras. 268-271.

[502] Canada's First Opening Statement (Day 1), para. 272 (footnote omitted). *See also ibid.*, paras. 272-274.

[503] *See* Lumber Final I&D Memo, p. 117 (Exhibit CAN-010).

> . . . based on the general characteristics of a tree, the harvester can determine the best use of the tree. [The Government of Nova Scotia] added that trees can produce several different types of log types (*e.g.*, pulplog, studwood, sawlog). In such instances, the seller of the tree would sell the section of the tree to the appropriate mill for that quality of the wood (*e.g.*, the studwood length to a studmill, the sawmill length to a sawmill, etc.).
>
> At verification, the officials who conducted the NS Survey explained that "Companies will sell the portion of the harvest not suited to their mill as roadside sales to other mills," . . . [T]he source documents demonstrate that the non-sawmills paid a stumpage price for standing timber and not, as the Canadian Parties' claim, a price that reflects only a portion of a harvested log. Our review of source documents for other transactions contained in the NS Survey also reflect the purchase of standing timber, as opposed to the purchase of a portion of harvested log.[504]

181. Canada's arguments on this point continue to lack merit.

2. The Deloitte Survey Nova Scotia Data Is Reliable and Probative

182. The U.S. first written submission demonstrates that there is no merit to Canada's claims that the USDOC improperly relied on the Deloitte survey as evidence of private stumpage transaction prices.[505] Canada's statements during the first substantive meeting and its responses to the first set of Panel questions largely repeat arguments that the United States already has addressed in the U.S. first written submission.[506] The United States addresses relevant points below.

a. Canada Has Failed to Demonstrate that the Deloitte Survey Was Not Reliable

183. Canada continues to argue that the private transaction prices reported in the Deloitte survey are somehow unreliable.[507] Canada asserts that the USDOC "simply accepted at face value" the prices reported in the Deloitte survey.[508] This assertion is plainly untrue. As

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[504] *See* Lumber Final I&D Memo, p. 117 (Exhibit CAN-010).

[505] *See generally* U.S. First Written Submission, paras. 155-174.

[506] *See* Canada's First Opening Statement (Day 3), paras. 96-131; Canada's Responses to the First Set of Panel Questions, paras. 54-76.

[507] *See* Canada's First Opening Statement (Day 3), paras. 96-131; Canada's Responses to the First Set of Panel Questions, paras. 54-76.

[508] Canada's First Opening Statement (Day 3), para. 99.

discussed above in section II.A, the USDOC issued extensive questionnaires, supplemental questionnaires, and conducted verification of the responses concerning the Deloitte survey.[509]

184. Canada continues to argue that the minor corrections identified at verification were much more problematic than they actually were.[510] Canada asserts that [[***]] of the thirteen transactions that the USDOC examined at verification "exhibited cause for concern," but Canada's citation for this allegation refers only to Canada's own case brief arguing this point to the USDOC in the course of the underlying investigation.[511] Further, the argument to which Canada cites does not relate to whether [[***]] of the specific transactions the USDOC examined at verification "exhibited cause for concern," but rather repeats a general argument that because certain stumpage transactions reported in the survey involve [[***]], and "[p]ayments made to a [[***]] are likely to include costs beyond those paid to the owner of the land for the right to harvest standing timber (*i.e.*, stumpage)," then there "is reason to believe" that the stumpage transactions reported to Deloitte [[***]].[512] There is no evidentiary support for Canada's argument; it remains merely unsubstantiated speculation.

185. Canada faults the USDOC for not "investigat[ing] whether errors such as this one, that actually Nova Scotia informed it of at the beginning of verification, affected other transactions, or ask to see more transactions."[513] This is incorrect. The United States addressed these arguments in its responses to the first set of Panel questions.[514] As explained, the USDOC examined source documents for "the pre-selected six transactions," [[***]] of which involved an alleged [[***]], but also "selected [an] additional six transactions … during the verification" for examination.[515] Of those additionally-selected six transactions, [[***]] involved the alleged [[***]].[516] Yet the USDOC continued to find "no discrepancies," despite its further examination of the potential issue.[517]

186. Canada faults the USDOC for "assum[ing] that the problematic transactions [the USDOC] examined were not representative of the data set," as opposed to "reflect[ing] errors in

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[509] *See generally*, U.S. Responses to the First Set of Panel Questions, paras. 46 and 106-116.

[510] *See* Canada's Responses to the First Set of Panel Questions, paras. 133-134.

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

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

[513] Canada's First Opening Statement (Day 3), para. 124.

[514] *See generally*, U.S. Responses to the First Set of Panel Questions, paras. 106-116.

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

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

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

the broader responses."[518] However, minor corrections to information initially reported to the USDOC are common (if not expected) and are evident across the other verifications in this investigation as well. The USDOC's verification of every provincial government and every company respondent in this investigation involved corrections to, and uncovered issues with, those governments' and company respondents' responses to the USDOC.[519]

187. Canada further argues that the USDOC erred in using the Nova Scotia prices because of "overreliance on the assumption that the survey was conducted in the ordinary course."[520] Canada mischaracterizes the USDOC's determination. The USDOC verified that the survey was conducted in the ordinary course of business. Nova Scotia reported to the USDOC that it required private-origin stumpage prices "to set forestry policy, including Crown stumpage rates."[521] This was confirmed by the Statement of Work provided by Deloitte to Nova Scotia in June 2016 (in advance of USDOC's investigation). The Statement of Work provided that:

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[518] Canada's First Opening Statement (Day 3), para. 124.

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

[520] Canada's First Opening Statement (Day 3), para. 101.

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

]][522]

The survey period "included transactions taking place between April 1, 2015 through March 31, 2016, which aligned with the fiscal year of the Government of Nova Scotia."[523]

188. The description in the Statement of Work is mirrored in the Deloitte survey itself, which begins by setting forth Deloitte's understanding that:

> [I]t is the policy of Nova Scotia Department of Natural Resources ("NSDNR") that its Crown land stumpage rates (*i.e.*, the price to be paid for the right to harvest standing trees on Crown lands) be set so that the price of Crown timber reflects the price negotiated between private parties in a competitive marketplace. Accordingly, periodic surveys are conducted of Registered Buyers who routinely purchase stumpage from independent private land owners in order to assess pricing negotiated by private parties in a competitive marketplace.
>
> Pursuant to this policy, we undertook a survey of Registered Buyers for the purpose of collecting detailed information pertaining to Registered Buyers' transactions to purchase private stumpage from independent private woodlot owners in the Province of Nova Scotia.[524]

189. During the USDOC's verification of Nova Scotia's questionnaire responses, the provincial government again reiterated to USDOC officials that Nova Scotia periodically commissions surveys for the purpose of setting Crown prices in the province, with prior surveys occurring in 2008, 2009-2010, and 2011-2012.[525] This was consistent with Nova Scotia's statement in its initial questionnaire response that, during the period of investigation, Crown prices were set using the 2011-2012 private stumpage survey results indexed to 2015.[526] The USDOC concluded that Nova Scotia had a policy of periodically surveying private stumpage

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

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

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

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

[526] Government of Nova Scotia Initial Questionnaire Response, p. 5 (Exhibit CAN-313).

transactions and using those prices to set its Crown stumpage price, and Nova Scotia commissioned the 2015 Deloitte survey for the same purpose.[527]

190. Canada further misconstrues the USDOC's determination when it argues that the USDOC only relied on the survey because it was, in fact, "used" to set prices.[528] Canada does not go so far as to argue that Nova Scotia does not have a policy of setting Crown stumpage prices to reflect private prices. Canada implies rather that the USDOC should have concluded, in the face of the multiple unambiguous statements detailed above, that the 2015 survey was not conducted pursuant to that policy because the transactions surveyed related to softwood stumpage transactions relevant to pricing sawlogs and studwood. But, in contrast to the implications and speculation on which Canada relies, the evidence indicates (and it was reasonable for the USDOC to conclude) that the 2015 Deloitte survey was conducted in Nova Scotia's ordinary course of business and for its stated purpose.

191. With respect to the new evidence that Canada has introduced, that information is irrelevant to the USDOC's finding that the Deloitte survey was "conducted by the GNS in the ordinary course of business."[529] In the preliminary decision memorandum, the USDOC explained that:

> We find that the private stumpage prices in the *GNS Private Stumpage Survey Report*, which was conducted by the GNS in the ordinary course of business, and the disaggregated unit prices on which the report was based, contain a sizable number of observations, reflect prices throughout the province, and reflect private stumpage prices for a variety of species and log types. In particular, the *GNS Private Stumpage Survey Report* includes the prices paid for private-origin saw logs as well as studwood/ lathwood logs in the SPF category, which, as described below, is the primary and most commercially significant species reported in the SPF groupings for New Brunswick, Québec, Ontario, and Alberta. Therefore, we preliminarily determine that the *GNS Private Stumpage Survey Report* constitutes a reliable data source that is sufficiently representative of the private stumpage market in Nova Scotia to serve as a tier-one benchmark.[530]

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

[528] *See, e.g.*, Confidential PowerPoint Presentation accompanying Canada's First Opening Statement (Day 3), p. 79 (Exhibit CAN-528 (BCI)).

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

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

192. Whether the Nova Scotia stumpage survey was [[***]] is immaterial to the USDOC's conclusions, which rested on the fact that the survey was commissioned for the purpose of setting Crown stumpage prices.[531]

193. The fact that Canada has based its argument on freedom of information requests that were, [[***]], not in its possession (and thus not on the USDOC's record) until after the conclusion of the underlying investigation highlights the absurdity and irregularity of Canada's tactic. This information was not, and could not have been, considered by the USDOC. Likewise, this is information that the interested parties participating in the investigation have not considered. The investigative process depends on the opportunity for parties on both sides to provide information and argument concerning evidence put before the investigating authority. The information that Canada now seeks to introduce has not been subjected to such scrutiny. This development has no bearing on the Panel's review of the USDOC's determination.

194. Finally, Canada continues to argue that the USDOC failed to conduct a diligent investigation because the USDOC observed in the final issues and decision memorandum that the Canadian parties had failed to quantify any material difference between Nova Scotia and other provinces.[532] The U.S. first written submission addressed these arguments[533] and Canada's statements at the first substantive meeting do not rebut the U.S. arguments. Canada's statements at the first substantive meeting are at a level of generality that renders Canada's arguments meaningless.[534] For example, Canada argues that the USDOC "failed in its basic obligation to ask the pertinent questions."[535] Canada provides no support for this assertion and actually contradicts its own position within the same section of its opening statement, arguing that:

> [T]here were significant differences . . . [b]ut it would be unrealistic and effectively impossible for the other Canadian parties to quantify every relevant difference. Detailed information

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

[532] *See* Canada's First Opening Statement (Day 1), paras. 239-240 (citing U.S. First Written Submission, paras. 131-138). *See also* U.S. First Written Submission, para. 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 benchmark. 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." (footnotes omitted)).

[533] *See* U.S. First Written Submission, paras. 131-132, 135.

[534] *See* Canada's First Opening Statement (Day 1), paras. 239-245.

[535] Canada's First Opening Statement (Day 1), para. 245.

> on the Nova Scotia market is not readily available to other Canadian provinces or the respondent companies, and is not collected in the ordinary course of business.[536]

As the United States has explained, the record provides ample evidence that the USDOC "ask[ed] the pertinent questions,"[537] "diligently assess[ed] the suitability of any benchmark it was considering, including differences in prevailing market conditions,"[538] and "collect[ed] information on its Nova Scotia benchmark."[539]

195. Canada also argues, in error, that "[t]he United States now claims that [the USDOC's] duties to diligently investigate and base its determination on positive record evidence do not apply with respect to the interactions between [the USDOC] and Nova Scotia because Nova Scotia was a 'non-respondent' in the investigation**.**"[540] The United States addressed this point in the U.S. responses to the first set of Panel questions.[541] As noted, Nova Scotia certainly was a respondent in the USDOC's countervailing duty investigation.[542] But Canada's assertion about conducting a diligent investigation and basing the determination on positive record evidence has no connection to Nova Scotia's status in the investigation. Canada's assertion is also completely false. The United States never suggested (for any reason, whether having to do with Nova Scotia being a respondent or not) that an investigating authority should not diligently investigate or should not base its determination on positive record evidence.

196. As the United States has explained, when the U.S. first written submission referred to "non-respondents," the United States meant the private individuals from whom Deloitte requested information when it conducted the survey.[543] The statement in the U.S. first written submission responds to the erroneous assertion Canada makes when Canada says that the questionnaires, supplemental questionnaires, meetings, hearings, briefings, and verifications of and concerning the Government of Nova Scotia were insufficient.[544] Not only did the USDOC conduct a verification of the Government of Nova Scotia (in addition to all of the foregoing

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[536] Canada's First Opening Statement (Day 1), para. 241.

[537] Canada's First Opening Statement (Day 1), para. 245.

[538] Canada's First Opening Statement (Day 1), para. 240.

[539] Canada's First Opening Statement (Day 1), para. 240.

[540] Canada's First Opening Statement (Day 1), para. 242.

[541] *See* U.S. Responses to the First Set of Panel Questions, paras. 80-83.

[542] U.S. Responses to the First Set of Panel Questions, para. 81.

[543] U.S. Responses to the First Set of Panel Questions, para. 80.

[544] *See, e.g.*, Canada's Responses to the First Set of Panel Questions, para. 96.

exchanges), the USDOC also met with the Deloitte officials to verify their execution of the survey.[545] On top of all that, Deloitte itself conducted a verification of the survey participants.[546]

197. The USDOC highlighted these facts when it addressed Canada's arguments in the final issues and decision memorandum, emphasizing that, "in making their arguments, the Canadian Parties fail[ed] to mention that Deloitte conducted on-site verifications to ensure that the survey respondents submitted accurate information that adhered to the survey instructions."[547]

198. Canada's argument for additional verification is spurious. The USDOC described the process in detail as part of the verification report for Nova Scotia, and Canada simply ignores this fact:

> Deloitte officials explained that they processed the data as they were returned. Upon receipt of a completed survey, Deloitte scheduled on-site visits to verify random samples of submitted transactions. Through site on-visits [*sic*], Deloitte reconciled survey data with source documents such as scale slips, payment invoices, signed contracts, accounting ledgers, and inventory management records. Deloitte verified source documents to ensure alignment with values reported in the participant's submission. *See* **NS-VE-6** at 46-47.[548]

199. The underlying exhibits provide even further confirmation that the Deloitte survey and both verifications (Deloitte's verification of survey responses and the USDOC's verification of the Government of Nova Scotia with Deloitte officials) were thorough, diligent, and complete.[549] Canada has failed to demonstrate that the USDOC's efforts in examining and soliciting relevant information were insufficient in light of these facts.

b. Canada's Arguments Regarding Lump-Sum Transactions Lack Merit

200. Canada argues that "the Nova Scotia Survey included lump-sum transactions or other transactions that included elements in addition to the consideration paid to the landowner for the

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

[546] *See* U.S. Responses to the First Set of Panel Questions, para. 81 (citing Lumber Final I&D Memo, pp. 116-120 (Exhibit CAN-010)).

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

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

[549] *See* Nova Scotia BCI Deloitte Survey [[***]] (Exhibit CAN-512 (BCI)).

standing timber",[550] and, therefore, Canada argues, the USDOC incorrectly concluded that "the Nova Scotia survey applied a consistent definition of 'transaction' that excluded lump-sum transactions."[551] The United States addressed this argument in the U.S. first written submission and in the U.S. responses to the first set of Panel questions.[552]

201. First, Canada argues that "survey respondents were not given a definition of 'transaction.'"[553] Canada's assertion is incorrect. The USDOC specifically examined the definition of "transaction" used by Deloitte officials in the survey: "[[***]]."[554]

202. Canada argues that "the term 'transaction' was [[***]]" and that "the description provides no useful content, and certainly no indication that lump-sum transactions were excluded."[555] The United States has already addressed this issue.[556] Although this was [[***]], Canada again omits that the source documents, including [[***]], were subject to verification, initially by Deloitte and, later, by the USDOC.[557] Accordingly, the USDOC found that the reported transaction price reflected "the negotiated, contracted price between the buyer and seller."[558] Canada's position on this point is simply without merit.

203. Second, Canada argues that "[t]here was no effort made within the survey or by [the USDOC] to identify or control for lump-sum transactions."[559] As explained, however, Deloitte officials "conducted on-site verifications to ensure that survey respondents submitted accurate information that adhered to the survey instructions."[560] At verification, the USDOC found no evidence of lump sum transactions in the source documents examined, and the USDOC

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[550] Canada's Responses to the First Set of Panel Questions, para. 73.

[551] Canada's Responses to the First Set of Panel Questions, para. 74.

[552] U.S. First Written Submission, paras. 166-168; U.S. Responses to the First Set of Panel Questions, paras. 45-46.

[553] Canada's First Opening Statement (Day 3), para. 125.

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

[555] Canada's Responses to the First Set of Panel Questions, para. 75 (quoting Nova Scotia, "Deloitte Survey: Engagement Summary," p. 40 (Exhibit CAN-512 (BCI))).

[556] *See* U.S. Responses to the First Set of Panel Questions, para. 116.

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

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

[559] Canada's First Opening Statement (Day 3), para. 127. *See also ibid.*, paras. 126-130.

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

examined the largest transaction by volume reported in the Deloitte survey.[561] Given that there is 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 utterly lacks support.

204. Canada continues to argue that there is "overwhelming evidence the survey did, in fact, include lump-sum transactions."[562] But once again, Canada's assertion relies on speculation, not evidence. Canada asserts that, in a separate case, the Port Hawkesbury Paper mill in Eastern Nova Scotia most commonly purchased private stumpage through 'advance payment, or lump sum for a specific harvest volume.'"[563] However, Canada then changes from describing this as "overwhelming evidence" to describing it as an "overwhelmingly supported . . . inference" to describing it as a question the USDOC had "a duty to investigate."[564] The progression of Canada's own terms reveals that there is no evidence, only Canada's speculation. The USDOC addressed the arguments Canada now makes in the final issues and decision memorandum, finding that "the Canadian Parties provide nothing more than conjecture to support their claim" while "record evidence contradicts the Canadian Parties' claims"[565]:

> We also disagree with the Canadian Parties' claims that the NS Survey contains biases in terms of transaction size and that the regional make-up of the pricing data improperly skewed the prices upwards. According to the Canadian Parties, the size of the transactions in the NS Survey indicate that the prices do not reflect payments for a given tree, but, rather, are lump-sum prices that reflect the cost of stumpage rights for an entire tree stand. They further argue that the volumes in the NS Survey only reflect volumes associated with harvested sawlog and studwood logs that are destined for sawmills. In other words, the Canadian Parties claim that the value data in the NS Survey are broader than the volume data from the survey, which in turn results in an overstated benchmark unit price. The Canadian Parties contend that their lump-sum price theory is bolstered by the fact that much of the survey data come from the Eastern region of Nova Scotia where the Port Hawkesbury Paper mill is located, a facility that they claim purchases timber in lump-sum transactions.

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

[562] Canada's Responses to the First Set of Panel Questions, para. 76.

[563] Canada's Responses to the First Set of Panel Questions, para. 76 (quoting Canada's own argument from its administrative case brief).

[564] Canada's Responses to the First Set of Panel Questions, para. 76 (underline added).

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

> Other than noting that certain transactions in the NS Survey contain relatively low volumes, the Canadian Parties provide nothing more than conjecture to support their claim that the stumpage data reflect values for an entire tree stand while the volumes in the survey reflect only limited volumes of certain, specified log types. Further, record evidence contradicts the Canadian Parties' claims. For example, the NS Survey very clearly instructed survey respondents to report the "stumpage rates" they paid for "softwood sawlogs," and the source documents on which the NS Survey is based indicate stumpage prices paid for sawlogs and studwood. Further, in making their arguments, the Canadian Parties fail to mention that Deloitte conducted on-site verifications to ensure that the survey respondents submitted accurate information that adhered to the survey instructions.
>
> We also find that Canadian Parties' comments concerning the regional make-up of the NS Survey data do not support their claim that the value data in the survey are overly broad. The Canadian Parties' comments on this point hinge on the following assumptions: (1) Port Hawkesbury Paper, in addition to buying standing timber in lump-sum transactions, accounted for a substantial number and volume of the transactions contained in the NS Survey, (2) despite the instructions in the survey to provide "stumpage rates" for "softwood sawlogs," Port Hawkesbury Paper responded to the survey with volume and value data that were not on the same basis, and (3) the purported flaws in the data submitted by Port Hawkesbury Paper are representative of the flawed data reported by the remaining survey respondents. First, it is not clear that Port Hawkesbury responded to the NS Survey. The NS Survey indicates that not all recipients of the survey chose to participate. Further, other than the survey respondents whose source documents the Department examined at verification, the identities of the survey respondents are not on the record. Thus, it is speculative to claim that Port Hawkesbury responded to the NS Survey. Moreover, in the absence of any source documentation, and based on the reasons discussed above, it is even more speculative to claim that the survey results from Eastern Nova Scotia contain volume and value data that are not on the same basis.[566]

205. Canada's argument on this point should be rejected.

[566] Lumber Final I&D Memo, pp. 117-118 (Exhibit CAN-010) (footnotes omitted; underline added).

c. Canada's Arguments Regarding the Inclusion or Exclusion of Pulpwood Lack Merit

206. Canada continues to argue that the survey captured an incomplete picture because the "Nova Scotia Survey reported prices for sawlogs and studwood, which it grouped together as 'sawable timber', and excluded prices for pulpwood."[567] As the United States has demonstrated, the USDOC explained that the government of Nova Scotia conducted the study to cover prices for sawable timber, not pulpwood. The absence of pulpwood pricing from a survey not concerned with pulpwood is no reason to consider the study results invalid. On the contrary, including the pulpwood price in the stumpage price would have distorted the results. Canada's arguments regarding pulpwood continue to be illogical.

207. With respect to survey definitions, Canada argues that the "only determinant of a how a log is classified is the purchaser's subjective decision of how to classify it."[568] Canada argues that "subjective, use-based definitions also make the survey useless for comparison with other provinces."[569] Canada's argument is unpersuasive. The USDOC compared like to like by looking only at sawable timber. As explained in the U.S. first written submission,[570] 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.[571] 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.[572] 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…."[573] Although Canada contends that Alberta does not employ a use-based definition, Canada's argument refers only to Alberta's pricing scheme.[574] But even if Alberta does not price stumpage differently based on the use of the timber, the positive record evidence, upon which the USDOC relied, demonstrates that Alberta otherwise categorizes timber by its use. The USDOC

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[567] Canada's Responses to the First Set of Panel Questions, para. 56.

[568] Canada's Responses to the First Set of Panel Questions, para. 57.

[569] Canada's Responses to the First Set of Panel Questions, para. 59.

[570] *See* U.S. First Written Submission, para. 126.

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

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

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

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

further explained that "[t]he GOQ, GOO, and GOA rely on similar use-based definitions when determining whether a log is classified as a sawlog or a pulplog."[575]

208. Canada also argues that "Deloitte should have surveyed only sawmills and stud mills and requested (and reported) the prices that they paid for all types of stumpage, including their pulpwood purchases."[576] Canada argues that any survey about stumpage should cover all stumpage.[577] But the Deloitte survey explains that Nova Scotia sought to survey prices for sawable stumpage. There is no support for Canada's assertion that a survey for prices of sawable stumpage should include non-sawable stumpage. Canada argues that "[h]arvesters in Nova Scotia tend to pay more for sawlogs and studwood, and less for pulpwood, within a stumpage transaction."[578] But Canada's assertion adds nothing; it would distort the benchmark to include a different good (pulpwood) in the calculation.

209. As explained in the U.S. first written submission,[579] 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.[580] The USDOC found that "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."[581] 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.

210. Canada argues that instead of focusing on "timber used to make softwood lumber in each jurisdiction," the USDOC should have looked at "whether the benchmark reflects purchases of standing timber of a similar quality to the standing timber purchased by the respondents in other provinces."[582] But this is exactly what the USDOC did. For example, the USDOC clarified, in

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

[576] Canada's Responses to the First Set of Panel Questions, para. 62.

[577] *See* Canada's Responses to the First Set of Panel Questions, para. 62 ("If the purpose of the survey had been to determine prices paid by Nova Scotia lumber producers that purchase private stumpage, Deloitte should have surveyed only sawmills and stud mills and requested (and reported) the prices that they paid for all types of stumpage, including their pulpwood purchases.").

[578] Canada's Responses to the First Set of Panel Questions, para. 63.

[579] *See* U.S. First Written Submission, para. 127.

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

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

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

response to questions from Canadian parties, that they should provide all relevant definitions for grades or classifications and include a breakdown of sawable fiber and pulpwood:

> Please provide definitions of all classifications or grades of timber used in private transactions or sales of Crown stumpage in the Province. Please provide data reflecting volumes and values, broken down by private, industrial, and Crown stumpage sales, for each classification or grade of timber, including but not limited to sawlog, studwood, lathwood, pulpwood, and bolts.[583]

The USDOC therefore was able to distinguish between the sawable fiber and pulpwood fiber reported by the Canadian parties.

d. Canada's Argument that Reported Prices Included Pulpwood while the Benchmark Prices Did Not Include Pulpwood Lacks Merit

211. Canada's description of pulpwood being included in the reported stumpage prices for Quebec, Alberta, and Ontario is misleading.[584] Canada speculates that because pulpwood is not separated out in these three provinces, it must be included in the prices that were reported. But the respondents were instructed to report their stumpage used for the production of softwood lumber – not for pulpwood.[585] Canada's explanation is not supported by the facts and Canada seeks to introduce a new question that, if it were actually the case, should have been addressed long ago in the initial reporting by respondents. Moreover, to the extent that any pulpwood was produced as a co-product of the stumpage purchase, the mills would have treated that as a co-product.[586]

212. 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,"[587] 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.

213. Canada argues that the USDOC [[

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[583] USDOC Response to Requests for Clarification by Canadian Parties (issued Feb. 3, 2017), p. 17 (Exhibit USA-073) (italics in original).

[584] *See* Canada's Responses to the First Set of Panel Questions, paras. 65-70.

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

[586] *See, e.g.*, Lumber Final I&D Memo, p. 223 (Exhibit CAN-010).

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

]].[588] As explained 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]"[589] and Resolute reported this purchase. In this regard, the USDOC issued a supplemental questionnaire to Resolute requesting clarification of the grades it reported in the initial questionnaire response:

> On page 27 of Resolute's response to Section III of the initial questionnaire on stumpage programs, you provided descriptions of 'B', 'C', and 'M', which represent the grades of Crown stumpage purchased by Resolute. In the tables listing Resolute's Crown stumpage purchases in Exhibit RESB-16, the stumpage grades are identified as 'A', 'B', 'C', 'D', 'G', 'H', 'I', 'M', or 'R'. Please provide descriptions of 'A', 'D', 'G', 'H', 'I', and 'R' as they relate to grades of Crown stumpage purchased by Resolute. Please explain how the stumpage grades 'A', 'B', 'C', 'D', 'G', 'H', 'I', 'M', and 'R' differ from each other in terms of cost, size, quality, etcetera.[590]

214. When Resolute responded, Resolute clarified [[***]].[591] Notwithstanding that [[***]]. For its part, the Nova Scotia stumpage benchmark

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[588] Canada's Responses to the First Set of Panel Questions, para. 66.

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

[590] Supplemental Questionnaire to Resolute (issued Mar. 30, 2017), p. 3 (Exhibit USA-074).

[591] Resolute First Supplemental Questionnaire Response (Stumpage) (April 12, 2017), p. 9 (Exhibit USA-069). *See also ibid.*, pp. 7-8 ("Figure 1 on page 9 of the Scaling Manual lists the species, species code, and the grades that can apply to these species. For example, Resolute uses in Québec only spruce, fir, jack pine and larch to produce softwood lumber. For these species, only grades B, C, M, N and R apply. Despite the fact that Resolute uses only these species in its sawmills, stumpage charges show up for other species-grade combinations in Resolute's documents in the following three instances: 1. For any given lot sold on the auction market, Resolute, in submitting its bid, is required to put a 'stumpage' value for every species-grade combination that is listed in the information that BMMB provided for that lot. When Resolute has the winning bid, it pays stumpage for any volume of these species-grade combinations that come out of the lot for which Resolute was the winning bidder. For SPF volumes, and for all volumes of other species-grade combinations, Resolute must abide by the Scaling Manual and grade every log in accordance with the scaling method selected. Resolute then may proceed to sell those volumes to other mills that can process those species (such as Eastern White Pine ('EWP'), for which Resolute does not have appropriate processing facilities). 2. The odd log, logs or stems of unwanted species, may occasionally find its way into a truck load and may be delivered inappropriately to a sawmill. When an unwanted species shows up at a Resolute sawmill, Resolute must scale that log using the appropriate instructions for that species. This contamination amounts to traces in Resolute's volume and stumpage reports. Resolute does its best to clean the truckloads from such odd logs in the bush but does not always succeed. These unwanted logs generally go out as firewood. 3. Failure from a buyer – For all species-grade combinations that Resolute does not process in its sawmills, Resolute negotiates with mills that could use those species.")

reflected prices for sawable timber in Nova Scotia.[592] Thus, the USDOC compared like to like: timber that was sawed by respondents was compared to Nova Scotia sawable timber. The USDOC found that "includ[ing] pulplogs" (*i.e.*, logs that are not sawable) "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."[593]

3. Adjustments to Nova Scotia Prices Are Not Warranted

215. There is no support in the underlying record for Canada's argument to include additional charges not included in respondents' reported stumpage prices and not included in Nova Scotia's "'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees."[594] As explained in the U.S. first written submission, the USDOC found that these additional expenses were not directly related to stumpage prices, that they were billed as separate items, and that no record evidence indicated that any such additional items were included within the Nova Scotia benchmark prices.[595]

a. Canada's Argument that Additional Costs Must Always Be Included Is Illogical

216. Canada asserts that "the reality [is] that all of the charges and costs that [the USDOC] ignored are part of the full cost of Crown-origin timber, and that this full cost was incurred by the respondent companies."[596] But again, Canada misconstrues the relevant question under Article 14(d) of the SCM Agreement. As explained, the inquiry under Articles 1.1(b) and 14(d) of the SCM Agreement, as indicated by the text of those provisions, is concerned with the benefit conferred upon the recipient in relation to <u>what the recipient would have had to pay</u> to obtain the input under market conditions.[597] Here, the input is a single component – stumpage. Under market conditions, to purchase stumpage, a purchaser would have to pay for stumpage. While the stumpage component is capable of being packaged together with other components, it does

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

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

[594] Lumber Final I&D Memo, p. 138 (Exhibit CAN-010). *See also* Canada's First Written Submission, paras. 876-878.

[595] *See generally* U.S. First Written Submission, paras. 139-154; U.S. First Opening Statement (Day 2), paras. 6-10; Lumber Final I&D Memo, p. 136 (Exhibit CAN-010).

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

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

not follow that, under prevailing market conditions, to purchase stumpage, a purchaser would have to pay for stumpage plus other components in order to purchase stumpage. The survey responses collected by Deloitte provide evidence of exactly that – prices for the purchase of stumpage – and not prices for the purchase of stumpage plus other components such as forestry activities. The survey provides the only evidence of prevailing market conditions in Canada, given the predominance of the provincial governments elsewhere. The record is clear that stumpage rights are severable and transferable, notwithstanding that certain provinces may bundle stumpage together with other rights or obligations.

217. There is no support in the underlying record for Canada's argument to include additional charges not included in respondents' reported stumpage prices, and not included in Nova Scotia's "'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees."[598] As explained in the U.S. first written submission, the USDOC found that these additional expenses were not directly related to stumpage prices, that they were billed as separate items, and that no record evidence indicated that any such additional items were included within the Nova Scotia benchmark prices (despite Canada implying otherwise).[599]

218. Canada argues that adjustments should have been made because "the record evidence demonstrated that provinces took into account those costs when setting administered stumpage rates."[600] As the United States has explained previously, there is no record evidence demonstrating that to be the case.[601] Canada's argument seems to be that because costs exist, they should be added in to the separate price for stumpage. The USDOC did not take the position that the costs do not exist, but rather that they were reported separately from the price of stumpage and not taken into account when setting the price for stumpage. Because of that, there was nothing to adjust. The USDOC compared stumpage price to stumpage price.

219. The USDOC also did not take the position that adjustments are never warranted. The USDOC explained, rather, that adjustments will be necessary to make sure like is compared to like. Canada's reference to other situations where adjustments may or may not have been warranted is unavailing.[602]

220. The United States notes that Panel question 18 uses the phrase "situations where the government imposes additional costs or payments on private parties as a condition for acquiring a good." The benchmark analysis is concerned with remuneration, that is to say, the price of the good. Where the market-based transactions that comprise the benchmark reflect only the price of that good, it would not make sense to compare those market-based benchmark prices to the price charged for the good plus the satisfaction of other contractual conditions. This is not an

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

[599] *See* Lumber Final I&D Memo, p. 136 (Exhibit CAN-010). *See also* Canada's First Written Submission, paras. 876-878. The United States also refers the Panel to the U.S. responses to Panel questions 18, 27, and 28.

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

[601] *See* U.S. First Written Submission, para. 151.

[602] *See* Canada's Responses to the First Set of Panel Questions, para. 93.

abstract valuation exercise. The USDOC relied on evidence of the price of stumpage as the benchmark.

221. Moreover, relying on the price of stumpage alone is not inconsistent with Article 14(d) of the SCM Agreement, despite what Canada has suggested. Canada argues:

> An investigating authority cannot properly determine whether a benefit has been conferred and a recipient made 'better off' if it fails to consider the full cost to that recipient of receiving a government-provided good. This means that an investigating authority must take into account *all* of the government-imposed costs that must be incurred by the recipient in exchange for that government-provided good. This is because the investigating authority must determine whether the remuneration is adequate, and so it must necessarily capture the entire cost incurred by the recipient.[603]

222. Canada is wrong. Canada misreads the Appellate Body report in *US – Carbon Steel (India)* to argue that a subsidy recipient's general costs of doing business should offset the amount of benefit conferred by the subsidies received.[604] But the Appellate Body report says no such thing.[605]

223. When Canada quotes from the report in *US – Carbon Steel (India)* to refer to "the *full cost to the recipient*,"[606] Canada is referring to a dispute in which India challenged a provision of the USDOC's benchmark regulation, on an "as such" basis, because the USDOC regulation expresses a preference for delivered prices to be used as the benchmark.[607] India argued, in that dispute, that the benchmark should be based on an *ex works* price.[608] But the Appellate Body rejected India's argument because, given the reference to "transportation" in Article 14(d), the use of an *ex works* price as a benchmark would fail to capture the full extent of the benefit – in other words, it would fail to capture the full cost to the recipient in terms of what the recipient would have had to pay to obtain the input under market conditions.[609] The Appellate Body's

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[603] Canada's Responses to the First Set of Panel Questions, para. 85 (citing *US – Carbon Steel (India) (AB)*, para. 4.245; *Canada – Aircraft (AB)*, para. 157) (italics in original).

[604] *See* Canada's First Written Submission, para. 863 (quoting *US – Carbon Steel (India) (AB)*, para. 4.245); *see also* Canada's First Written Submission, paras. 42 and 869 (same)

[605] *See generally* U.S. First Opening Statement (Day 2), paras. 2-4.

[606] Canada's First Written Submission, para. 863 (quoting *US – Carbon Steel (India) (AB)*, para. 4.245) (italics added by Canada).

[607] *See US – Carbon Steel (India) (AB)*, paras. 4.245-4.251.

[608] *See US – Carbon Steel (India) (AB)*, para. 4.248.

[609] *See US – Carbon Steel (India) (AB)*, para. 4.246.

reference to "the full cost to the recipient" does not suggest (nor does it even contemplate) Canada's notion that the benefit amount should be discounted by so-called "additional remuneration."[610] Moreover, the reason why the Appellate Body places so much of the emphasis in that discussion on costs "to the recipient" is that the Appellate Body was also explaining that "an understanding of 'prevailing market conditions' as referring solely to the conditions set by the providers of the good" must be rejected.[611] The Appellate Body explained that such an understanding must be rejected because it cannot be reconciled with "the well-established proposition that a financial contribution provided by a government confers a benefit if it makes the *recipient* 'better off' than it would otherwise have been absent that contribution."[612]

224. When these statements from the Appellate Body report are read in context, it is clear that Canada has construed the Appellate Body's finding in *US – Carbon Steel (India)* in a manner directly contrary to what the Appellate Body actually found.[613] As Canada's misunderstanding is the premise for Canada's entire argument regarding "additional remuneration" and adjustments, it follows that Canada's argument lacks any foundation.

b. Canada's Reliance on Prior Lumber Investigations Is Misplaced

225. Canada goes on to argue (with no support) that such adjustments must be made to "any benchmark, *whether or not* similar payments were included in that benchmark."[614] Canada's position is illogical. As explained, the USDOC evaluated the constituent features of the Nova Scotia private stumpage benchmark, concluded that it reflected "a 'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees," and compared that benchmark to the company respondents' pure stumpage purchase prices.[615]

226. Canada erroneously asserts that the purported need for adjustments "is a reality that [the USDOC] consistently recognized in previous softwood lumber investigations."[616] Canada's

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[610] *See, e.g.*, Canada's First Written Submission, paras. 863-869.

[611] *See US – Carbon Steel (India) (AB)*, para. 4.245 (explaining that "an understanding of the term 'prevailing market conditions' as referring solely to the conditions set by the providers of the good in question stands in tension with the well-established proposition that a financial contribution provided by a government confers a benefit if it makes the *recipient* 'better off' than it would otherwise have been absent that contribution.") (emphasis added) (citing *Canada – Aircraft (AB)*, para. 157).

[612] *US – Carbon Steel (India) (AB)*, para. 4.245 (quoting *Canada – Aircraft (AB)*, para. 157) (italics in original).

[613] *See, e.g.*, Canada's First Written Submission, paras. 863-869.

[614] Canada's Responses to the First Set of Panel Questions, para. 87 (italics in original).

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

[616] Canada's Responses to the First Set of Panel Questions, para. 87. *See also* Canada's Responses to the First Set of Panel Questions, paras. 109-116.

assertion glosses over several important considerations. The United States has addressed these in prior submissions.[617]

227. In each proceeding involving softwood lumber from Canada, the USDOC has determined to make or not to make adjustments, as appropriate, for the selected benchmark depending on the facts of the case. The USDOC's determination in this investigation is no different, in that the need for adjustments is informed by the nature of the selected benchmark.

228. In the *Lumber IV* countervailing duty investigation and subsequent administrative reviews, the USDOC made certain adjustments requested by interested parties. The rationale for doing so is rooted in the circumstances of those proceedings. First, as discussed in the U.S. response to Panel question 17, in the *Lumber IV* investigation, the USDOC evaluated the adequacy of remuneration paid for stumpage in the Canadian provinces originally using U.S. benchmarks. The USDOC stated, in that investigation, that "[m]arket prices within the country necessarily reflect prevailing market conditions in the country of provision", but "[b]ecause we have determined that there is no appropriate Canadian market-based benchmark price available, we turned to the next most commercially reasonable sales, those in the United States," and "adjusted these sales prices for factors to account for comparability, *i.e.*, to account for different prevailing market conditions."[618] The USDOC made certain adjustments because it relied upon out-of-country benchmarks, and thus was required to make adjustments to reflect prevailing market conditions in the country where the subsidies were provided, Canada. That is not the case with the Nova Scotia pure stumpage benchmark at issue in the countervailing duty investigation that is the subject of this dispute.

229. When certain aspects of the *Lumber IV* investigation were re-opened upon remand in the course of litigation, the USDOC continued to make certain adjustments when it relied upon log prices to determine whether provincial stumpage prices were set in accordance with market principles.[619] However, the USDOC did so to get "back to the stump" in order to compare the resulting benchmark with Crown stumpage fees.[620] That is not the case with the Nova Scotia pure stumpage benchmark at issue in the countervailing duty investigation that is the subject of this dispute.

230. The USDOC also made certain adjustments when it relied upon Maritimes (Nova Scotia and New Brunswick) stumpage prices as a benchmark for the provision of stumpage in provinces

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[617] *See, e.g.*, U.S. Responses to the First Set of Panel Questions, paras. 85-89.

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

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

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

other than British Columbia in subsequent administrative reviews in *Lumber IV*.[621] However, in those administrative reviews, the USDOC concluded that the benchmark "reflect[ed] prices at the point of harvest," and thus the USDOC "adjusted the [provincial] unit stumpage prices … such that they were on the same 'level' as the private stumpage prices [the USDOC] obtained from the Maritimes" and used as the benchmark.[622] The USDOC's determination to make adjustments, again, was premised on the characteristics of the selected benchmark – one that, although from the country of provision for the good of provision, reflected prices at the point of harvest. The USDOC thus made adjustments to ensure that the comparison stumpage price also reflected prices at the point of harvest. That is not the case with the Nova Scotia pure stumpage benchmark at issue in the countervailing duty investigation that is the subject of this dispute. Here, "Deloitte explained that the report surveyed initial studwood and sawmill grade purchases, as brought through the mill gate from the logging site."[623]

231. As explained, in this investigation, the USDOC determined that it did not need to make adjustments for provinces other than British Columbia. This determination followed the same record-based analysis as the prior determinations. Canada's general statements about "consistency" fail to take into account the particulars of this investigation and the prior proceedings, and, as demonstrated, lack any foundation.

c. Canada Continues to Ignore the Fact that Costs Were Separately Billed

232. Canada continues to argue that separately billed costs should be added in to the separately reported stumpage price.[624] Canada's argument is essentially that the price for stumpage cannot ever be isolated from other fees. But this is not the case. As explained, there is no support in the underlying record for Canada's argument to include additional charges not included in respondents' reported stumpage prices and not included in Nova Scotia's "'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees."[625]

233. Canada argues that the separate costs are directly related.[626] As explained in the U.S. first written submission,[627] the USDOC found that these additional expenses were not directly related to stumpage prices, that they were billed as separate items, that no record evidence indicated that

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

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

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

[624] Canada's Responses to the First Set of Panel Questions, para. 117.

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

[626] Canada's Responses to the First Set of Panel Questions, paras. 118-123.

[627] *See* U.S. First Written Submission, para. 153. *See also ibid.*, paras. 139-154.

these costs were taken into account when setting the stumpage prices, and that no record evidence indicated that any such additional items were included within the Nova Scotia benchmark prices (despite Canada implying otherwise).[628] Canada makes similar arguments with regard to roads.[629] Canada's arguments with regard to roads are wrong for the same reasons just described.

234. Canada also argues that it was not relevant that costs and stumpage were billed separately.[630] But the USDOC explained:

> We disagree that we cannot legally distinguish between "long-term tenure rights" and "stumpage." Costs associated with long-term tenure rights are billed on separate invoices or as separate line items by the provinces, rather than incorporated into the stumpage price, and, as discussed above, there is no evidence on the record that these costs are taken into account by provincial governments when setting stumpage prices.[631]

235. Canada now argues that "*precisely* because" the costs were not part of the price paid in Nova Scotia, additional costs should be added to the price respondents paid for stumpage.[632] Canada's argument continues to be illogical. The USDOC compared like to like. Canada's reference to "common sense and basic economics" is not that, and Canada ignores what the inquiry under Article 14(d) is concerned with measuring.[633] While Canada's approach would be to re-construct the entire economic relationship between the provinces and their producers, the inquiry under Article 14(d) is concerned with measuring the adequacy of remuneration for a single component (the price of the good, which, in these circumstances, could be identified and isolated).

236. If the benchmark reflects the prevailing market conditions for the good or service in the country of provision, no adjustment to the benchmark is necessary to account for the additionally-imposed costs or payments. If the benchmark does not reflect the prevailing market conditions for the good or service in the country of provision, then the investigating authority must adjust the benchmark so that it does, or consider the use of an alternative benchmark that better reflects the prevailing market conditions for the good or service in the country of provision.

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[628] *See* Lumber Final I&D Memo, p. 136 (Exhibit CAN-010). *See also* Canada's First Written Submission, paras. 876-878. The United States further refers the Panel to the U.S. responses to Panel questions 18, 27, and 28.

[629] *See* Canada's Responses to the First Set of Panel Questions, paras. 127-132.

[630] Canada's Responses to the First Set of Panel Questions, para. 124.

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

[632] Canada's Responses to the First Set of Panel Questions, para. 125 (italics in original).

[633] Canada's Responses to the First Set of Panel Questions, para. 126.

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

> Below, we provide descriptions of how we calculated the Nova Scotia and U.S.-based benchmarks used to determine whether the GOA, GBC, GNB, GOO, and GOQ sold Crown-origin standing timber to the mandatory respondents for LTAR. We also discuss how we conducted the benefit calculation in each province at issue.
>
> Concerning the provision of standing timber for LTAR benefit calculation, the Department has analyzed whether to add certain "adjustments," or costs, that the respondent firms argue are associated with or required under their various tenure arrangements. On this point, we note that unlike in *Lumber IV*, we are examining the stumpage price paid on a company-specific basis in this investigation. The current record allows us to examine accurately each individual respondent's arrangement under its tenure agreement and assess the relationship between the tenure arrangement and the stumpage price paid. We preliminarily determine that the stumpage prices reported by the respondents do not include various costs or "adjustments," and that, rather, these costs are related to their long-term tenure rights under various tenure arrangements.[634]

238. The USDOC maintained this finding for the Nova Scotia benchmark in the final issues and decision memorandum. The USDOC explained:

> The Department preliminarily determined that the company-specific methodology used in this investigation, as opposed to the aggregate method used in *Lumber IV*, allowed the Department to examine each respondent's specific costs and assess the relationship between each company's tenure arrangements and the stumpage prices paid. In addition, the Department preliminarily determined that these costs are related to the respondents' long-term tenure rights and not to the stumpage prices paid to the Crown.[635]
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[634] Lumber Preliminary Decision Memorandum, pp. 50-51 (Exhibit CAN-008).

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

> Since issuing the *Preliminary Determination*, the Department has verified the questionnaire responses submitted by the respondent companies and the provincial governments. Specifically, the Department has verified the information pertaining to the various agreements granting respondents the right to harvest Crown timber[FN820], and the relationship between their harvest agreements and the stumpage prices the respondents paid for Crown standing timber. We have also verified the Nova Scotia private standing timber benchmark and the costs included in the private prices composing the Nova Scotia benchmark.
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> [FN820:] We examined Canfor's FMAs, CTPs, and CTQs with the GOA; JDIL's FMAs with the GNB; Resolute's TSGs with the GOQ; Resolute's SFLs and FRLs with the GOO; Tolko's FMAs and CTQs with the GOA; and West Fraser's FMAs, CTQs, and CTPs with the GOA.[636]

239. In responding to the arguments of the Canadian parties in the final issues and decision memorandum, the USDOC's explanation also addresses the argument Canada makes here. The USDOC explained:

> Certain Canadian parties argue that, as a legal matter, we cannot distinguish between "long-term tenure rights" and "stumpage." To support this argument, the parties rely on *Lumber IV* and section 771(5)(E) of the Act, arguing that in measuring the benefit that each respondent received from its purchase of standing timber, the Department must include all costs incurred by the respondent (including legally obligated costs associated with long-term tenure rights) in exchange for its right to harvest Crown timber. We disagree that we cannot legally distinguish between "long-term tenure rights" and "stumpage." Costs associated with long-term tenure rights are billed on separate invoices or as separate line items by the provinces, rather than incorporated into the stumpage price, and, as discussed above, there is no evidence on the record that these costs are taken into account by provincial governments when setting stumpage prices.[637]

240. There is no support in the underlying record for Canada's argument to include additional charges not included in respondents' reported stumpage prices and not included in Nova Scotia's

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

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

"'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees."[638]

d. Canada Continues to Misunderstand the Meaning of the Term "Prevailing Market Conditions" in Article 14(d) of the SCM Agreement

241. As addressed above, Canada asserts that "evidence also demonstrates that the prevailing market conditions are so different that it would be extremely difficult to adjust for these differences."[639] Canada argues that "[t]he United States misconstrues this evidence by claiming that it was submitted solely as a request for adjustments between regional markets."[640] As explained in the U.S. first written submission,[641] Canada's misunderstanding 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.[642]

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

243. 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)."[643] In addition, the USDOC evaluated the constituent features of the Nova Scotia private stumpage benchmark, concluded it

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

[639] Canada's Responses to the First Set of Panel Questions, para. 94.

[640] Canada's Responses to the First Set of Panel Questions, para. 94.

[641] *See* U.S. First Written Submission, paras. 81-112.

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

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

reflected "a 'pure' stumpage price that reflects solely the costs buyers incurred for the right to harvest individual trees," and compared that benchmark to the company respondents' pure stumpage purchase prices.[644]

244. Canada continues to argue for an approach that relies on the wrong legal standard, claiming that use of so-called "out-of-market prices" creates an additional obligation to adjust prices (similar to what is required to ensure that the benchmark reflects prevailing market conditions in the country of provision when using an out-of-country benchmark).[645] Canada argues that the "benchmark selected in these circumstances must be 'as comparable as possible.'"[646] However, as noted, Canada argues (in the immediately preceding paragraph) that "evidence also demonstrates that the prevailing market conditions are so different that it would be extremely difficult to adjust for these differences."[647] Canada undermines its own position with these statements. In any case, there is no additional obligation to "adjust" prices, as Canada suggests,[648] when prices from within the country of provision – from actual transactions – serve as the benchmark. Here, the USDOC compared like to like and no adjustments are required. The USDOC's selected benchmark was, indeed, as comparable as possible – and no further adjustment would improve that.

245. Canada asserts that "[i]t makes no sense to suggest that benchmark prices can be rejected on the basis of the very market conditions to which they are supposed to relate in the first place."[649] Canada evidently understands the term "market conditions" to mean "any" conditions, but Article 14(d) does not refer to just "any" conditions – it refers to "prevailing market conditions for the good or service in question in the country of provision." Moreover, with respect to Canada's repeated assertion that "the Appellate Body has made clear that these circumstances are '*very limited*,'" Canada completely ignores that the Appellate Body was describing the very circumstances of the Canadian lumber industry and the consequences of such predominant government ownership of nearly all the supply of the good in the country of provision.[650]

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

[645] Canada's Responses to the First Set of Panel Questions, para. 95 (underline added).

[646] Canada's Responses to the First Set of Panel Questions, para. 95.

[647] Canada's Responses to the First Set of Panel Questions, para. 94.

[648] *See* Canada's Responses to the First Set of Panel Questions, para. 98.

[649] Canada's Responses to the First Set of Panel Questions, para. 104.

[650] Canada's Responses to the First Set of Panel Questions, para. 106 (italics in original) (quoting *US – Softwood Lumber IV (AB)*, para. 102).

C. Canada Has Failed to Demonstrate that the USDOC Erred in Concluding that Provincial Prices Were Not Market-Determined Prices

246. Canada has failed to demonstrate that the USDOC erred in finding that provincial prices in Alberta, Ontario, Quebec, and New Brunswick were not market-determined prices.[651] As the United States has shown for each province, Canada is wrong that the government prices are market-determined prices. Canada has, for the most part, repeated arguments made in Canada's first written submission, but Canada's arguments in its statements during the first substantive meeting and in its responses to the first set of Panel questions fail to overcome the flaws that the United States has addressed already in the U.S. first written submission, statements, and responses.

247. As addressed in the U.S. responses to the first set of Panel questions, in the preliminary and final determinations, the USDOC found that the government in each province was the majority supplier during the period of investigation.[652] It is undisputed that government-owned timber makes up the majority of the softwood timber harvest in each of the five provinces at issue; indeed, Canada itself reported this fact in its response to USDOC's initial questionnaire.[653]

248. Although there is no market share threshold above which an investigating authority may conclude *per se* that price distortion exists, the more predominant a government's role in the market, the more likely it is that the government's role results in the distortion of private prices.[654] Here, because of the government's role as the majority supplier in each province, the USDOC undertook to further examine whether the remaining portion of the market operated independently such that private prices could be considered independent of the government price.[655] The U.S. first written submission addresses these findings and rebuts Canada's arguments with respect to these issues.[656] In the discussion that follows, the United States provides a few additional comments in response Canada's recent statements.

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[651] NB Section II.D separately addresses issues related to British Columbia.

[652] *See* U.S. Responses to the First Set of Panel Questions, paras. 66-67 (identifying level of government market share in each province).

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

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

[655] *See, e.g.*, Lumber Final I&D Memo, p. 81 (Exhibit CAN-010) (discussing New Brunswick stumpage; similar statements appear as well in the discussions of the other provinces).

[656] *See* U.S. First Written Submission, paras. 315-343 (addressing arguments regarding Alberta distortion), paras. 279-314 (addressing arguments regarding Ontario distortion), paras. 238-278 (addressing arguments regarding Quebec distortion), and paras. 182-237 (addressing arguments regarding New Brunswick distortion).

1. Alberta

249. With respect to the USDOC's rejection of Alberta log prices, Canada continues to argue that "Alberta log prices were market-determined."[657] The United States has addressed this contention above and in the U.S. first written submission, and demonstrated that it lacks merit.[658]

250. As explained, the USDOC found that more than 98 percent of the harvest volume in Alberta was Crown-origin timber provided by the government to lumber producers.[659] The USDOC determined that this evidence reflected "near complete Crown dominance of the market for standing timber in Alberta,"[660] and that under these circumstances, "the market . . . is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price."[661]

251. The USDOC also considered the survey of private prices for Alberta logs (the TDA survey) that Alberta argued could serve as an alternative benchmark, but this survey contained only a very small volume of private stumpage transactions (representing less than one third of one percent of the total volume).[662] The USDOC determined that these stumpage prices were "relatively inconsequential as compared to the total volume of sales."[663] The USDOC evaluated the minimal stumpage transactions and found them not to be reflective of freely determined prices between buyers and sellers, for a host of reasons.[664] The Canadian parties nevertheless requested that the USDOC further consider the possibility of using log prices as an alternative benchmark. The USDOC explained that, as a general matter, it preferred to rely on the primary benchmark (stumpage) rather than constructing a benchmark (derived from log prices).[665]

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[657] Oral Statement of Canada at the First Substantive Meeting of the Panel, Day 1 (February 26, 2019) ("Canada's First Opening Statement (Day 1)"), para. 85.

[658] *See* U.S. First Written Submission, paras. 315-343.

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

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

[661] 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).

[662] 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).

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

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

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

252. However, the USDOC further addressed certain questions relating to log prices in order to fully consider the arguments and comments of the interested parties.[666] The USDOC explained:

> In the *Preliminary Determination*, we determined that available prices stemming from purchases of private stumpage in Nova Scotia, *i.e.*, the NS Survey prices, satisfied the regulatory requirements for a tier-one benchmark to measure the adequacy of remuneration for Crown stumpage in Alberta. As discussed in Comments 39-43, we continue to find that NS Survey prices are the appropriate tier-one benchmark for Crown stumpage in the province. Consequently, given the hierarchical approach for benchmark selection under 19 CFR 351.511(a)(2), it is not necessary for the Department to examine the suitability of or rely upon non-tier-one benchmark data, such as the TDA survey prices in Alberta, which would fall under the third tier of the LTAR benchmark hierarchy set forth in 19 CFR 351.511(a)(2).
>
> Nonetheless, as set forth below, we disagree with the parties' contentions that the TDA log prices reflect market prices that are consistent with market principles pursuant to 19 CFR 351.511(a)(2)(iii) that would be useable as a tier-three benchmark.[667]
>
> * * *
>
> If we were evaluating TDA survey data under tier three of our benchmark hierarchy, we would examine whether these data represent prices that are consistent with market principles. Our consideration of the appropriateness of TDA survey data as a tier-three benchmark indicates the following: first, the salvage timber is cut without regard to the tenure holder's approved cutting plan, and therefore the prices are not a fair representation of the price of mature standing timber; second, TDA transaction data contain "salvage" transactions of logs that were not offered for sale on the 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

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

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

> included Crown stumpage; and fourth, timber in Alberta is subject to an export prohibition under Section 31 of the *Alberta Forests Act*, which prevents log sellers from seeking the highest prices in all markets and, thus, artificially creates downward pressure on log prices throughout the province.
>
> For the foregoing reasons, in this final determination, we find that the TDA transaction prices are not useable as either a tier-one or a tier-three benchmark to measure the benefit conferred by the GOA's provision of stumpage for LTAR.[668]

253. The USDOC concluded that the private stumpage prices in Alberta are distorted and cannot be used as an appropriate benchmark.[669] As explained in the U.S. first written submission, "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."[670] Ultimately, in evaluating the log prices from the TDA data, the USDOC concluded that those prices were not consistent with market principles (*i.e.*, they were distorted).

2. Ontario

254. With respect to the USDOC's rejection of Ontario private stumpage prices, Canada continues to argue that "Ontario's log market is robust" and that the USDOC "rejected the record evidence and benchmark without conducting any benchmark distortion analysis at all."[671] Neither of Canada's assertions is correct. The United States has addressed Canada's contention above and in the U.S. first written submission, and demonstrated that it lacks merit.[672]

255. As explained, the USDOC found that Crown timber accounted for more than 96 percent of the harvest volume in the province during the relevant period.[673] The USDOC found that Ontario administratively set prices based on three components, only one of which considered market conditions (namely, the relatively minor estimated forest renewal charge). The primary component, however, as the USDOC "learned at verification . . . was administratively set at

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

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

[670] U.S. First Written Submission, para. 335. *See also* Lumber Final I&D Memo, pp. 49-54 (Exhibit CAN-010).

[671] Canada's First Opening Statement (Day 1), para. 110-111.

[672] *See* U.S. First Written Submission, paras. 279-314.

[673] *See* Lumber Preliminary Decision Memorandum, p. 30 (citing GQRGOO at Exhibit ON-STATS-2) (Exhibit CAN-008).

C$2.84/m^3 in FY 1997-1998 and has been inflated annually" for the two decades since.[674] More than 96 percent of the harvest volume in Ontario is subject to this pricing mechanism.

256. In addition to this price-setting mechanism, the USDOC determined that "the five largest tenure-holding corporations accounted for [more than 92] percent of the allocated Crown-origin standing timber in FY 2015-2016," and that these five organizations were also the dominant purchasers of private-origin standing timber.[675] These companies attained substantial market power over sellers of non-Crown-origin standing timber by virtue of these circumstances.[676] The USDOC concluded that these circumstances, in conjunction with the ability of these tenure-holding corporations to purchase Crown-origin standing timber irrespective of their allocated volume, and to transfer allocated timber between sawmills or to third parties,[677] served to suppress prices of private timber in the province, yielding private timber prices that were not market-determined.

3. Quebec

257. With respect to the USDOC's rejection of Quebec auction prices, Canada continues to argue that the USDOC's "decision was based only on speculation, and government market share" and that any investigating authority "would have had to conclude that auctions in Québec are a valid market price and a usable benchmark."[678] The United States has addressed this contention above and in the U.S. first written submission, and demonstrated that it lacks merit.[679]

258. As explained, the USDOC concluded that Crown timber accounted for 73 percent of the stumpage harvest during the relevant period. Of this 73 percent, 51 percent was provided directly by the province to producers *via* timber supply guarantees ("TSGs"), and the remaining 22 percent was provided by the government to producers *via* auctions of Crown timber.[680] The USDOC found that using timber supply guarantees, "a sawmill can source up to 75 percent of its supply need at a government-set price,"[681] and that 94 percent of TSG-holders did so.[682] The USDOC determined that "there is strong motivation for a sawmill to treat its TSG-guaranteed volume as its primary source of supply and its auction volume as an additional or residual supply

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[674] Lumber Final I&D Memo, pp. 93-94 (Exhibit CAN-010).

[675] Lumber Preliminary Decision Memorandum, p. 30-31 (Exhibit CAN-008); Lumber Final I&D Memo, p. 94 (Exhibit CAN-010).

[676] *See* Lumber Preliminary Decision Memorandum, p. 30-31 (Exhibit CAN-008).

[677] *See* Lumber Preliminary Decision Memorandum, pp. 30-31 (Exhibit CAN-008); Lumber Final I&D Memo, p. 93 (Exhibit CAN-010).

[678] Canada's First Opening Statement (Day 1), para. 181.

[679] *See* U.S. First Written Submission, paras. 238-278.

[680] GQRGOQ, Table 7 (Exhibit CAN-170).

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

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

source."[683] The ramifications of this arrangement were further amplified by other aspects of the provincial timber policies. For example, the USDOC verified that TSG holders are not required to purchase all of their annual TSG allocation volumes,[684] they did not purchase a significant percentage of the softwood sawlog volume that was put up for auction in 2015 (15 percent),[685] and they were permitted to shift up to 10 percent of their allocated timber volumes among affiliated sawmills and to other corporations.

259. These circumstances, the USDOC found, reduced the need of TSG-holding corporations to source from non-allocated sources, such as the provincial auction or from private parties.[686] This reduced reliance on non-allocated sources is further evident in the data reported to the USDOC by Canadian respondents: the TSG-holding sawmills sourced just over 20 percent of their Crown supply from the auction, while the remaining nearly 80 percent they sourced from their timber supply guarantees.[687] In addition, the USDOC determined that, because a few major players accounted for the majority of purchase and consumption volumes (for both TSG-allocated timber and auctioned timber), the predominant buyers had both of these provincial timber mechanisms available to influence the auction prices.[688]

260. With respect to provincial auction prices in Quebec, the USDOC concluded that Quebec policies would exclude bidders that would want to sell timber (either harvested, or the harvested logs) for milling outside of the province."[689] The USDOC determined that "limiting bidders suppresses auction bids, because bidders understand that there are fewer parties against which their bid will compete."[690] Based on the evidence of these circumstances, the USDOC ultimately concluded that Quebec's timber market was distorted, and that its auction mechanism was not "based solely on an open, market-based competitive process" that could yield market-determined benchmark prices suitable for the benchmark comparison.[691]

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

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

[685] Lumber Preliminary Decision Memorandum, p. 41 (Exhibit CAN-008); Lumber Final I&D Memo, Comment 35, pp. 101-102 (Exhibit CAN-010).

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

[687] 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, Table 20.3) (Exhibit CAN-010).

[688] Lumber Preliminary Decision Memorandum, pp. 40-41 (Exhibit CAN-008); Lumber Final I&D Memo, p. 101 (citing Quebec Final Market Memorandum, Table 20.2) (Exhibit CAN-010).

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

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

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

4. New Brunswick

261. With respect to the USDOC's rejection of New Brunswick private stumpage prices, Canada continues to argue that "the market share that [the USDOC] found shows that New Brunswick supplies . . . an amount that is self-evidently not predominant" and that "the only relevant evidence available" to the USDOC was "evidence showing that Crown supply cannot distort private prices."[692] The United States has addressed this contention above and in the U.S. first written submission, and demonstrated that it lacks merit.[693]

262. As explained, the USDOC found that Crown timber accounted for the majority of the market, and approximately 55 percent of the provincial harvest during the relevant period.[694] Among other things, the USDOC took into account several reports by a New Brunswick forest task force and the provincial Auditor General, in which these officials reported that consumption of Crown-origin standing timber by sawmills is concentrated among a small number of corporations and that those same corporations also dominate consumption of standing timber harvested from private lands.[695] The leverage of these private mills as dominant consumers, according to the official reports, in conjunction with Crown stumpage policies in the province, suppresses prices from private woodlots, and in turn those suppressed private prices lead to an artificially low price for Crown stumpage, which is set by the province based on private stumpage prices.[696] The Auditor General concluded – and the USDOC took note – that "the [stumpage] market is not truly an open market," and that "it is not possible to be confident that the prices paid in the market are in fact fair market value."[697]

263. The USDOC did not rely on these official reports alone, however. The USDOC also considered evidence that, while producers in New Brunswick may be granted multi-year, non-transferable tenure rights to harvest Crown timber, they chose not to consume a significant volume of their allocated Crown timber, and this dynamic disincentivized producers from purchasing private timber priced at or above the provincial-set prices for Crown timber. The USDOC ultimately determined on this basis (and on the basis of additional evidence) that private stumpage prices in the province, as reflected in the New Brunswick private stumpage survey, were distorted and unusable as benchmarks.

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[692] Canada's First Opening Statement (Day 1), para. 185.

[693] *See* U.S. First Written Submission, paras. 182-237.

[694] *See* Lumber Final I&D Memo, Comment 28 (citing GNB Verification Report, Exhibit VE-1, Table 3) (Exhibit CAN-010).

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

[696] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010) (citing Lumber Preliminary Decision Memorandum, p. 32 (Exhibit CAN-008); Petition at Exhibit 228).

[697] Lumber Final I&D Memo, Comment 28 (Exhibit CAN-010) (citing "Analysis" section of 2008 report).

D. Canada Has Failed to Demonstrate that the USDOC's Stumpage Benchmark Determination for British Columbia Is Inconsistent with Article 14(d) of the SCM Agreement

264. This section addresses the USDOC's determination to use an out-of-country benchmark for British Columbia stumpage. First, section II.D.1 addresses Canada's continued arguments regarding the British Columbia auction system and demonstrates that the USDOC's distortion finding is not inconsistent with Article 14(d) of the SCM Agreement. The provincial government's predominance in the market, combined with the flaws in its auction system, resulted in price distortions that render a comparison to BC prices circular. Therefore, BC prices could not serve as a meaningful benchmark. Second, section II.D.2 addresses Canada's continued arguments regarding the Washington log benchmark and demonstrates that the selected benchmark derived from private log prices is not inconsistent with Article 14(d) of the SCM Agreement. The U.S. log prices reflected private prices for comparable goods consistent with market principles, and the USDOC made appropriate adjustments to ensure that the prices related to prevailing market conditions for British Columbia stumpage.

1. British Columbia Stumpage Prices Are Not Market-Determined Prices

265. The United States has demonstrated that 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.[698] Canada has, for the most part, repeated arguments made in Canada's first written submission, but the United States has addressed the substance of these arguments already. The discussion that follows will address Canada's arguments as most recently presented.

266. Canada continues to argue, with respect to the USDOC's rejection of British Columbia auction prices, that "the auction sales during the POI were competitive *as a matter of fact*."[699] Canada's statement misapprehends the nature of the USDOC's inquiry. In the underlying investigation, the USDOC was required to examine whether BCTS auction prices provided a viable benchmark to measure the adequacy of remuneration for British Columbia's provision of stumpage. The USDOC explained that BCTS prices, which were the only benchmark proposed by the Canadian respondent interested parties, would present a viable benchmark if the auction mechanism is open and competitive, and thus "actually functions as a market price, and functions independently of the government-set price."[700]

267. The USDOC determined that BCTS auction prices were not a suitable benchmark because (1) BCTS prices were not independent of prices for timber on the administered portion

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[698] *See* U.S. First Written Submission, paras. 353-354, 357, 362-372, and 374-402.

[699] Canada's Responses to the First Set of Panel Questions, para. 248 (italics in original).

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

of GBC-owned land, because the tenure-holding sawmills were also the predominant purchasers of BCTS-harvested timber; (2) BCTS prices were not set by competitive bid procedures, because the three-sale limit on Timber Supply Licenses inhibits competition and suppresses prices; and (3) the GBC's and GOC's restraints on the exportation of BC-origin logs contribute to an overabundant supply of logs and suppresses standing timber prices.[701]

268. Canada's premise that the USDOC relied upon the prevailing level of competition, which purportedly reflected aspects of the BC economy other than the government's predominant ownership of stumpage, therefore misses the mark. In fact, the USDOC analyzed the entire structure of the market, and explained the specific relevance of the prevailing level of competition. This is consistent with findings in prior Appellate Body reports, which have 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," or "the behaviour of the entities operating in that market."[702]

269. The USDOC sought to analyze whether the BCTS auction prices were competitive and open and independent, such that they could provide a benchmark market price for BC stumpage that was not distorted by the government's ownership of the vast majority of harvestable forest land. The USDOC concluded that BCTS auction prices were not competitive, open, and independent because the same dominant firms consumed auctioned timber, and purchased the comparatively much larger share of their Crown stumpage inputs under their long-term tenures at prices set by the results of those same auctions. Thus, the USDOC explained that, although the participants in BCTS auctions are primarily independent loggers, the prices paid by these loggers key off prices that the dominant tenure-holding sawmills are willing to pay. Accordingly, BCTS prices are effectively limited by what those tenure holders pay for timber harvested from their tenures.[703]

270. Canada misunderstands the analysis that the USDOC undertook. The relevant analysis was not whether the government of British Columbia's predominant ownership of stumpage created the concentration of market power among BC sawmills, or whether such market concentration distorted prices for stumpage in BC by itself. Rather, the USDOC's finding that the BCTS auction prices were not a viable benchmark relied on three distinct grounds, including that auction prices were limited by the Crown stumpage prices paid by dominant tenure-holding firms. The USDOC considered together the level of competition and overall market structure. But the USDOC's analysis was not based upon the prevailing "level of competition."

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[701] *See* Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

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

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

271. In this case, the provincial government of British Columbia owns over 94 percent of the land, and 90 percent of the timber harvested during the period of investigation came from provincial Crown land.[704] As a result of its investigation, the USDOC determined 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, could not serve as a meaningful benchmark.

272. The USDOC's distortion finding was not based on mere government presence, but rather on three distinct grounds: auction prices were limited by the Crown stumpage prices paid by dominant tenure-holding firms; a three-sale limit on Timber Supply Licenses that artificially limited the number of bidders in British Columbia's government auctions and created other, additional distortions; and provincial and federal log export restraints suppressed log prices, which impacted stumpage prices.[705] Canada's argument ignores each of these findings.

273. Canada continues to argue that the "purpose of the three-sale limit is to promote and maintain competition in the BCTS auctions by maintaining a diverse pool of bidders."[706] The USDOC addressed this issue in the final issues and decision memorandum.[707] 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."[708] 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.[709]

274. Canada argues that the USDOC did not "demonstrate that the three-sale limit *in fact* affected the number of bidders" in a given auction.[710] 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

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[704] Lumber Preliminary Decision Memorandum, p. 20 (citing GQRGBC at BC I-34 and Exhibit BC-S-2) (Exhibit CAN-008).

[705] *See* Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010). *See also* U.S. First Written Submission, paras. 374-402.

[706] Canada's Responses to the First Set of Panel Questions, para. 244.

[707] *See* Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010). *See also* U.S. First Written Submission, paras. 374-402.

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

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

[710] Canada's First Written Submission, para. 182 (italics in original).

BCTS auction is inconsistent with an open, competitive auction because it introduces an artificial limit on the number of bidders.[711]

275. Canada has mischaracterized the USDOC's findings as based merely on "inadequate competition."[712] The USDOC's discussion of the private firms in the market had particular relevance because the government was virtually the only seller of significance in the market. The USDOC found that, under these circumstances, auction prices effectively are limited by what tenure holders pay for timber harvested from their tenures.

276. Canada's position presumes acceptance of its own view of BCTS auction prices as competitive and market-determined. However, the USDOC found that the prices independent loggers paid were effectively limited by the prices that sawmills were willing to pay.[713] Consistent with the USDOC's finding that prices are limited in this fashion, it is not true that "another bidder at a higher price" would emerge.

277. Canada mischaracterizes the USDOC's analysis by asserting that the USDOC's finding "that the three-sale limit suppressed competition is . . . irreconcilable with [the USDOC's] conclusion that the three-sale limit has been 'effectively nullif[ied]'" when companies that already have three TSLs obtain additional licenses through proxies or intermediaries.[714] The USDOC's proxy analysis does not obviate its finding that the three-sale-limit inhibits competition, but rather demonstrates an additional way in which the BCTS distorts prices. The USDOC did acknowledge that some large firms have circumvented the three-sale limit and maintained dominance at auctions through the use of proxy bidders.[715] However, the USDOC continued to explain that proxies introduce "an additional source of market distortion" because large firms precluded from bidding pay cutting rights fees to obtain TSLs won by proxies at auction.[716] Because firms would not incur cutting rights costs if bidding directly, the proxy or intermediary must build its own margin into its bid by bidding lower than the amount for which it will resell the license to the large firm buyer.[717] Absent the three-sale limit, a large firm could acquire an additional license through BCTS directly and offer the full amount it is willing to pay. With the three-sale limit and reduced proxy bids, however, the entire value of the license to its ultimate holder is not captured by BCTS, which is the basis for the USDOC's finding that BCTS bids would not "reflect the full value of the timber."[718] Canada thus incorrectly concludes that

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

[712] *See* Canada's First Written Submission, paras. 161-167.

[713] Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

[714] Canada's Responses to the First Set of Panel Questions, para. 247.

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

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

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

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

the use of proxies nullifies the three-sale limit and thereby re-introduces competition to the auction process.[719] To the contrary, the use of proxies adds an additional level of market distortion to the BCTS.

278. As suggested by Panel question 83, this type of distortion is not theoretical.[720] The three-sale limit applies to all auctioned licenses currently being harvested. Canada has mischaracterized the three-sale limit as if it had no bearing on firm decisions in the industry, but in reality the three-sale limit imposes very real constraints on the operations of license holders. Under the applicable licenses, firms have up to four years to complete the harvest, and data provided by the government of British Columbia indicate that the average time to harvest an auctioned license during the period of investigation was 1.72 years.[721] Record evidence demonstrates that firms routinely turn to middlemen and proxies to avoid this constraint. For instance, one mandatory respondent operating in British Columbia [[

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279. To the extent that Canada suggests that evidence of the margin of distortion is required, Canada's argument finds no support in the SCM Agreement. Moreover, it is unclear what such evidence could be, given that it would appear to require a counterfactual comparison market in British Columbia that does not exist.

2. Washington Log Prices Are Appropriate as a Basis for Deriving a Market-Determined Stumpage Price

280. With respect to the USDOC's determination to rely on a stumpage benchmark derived from Washington log prices, the USDOC's reliance on Washington log prices satisfies the terms of Article 14(d) of the SCM Agreement because those prices reflect private transactions for comparable goods, and the USDOC made necessary adjustments to the log prices to ensure that the resulting stumpage comparison related to prevailing market conditions in British Columbia

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[719] Canada's Responses to the First Set of Panel Questions, para. 247.

[720] Panel question 83, directed to Canada, asks: "Please explain how the 'three-sale limit' affected the degree of market concentration and competition in the timber auction market in British Columbia. Please provide your response in light of the USDOC's finding at page 57 of its final determination that in introducing the three-sale limit, '[t]he GBC imposes an artificial barrier to participation in the BCTS auctions; while no companies are per se excluded from the auction system as a whole, the three-sale quota means that, to the extent some companies have already reached the quota, any given auction will find fewer bidders that could otherwise participate'."

[721] GBC QR, pp. I-171, I-178 (Exhibit CAN-018) (BCI)).

[722] *See* Canfor Corporation Verification Exhibits VE-3, p. 20 (Exhibit USA-055 (BCI)). *See also* Canfor Corporation QR, pp. 104-05 ("CFP cannot hold more than 3 TSLs at one time and based upon CFP's timber needs, CFP must purchase the majority of CFP's TSL volumes from these contractors and hence indirectly . . . If CFP is bidding directly, it calculates its anticipated logging, hauling and any on-block road costs to access the standing timber. If CFP is bidding indirectly, it works with contractors to establish their expectations for their logging and hauling cost and profit expectations in any successful bid which would deliver the logs to one or more of CFP's sawmills.") (Exhibit CAN-051 (BCI)).

for stumpage.[723] Canada has attempted to develop new lines of argument since its first written submission, but Canada's arguments lack substance and fail to overcome the substantive issues addressed by the USDOC in its final issues and decision memorandum and by the United States in its first written submission.

a. Canada's New Arguments Regarding Alleged U.S. Export Bans Are Not Relevant

281. Canada has introduced a new line of argument regarding alleged "export bans that exist in Oregon and Washington."[724] As addressed in the U.S. responses to the first set of Panel questions, there is no evidence on the USDOC's administrative record (or argument by interested parties) that coastal log export restrictions in the U.S. states of Oregon and Washington affect the WDNR log price data, which reflect log prices for the Washington interior, excluding the coast.[725] In Canada's responses to the first set of Panel questions, Canada merely refers to statements from the Kalt report that mention Oregon and Washington, but do not provide the underlying policies that Canada purports to describe.[726] In any event, the arguments Canada makes now were not advanced by the Canadian interested parties in the underlying investigation. The existence of export policies for public lands in the U.S. states of Oregon and Washington (where public lands are not the predominant source of timber) would not undermine the USDOC's findings in any case. Nor is the proportion of log exports a relevant issue. Rather, it is the market distortions in British Columbia that make prices in that province unusable as a benchmark.

282. As the United States has noted before, ability of the United States to respond to Canada's argument is constrained because the information to which Canada refers regarding the purported "export ban in the U.S. Pacific Northwest", such as the regulations themselves, does not appear to be a part of the record of the USDOC's proceeding.[727] As explained, Canada merely refers to statements from the Kalt report that mention Oregon and Washington, but do not provide the underlying policies that Canada purports to describe.[728] The Canadian interested parties did not make an argument regarding treatment of the purported U.S. PNW export ban as a prevailing market condition in their relevant case brief before the USDOC.[729] Canada cannot point to any determination by the USDOC treating the U.S. PNW policies as a prevailing market condition; the issue was not raised, so the USDOC's analysis does not address it. Given the predominant

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[723] *See* Lumber Final I&D Memo, pp. 73-74 (Exhibit CAN-010) (granting necessary adjustments).

[724] Canada's Responses to the First Set of Panel Questions, para. 273.

[725] U.S. Responses to the First Set of Panel Questions, para. 280.

[726] *See* Canada's Responses to the First Set of Panel Questions, paras. 273-277.

[727] Canada's First Written Submission, para. 196.

[728] *See* Canada's Responses to the First Set of Panel Questions, paras. 273-277.

[729] *See generally* GBC and BCLTC Case Br., Vol. V (Exhibit CAN-295).

government ownership of nearly all timber in British Columbia, the U.S. PNW policies are readily distinguishable from the Canadian and BC log export restraints.[730]

b. Canada's New Arguments Cannot Retroactively Rehabilitate the Dual-Scale Study

283. Canada also has introduced new arguments with respect to the 2016 dual-scale study in its responses to the first set of Panel questions. When confronted with a direct Panel question about the assertion that the study employed stratified random sampling, Canada changed the description of the study to reflect "purposive sampling of scale sites."[731] Canada's attempts to retroactively validate its study should be seen for what they are. Simply applying the label of "purposive sampling" cannot address the problems that the USDOC identified with the study. The USDOC's primary concern was that the study failed to identify a statistically valid sampling methodology for its site selection.[732] As the USDOC explained, it was insufficient for Jendro and Hart to explain merely that they applied "historical knowledge" in selecting the twelve sites.[733] For the study to be reliable, the authors would have needed to devise and implement a valid statistical methodology, but they did not do so.[734]

284. In the U.S. first written submission, the United States pointed out that, in Canada's first written submission, "Canada asserts for the first time the BC Dual Scale Study utilized '"stratified random sampling.' Such an explanation is conspicuously absent from the study itself, and was not provided at any time during the investigation."[735] Canada's attempt now to substitute a new *post hoc* label for its earlier *post hoc* label still fails to support Canada's position. The new label of "purposive sampling" appears to be no different, nor any more appropriate than relying on "historical knowledge." The choice of a valid statistical methodology must be evaluated in its context – and certainly must not be established on a *post hoc* basis.

c. Canada's Arguments Regarding Conversion Factors Are Meritless

285. With respect to conversion factors, Canada argues again that the author of the "Cahill study understood the limitations of the conversion factors he had developed using the USFS Product Cubic Scale … and cautioned that the conversion factors he had developed would not be appropriate for all cubic scaling systems", and Canada incorrectly asserts that "[n]either [the

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[730] *See* U.S. Responses to the First Set of Panel Questions, paras. 288-89.

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

[732] *See* Lumber Final I&D Memo, pp. 59-60 (Exhibit CAN-010) (citing Dual Scale Study, p. 8 (Exhibit CAN-020 **(**BCI**)**)). *See also* U.S. First Written Submission, paras. 431-432.

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

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

[735] U.S. First Written Submission, paras. 431-432 (quoting Canada's First Written Submission, para. 681).

USDOC] in its Final Determination, nor the United States" has addressed this assertion.[736] Canada is incorrect.

286. The United States addressed this point during the first substantive meeting and again in the U.S. responses to the first set of Panel questions. The U.S. response to Panel question 110 states:

> [T]he United States emphasizes that the Spelter Study provided the best available information for the USDOC to complete a volumetric conversion. Spelter's observation that "[t]he appropriateness of a standard conversion factor has to be weighed according to the purposes for which it is used" is exactly the point Canada fails to recognize. The standard conversion factor was appropriate in the context of this benchmark comparison. Canada implies that "precision" is somehow lacking, but its assertion is unfounded. Spelter's observation that a standard conversion factor would be "least appropriate" relates to "valuations" conducted "irrespective of the particular circumstances." That observation does not describe the situation in this dispute.

287. Canada argues that "no investigating authority conducting a benefit calculation could reasonably conclude" that the Cahill study "would be representative of the volumetric characteristics of logs entering B.C. Interior mills . . . let alone that such data would be more representative than the data derived from the 2016 Dual-Scale Study."[737] However, as explained above and in the U.S. response to Panel question 95, in reviewing the available conversion factors, the USDOC determined that the BC dual scale study conducted during the pendency of the investigation by the Government of British Columbia's researchers, Jendro and Hart, was not useable because the authors did not use a statistically valid sampling methodology for selecting the limited number of scaling sites included in the study.[738] The absence of such a sampling methodology was of particular concern because the BC dual scale study was commissioned specifically for use in this investigation; demonstrating an arm's-length approach to site selection was therefore relevant to the USDOC's evaluation of the reliability of the report.[739] Instead, the USDOC relied upon the only viable conversion factor study on the record, the USFS study, which was prepared by an impartial government agency in the ordinary course of business, and which the USDOC had also found reliable and used in the prior *Lumber IV* investigation and in *Supercalendared Paper from Canada – Expedited Review*.[740]

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

[737] Canada's Responses to the First Set of Panel Questions, para. 291.

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

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

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

288. The USDOC noted the Canadian parties' argument that the Spelter study was "outdated."[741] However, the USDOC did not reach this argument because it reasonably based its selection of the conversion factor upon the impartiality of the source and the reliability of the source's methodology. Specifically, the USDOC explained that "because we have no basis for concluding that the BC Dual Scale Study generated unbiased conversion factors, we have not addressed the parties' specific arguments regarding the relative merits of the BC Dual Scale Study as compared with the USFS study."[742]

289. Although there is a lack of contemporaneity between the 2002 Spelter study, which updated the 1984 study, and the 2015 period of investigation, the USDOC determined, as an objective and unbiased investigating authority could have determined, that this and other factors did not outweigh the USDOC's "concerns with the lack of a valid sampling methodology used to produce the data in the BC Dual Scale Study and the applicability of a conversion factor based on BC trees used on a price for Washington trees."[743] The Cahill study, as updated by Spelter, was the best available – and only usable – conversion factor on the record of the investigation, given the lack of reliable methodology and potential for bias in the dual scale study.

d. Canada's Suggestion that the United States Has Offered an "*Ex Post* Rationalization" for the USDOC's Distortion Finding Has No Merit

290. Canada argues that the United States has engaged in *ex post* rationalization by making the observation that British Columbia's stand-as-a-whole pricing practices could be considered a government practice rather than a market practice.[744] The U.S. observation is firmly grounded in the findings made by the USDOC.

291. As addressed in the U.S. response to Panel question 107, the USDOC explained in its final issues and decision memorandum that the market value of standing timber, and the logs that may be produced from that standing timber, is dependent upon its species. "The species of a tree largely determines the downstream products that can be produced from a tree; the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is in turn derived from the demand for the type of lumber produced from these logs."[745]

292. Furthermore, "a main condition for determining stumpage is the demand of the logs from that tree. As such, the Department would not accurately assess the adequacy of remuneration for

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

[742] Lumber Final I&D Memo, p. 61 (Exhibit CAN-010).

[743] Lumber Final I&D Memo, p. 61 (Exhibit CAN-010).

[744] *See* Canada's Responses to the First Set of Panel Questions, para. 302-305.

[745] Lumber Final I&D Memo, pp. 67-68 (Exhibit CAN-010).

stumpage from a weighted-average combined species benchmark, considering how its value is evaluated according to market principles."[746]

293. In selling timber "by the stand," the British Columbia government's approach combines the full range of species present in the stand in a single sale. The Canadian parties therefore proposed that the USDOC compare a single weighted-average "all species" benchmark to a single weighted-average "all species" stumpage rate.[747] However, because merging consideration of all species together in a single benchmark was inconsistent with how the stumpage's "value is evaluated according to market principles," the USDOC declined that proposal in favor of employing a transaction- and species-specific approach.[748]

e. Canada's Arguments Regarding Utility Grade Logs and Beetle-Killed Logs Are Meritless

294. Canada continues to repeat its arguments regarding utility grade logs and beetle-killed logs, but Canada has failed to demonstrate that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement when it addressed these issues in the final issues and decision memorandum. The United States has addressed Canada's argument in previous U.S. submissions.[749]

295. With respect to adjustments for utility grade logs, the USDOC determined there was no record evidence that would allow it to make a grade adjustment to the WDNR benchmark, because the record did not provide a reliable means of converting between Washington State and British Columbia grades.[750] Canada neglects to mention that the USDOC nevertheless utilized the entirety of the WDNR dataset, including all of the utility grade price quotes, in its species-specific benchmark prices.[751] Canada argues that the utility grade price quotes were insufficiently numerous, but this reflects the limitations of the record data, not a decision by the USDOC that utility-grade prices should be excluded from its benchmark. WDNR appears to have used a simple average of the quotes received for all grades to derive the species-specific price. However, WDNR reported the number of quotes underlying its prices in ranges rather than providing the specific number. For most species, including lodgepole pine, the WDNR Eastside data include utility grade prices for two months of the year, but the price data typically reflects a smaller number of quotes.[752] The exception is the basket category "Conifer," which

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

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

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

[749] *See, e.g.*, U.S. Responses to the First Set of Panel Questions, paras. 307-322.

[750] *See* Lumber Final I&D Memo, pp. 64, 75-76 (Exhibit CAN-010).

[751] *See* U.S. First Written Submission, para. 445.

[752] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

contains utility grade data for nine months of the period of investigation.[753] As explained, the USDOC fully utilized the entirety of the available WDNR dataset.

296. Canada's contention that the WDNR data did not include beetle-killed prices is not merely speculative, but contrary to the relevant evidence. Undisputed record evidence establishes that beetle infestation exists in the U.S. PNW among the same species as in British Columbia, although those species are less prevalent,[754] and Canada's own consultants obtained price quotes for beetle-killed logs from several mills in the United States.[755] Beetle-killed condition, like other quality issues, relates to log grade, and the WDNR benchmark did distinguish between three Washington State grades.[756] Accordingly, the USDOC's explanation that a beetle-killed condition adjustment was inappropriate, in part because the Canadian parties "ha[d] not provided evidence that blue-stained timber prices are not already included in the U.S. PNW log price benchmarks," reflects the illogical nature of Canada's argument that the WDNR dataset is entirely without prices for beetle-impacted logs.[757]

f. Canada Concedes That It Seeks Cost Adjustments to Reflect Willingness to Pay, Not to Reflect the Actual Price or the Prevailing Market Conditions

297. With respect to cost adjustments, Canada concedes an important point at paragraph 306 of its responses to the first set of Panel questions (specifically, in response to Panel question 108).[758] Canada explains that its position on cost adjustments is based on a standard that would reflect willingness to pay, rather than reflecting the actual price or the prevailing market conditions. Canada states:

> Canada does not dispute that the good under investigation is standing timber. However . . . an undisputed feature of forestry economics [is] that a sawmill's willingness to pay for standing timber will depend on what it anticipates it can sell its products for,

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[753] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

[754] GBC QR, Exhibit BC-S-183, Jendro and Hart Critique of Cross-Border Methodology, pp. 38-40 (Exhibit CAN-020 **(**BCI)).

[755] GBC QR, Exhibit BC-S-183, Jendro and Hart Critique of Cross-Border Methodology, p. 45, Table 12 (Exhibit CAN-020 **(**BCI)).

[756] *See* Washington Department of Natural Resources Delivered Log Price Information (Exhibit CAN-284); Petition Ex. 106 (Exhibit CAN-285).

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

[758] Canada's Responses to the First Set of Panel Questions, para. 306.

> taking into account all the costs of production and delivery to end-markets.[759]

298. Even if Canada's position were correct in describing how willingness to pay functions as a feature of forestry economics, that is not the relevant consideration under Article 14(d) of the SCM Agreement. The evaluation under Article 14(d) (at least under the facts of this dispute) entails comparing prices that have actually been paid to other prices that have actually been paid. To be clear, this means that the observed transaction prices have already cleared the threshold for the firm's willingness to pay. The benchmark prices reflect what was actually paid. Canada, however, argues for an interpretation of "prevailing market conditions" that would allow it to make the comparison on the basis of a "willingness to pay" analysis. That is not the applicable comparison for the purposes of Article 14(d) in this dispute,[760] and, accordingly, Canada's arguments largely fail on this basis alone.

E. Conclusion: The USDOC's Benchmark Determinations Are Not Inconsistent with Articles 1.1(b) or 14(d) of the SCM Agreement

299. In conclusion, 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). An unbiased and objective investigating authority could have reached the same conclusions that the USDOC reached.

300. Likewise, 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. The USDOC's analysis and explanation with regard to British Columbia confirms that an 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) and that the selected benchmark reflects the prevailing market conditions in Canada for British Columbia stumpage.

301. Accordingly, Canada has failed to establish that the USDOC's benchmark determinations are inconsistent with Articles 1.1(b) or 14(d) of the SCM Agreement.

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[759] Canada's Responses to the First Set of Panel Questions, para. 306.

[760] The United States recognizes that it may be the case in certain other situations that willingness to pay could be relevant – for example, where there are no actual transaction prices available and a benchmark must be constructed on the basis of market principles.

III. CANADA STILL HAS FAILED TO ESTABLISH THAT THE USDOC WAS REQUIRED TO PROVIDE OFFSETS FOR NEGATIVE COMPARISON RESULTS WHEN AGGREGATING MULTIPLE COMPARISON RESULTS TO CALCULATE THE OVERALL BENEFIT OF STUMPAGE PROVIDED BY THE GOVERNMENTS OF NEW BRUNSWICK AND BRITISH COLUMBIA

302. The U.S. first written submission demonstrates that nothing in the SCM Agreement or the GATT 1994 requires that an investigating authority provide offsets for negative comparison results when aggregating multiple comparison results to calculate the overall amount of subsidy 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 offsets for negative comparison results when aggregating multiple comparison results to calculate the overall subsidy benefit in the underlying countervailing duty investigation.[761]

303. In its statements during the first substantive meeting and in its responses to the first set of Panel questions, Canada, for the most part, simply has not responded to the arguments that the United States made in the U.S. first written submission. The statements Canada has made since its first written submission, and the responses Canada has given to the Panel's questions, have only made Canada's position more difficult to understand. In this section, the United States reacts to the statements and responses Canada has made since filing its first written submission.

A. Canada Asserts that It Is Not Arguing that the USDOC Was Required To Aggregate and Offset Comparison Results in the Benefit Calculation, but Canada's Own Statements Belie that Assertion

304. In its opening statement on the third day of the first substantive meeting, Canada attempted to clarify its claim that the USDOC "improperly 'set to zero' the results of certain comparisons used to calculate the benefit for the government provision of Crown-origin timber".[762] Canada only made matters more confusing.

305. Canada asserted that it is not "arguing that subsidies may be offset by transactions that are not subsidized".[763] Canada further asserted that "the United States seeks to portray Canada's claim as arguing in favour of a methodology of aggregation" that the panel in *US – Anti-Dumping and Countervailing Duties (China)* rejected, but, Canada contends, "[t]his is not the

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[761] *See* U.S. First Written Submission, paras. 472-527. The United States is not using the term "CVD zeroing", which appears in the first set of Panel questions, because this term may be prejudicial given prior reports concerning the use of "zeroing" in the antidumping context. The United States also observes that, when the panel in *US – Anti-Dumping and Countervailing Duties (China)* considered the same claim made by China that Canada makes in this dispute, that panel "[did] not find China's zeroing analogy to be apposite to this claim." *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.58.

[762] Canada's First Written Submission, para. 919, subheading III.E (the capitalization of the subheading has been modified for clarity).

[763] Canada's First Opening Statement (Day 3), para. 90.

claim that Canada has made".[764] Canada's assertions are plainly contradicted by Canada's own first written submission and Canada's responses to the first set of Panel questions.

306. In Canada's first written submission, Canada complains, with respect to New Brunswick, that the subsidy benefit to JDIL was "caused solely by [the USDOC's] decision to set negative comparison results to zero instead of simply aggregating them with the positive comparison results."[765] Canada is arguing that the USDOC was required to aggregate all the comparison results and offset the positive comparison results by the amount of any negative comparison results. Canada contends that the USDOC was required to take such an approach because not doing so allegedly was "unreasonable".[766]

307. Canada further reveals its true position when Canada complains, with respect to British Columbia, that, "instead of aggregating the comparison results in a way that mitigated the differences, [the USDOC] actively adjusted individual comparison results by setting the negative values to zero."[767] Canada asserts that this made the benefit calculation "less accurate".[768] Canada explicitly argues that, "[o]nly by aggregating the results of its comparisons, without first zeroing negative comparison results, could this inaccuracy have been overcome."[769] Again, Canada plainly contends that the USDOC was required to aggregate the comparison results and offset positive comparison results (*i.e.*, where a benefit was conferred and a subsidy existed) by the amount of any negative comparison results (*i.e.*, where no benefit was conferred and no subsidy existed).

308. Canada continued to make this argument even after asserting in its opening statement that it was not doing so. In its responses to the first set of Panel questions, Canada complained that the USDOC "made [its] benefit calculation more inaccurate when it set to zero certain comparison results that also reflected differences in prevailing market conditions."[770] Canada argued that, "[t]o mitigate" the purported problem, the USDOC "could easily have summed its comparison results."[771] Canada still argues that the USDOC was required to aggregate (or sum) multiple comparison results and provide offsets for negative comparison results in the benefit calculation.

309. Canada's assertions in its opening statement clearly are in conflict with its arguments elsewhere. Canada's assertions have confused, rather than clarified, Canada's position. The

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[764] Canada's First Opening Statement (Day 3), para. 91.

[765] Canada's First Written Submission, para. 935 (underline added).

[766] Canada's First Written Submission, para. 935.

[767] Canada's First Written Submission, para. 937 (underline added).

[768] Canada's First Written Submission, para. 937.

[769] Canada's First Written Submission, para. 940 (underline added).

[770] Canada's Responses to the First Set of Panel Questions, para. 326.

[771] Canada's Responses to the First Set of Panel Questions, para. 327 (underline added).

Canadian statements highlighted above, though, establish that Canada is, indeed, making the same arguments that were rejected by the panel in *US – Anti-Dumping and Countervailing Duties (China)*, as the United States demonstrated in the U.S. first written submission.[772]

B. Canada Misunderstands the Panel Report in *US – Anti-Dumping and Countervailing Duties (China)*

310. In addition to incorrectly asserting that it is not arguing in favor of aggregating comparison results and providing offsets for negative comparison results, an argument that was rejected by the panel in *US – Anti-Dumping and Countervailing Duties (China)*, Canada also mistakenly relies on the findings of the panel in *US – Anti-Dumping and Countervailing Duties (China)*.[773] But Canada appears to misunderstand the findings to which it refers. Canada asserts that, in *US – Anti-Dumping and Countervailing Duties (China)*:

> [T]he panel stated that "the guidelines of Article 14(d) mean that the level of aggregation or disaggregation of the analysis of a given 'good' must correspond to how that good is marketed in reality". In the specific facts before that panel, it found that the circumstance militated towards a disaggregated analysis. But it also left open "the possibility that a given set of factual circumstances … might dictate the methodology advocated by China in a specific case".[774]

311. Canada's quotations are misleading because Canada conflates two separate findings of the panel in *US – Anti-Dumping and Countervailing Duties (China)*. In the first quoted statement,[775] the panel is referring to "aggregation or disaggregation" not in the sense of summing up multiple comparison results and providing offsets or not providing offsets for negative comparison results, but rather in the sense of how to define the good at issue – for example, whether as a single good or as multiple types of a good. This is made clear earlier in the paragraph from which the quoted statement is taken; the panel states: "we are not convinced that the USDOC sought to define the 'good' at issue as 'rubber' in the aggregate, without distinction between various types of rubber inputs."[776] This question of aggregation or disaggregation concerns the determination of the transaction(s) and the benchmark(s) that are to be compared, not the calculation of the overall subsidy benefit and the aggregation of multiple

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[772] *See* U.S. First Written Submission, paras. 476-483.

[773] *See* Canada's First Opening Statement (Day 3), paras. 91-93.

[774] Canada's First Opening Statement (Day 3), para. 92 (quoting *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 11.65 and 11.59).

[775] "[T]he guidelines of Article 14(d) mean that the level of aggregation or disaggregation of the analysis of a given 'good' must correspond to how that good is marketed in reality". *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.65.

[776] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.65. *See also ibid*., paras. 11.60-11.65.

comparison results (with or without offsets for negative comparison results), which is what Canada's claim is about in this context. The quoted statement offers no support for Canada's claim that the USDOC "improperly 'set to zero' the results of certain comparisons used to calculate the benefit for the government provision of Crown-origin timber".[777]

312. The second statement that Canada quotes[778] appears in a separate section of the *US – Anti-Dumping and Countervailing Duties (China)* panel report, and the statement was made in connection with the panel's analysis of China's argument for "temporal or … product 'offsetting'".[779] That argument that China made in that dispute parallels the argument that Canada is making in this context concerning the USDOC's allegedly "set[ting] to zero"[780] the results of certain comparisons.[781] As demonstrated in the U.S. first written submission, the panel in *US – Anti-Dumping and Countervailing Duties (China)* rejected China's argument.[782]

313. Among other things, when 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."[783] 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."

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[777] Canada's First Written Submission, para. 919, subheading III.E (the capitalization of the subheading has been modified for clarity).

[778] Canada asserts that the panel "left open 'the possibility that a given set of factual circumstances … might dictate the methodology advocated by China in a specific case'". Canada's First Opening Statement (Day 3), para. 92 (quoting *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.59).

[779] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.56.

[780] Canada's First Written Submission, para. 919, subheading III.E (the capitalization of the subheading has been modified for clarity).

[781] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 11.55-11.59.

[782] *See* U.S. First Written Submission, paras. 476-483.

[783] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.47.

> 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 group of transactions is independent of the existence or absence of a benefit in other transactions.[784]

314. Canada contends that "[t]he fundamental point the panel was making [in *US – Anti-Dumping and Countervailing Duties (China)*] is that transactions must be carefully matched to benchmarks to ensure that adequacy of remuneration is accurately assessed. Artificially deconstructing the stand-as-a-whole price that Crown timber in B.C. is sold by in order to compare it to eastern Washington species prices is a clear example of a mismatched benchmark."[785] But that issue – how to select and match transaction(s) and benchmark(s) – is entirely separate from Canada's arguments concerning the aggregation of multiple comparison results and the provision of offsets for negative comparison results in the overall subsidy benefit calculation. Canada has made separate claims and presented separate arguments about the USDOC's selection and matching of transactions and benchmarks, and the United States has responded to those separate claims and arguments and demonstrated that they lack merit.[786]

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[784] *US – Antidumping and Countervailing Duties (China)*, paras. 11.47-11.48 (italics in original; underline added).

[785] Canada's First Opening Statement (Day 3), para. 93.

[786] In its panel request, Canada identifies separate and independent claims under Articles 1.1(b) and 14(d) of the SCM Agreement alleging that the United States "improperly rejected in-jurisdiction benchmarks for stumpage" (p. 2, part A.1); under Articles 1.1(b) and 14(d) of the SCM Agreement alleging that the United States "failed to make necessary adjustments to stumpage to reflect prevailing market conditions" (p. 2, part A.2); and under Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 alleging that the United States "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage" (p. 2, part A.4). Canada's first written submission likewise presents Canada's arguments concerning these separate claims in separate sections of the submission. *See* Canada's First Written Submission, paras. 488-598 (addressing Canada's claims against the USDOC's rejection of prices in New Brunswick and use of Nova Scotia prices as benchmarks); paras. 61-227 and 601-740 (addressing Canada's claims against the USDOC's rejection of prices in British Columbia and use of a Washington state benchmark); paras. 721-731 (addressing "stand-as-a-whole" pricing in British Columbia); and paras. 919-942 (addressing Canada's claim that the USDOC "improperly 'set to zero' the results of certain comparisons used to calculate the benefit). In the U.S. first written submission, the United States responds to Canada's claims and arguments on the same basis on which Canada presents them. *See* U.S. First Written Submission, paras. 182-237 (New Brunswick

Canada's additional claim in this context is that the USDOC "improperly 'set to zero' the results of certain comparisons used to calculate the benefit for the government provision of Crown-origin timber".[787] Canada's characterization of the panel's statement in *US – Anti-Dumping and Countervailing Duties (China)* is not correct,[788] and that panel's statement is not of any relevance to the particular claim that Canada makes here.

315. Accordingly, Canada's reliance on the panel report in *US – Anti-Dumping and Countervailing Duties (China)* continues to be misplaced.

C. Canada Has Not Explained How the USDOC's Decision to "Set the Benefit to Zero" Made its Allegedly "Already Inaccurate Benefit Calculation" Even More Inaccurate

316. The Panel asked Canada to explain "why the USDOC's decision to set the benefit to zero made its allegedly 'already inaccurate benefit calculation' even more inaccurate", and the Panel asked Canada to explain "how the USDOC's benefit calculation methodology in question 'distances the comparison results from their connection to prevailing market conditions'".[789] These are crucial questions, and Canada has failed to answer them.

317. Ultimately, Canada never explains why aggregating comparison results without providing offsets for negative comparison results is <u>itself</u> WTO-inconsistent. Canada asserts that the USDOC "failed to assess adequacy of remuneration for Crown timber in relation to prevailing market conditions by setting certain comparison results to zero."[790] However, aggregating the amounts of benefit conferred by various separate transactions (without providing offsets for instances where no benefit was conferred)[791] is totally unrelated to prevailing market conditions.

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benchmark); paras. 344-471 (British Columbia benchmark); paras. 459-465 ("stand-as-a-whole" pricing in British Columbia); and paras. 472-527 ("setting to zero" certain comparison results).

[787] Canada's First Written Submission, para. 919, subheading III.E (the capitalization of the subheading has been modified for clarity).

[788] The U.S. first written submission explains that Canada, quoting from the *US – Anti-Dumping and Countervailing Duties (China)* panel report, 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." Canada's First Written Submission, para. 925 (quoting *US – Antidumping and Countervailing Duties (China)*, para. 11.53; italics added by Canada). 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, <u>and militates against an aggregated, averaged approach across different kinds of goods</u>." *US – Antidumping and Countervailing Duties (China)*, para. 11.53 (underline added). The panel, in the statement on which Canada relies, was expressly rejecting the approach for which Canada now advocates. *See* U.S. First Written Submission, para. 481.

[789] First Set of Panel Questions, question 117.

[790] Canada's First Opening Statement (Day 3), para. 75.

[791] Or, as Canada puts it, "setting certain comparison results to zero". Canada's First Opening Statement (Day 3), para. 75.

Such aggregation is performed after prevailing market conditions have been taken into account in the selection and matching of transactions and benchmarks, and after transactions and benchmarks have been compared.

318. Canada contends that the USDOC's "setting to zero the comparison results of its mismatched prices moved [the USDOC] farther away from calculation results that could reflect prevailing market conditions";[792] it "compounded" the problem and "further skewed the ultimate benefit calculated";[793] it "compounded the problems";[794] the USDOC "made its benefit calculation methodology more inaccurate".[795] Canada just repeats these assertions over and over again without ever proving them. Certainly, Canada demonstrates that the calculation of the overall subsidy benefit amount could be reduced if the USDOC were to use Canada's preferred subsidy calculation methodology.[796] And for Canada, it seems to follow simply that because the total amount of subsidy benefit calculated using the USDOC's methodology was higher than it might have been using Canada's desired methodology, the result necessarily was "more inaccurate".[797] But Canada's reasoning is self-serving and, as the United States demonstrated in the U.S. first written submission, there is no basis in the SCM Agreement or the GATT 1994 to find that the USDOC was required to aggregate multiple comparison results and provide offsets for negative comparison results in the manner that Canada would prefer.[798]

319. Significantly, Canada argues that the USDOC's "setting to zero the comparison results of its mismatched prices moved [the USDOC] farther away from calculation results that could reflect prevailing market conditions".[799] Canada contends that "the prevailing market conditions contained in the benchmark averages that [the USDOC] selected were, on their face, unlike those of the individual transactions being assessed. As a result, [the USDOC] ensured that it was measuring differences in prevailing market conditions rather than isolating subsidization."[800] Canada repeatedly asserts that the USDOC's comparisons were "already inaccurate" before the USDOC aggregated the comparison results without providing offsets for negative comparison

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[792] Canada's First Opening Statement (Day 3), para. 87.

[793] Canada's Responses to the First Set of Panel Questions, para. 315.

[794] Canada's Responses to the First Set of Panel Questions, para. 322.

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

[796] *See* Canada's First Written Submission, paras. 933-935, 941-942; Canada's First Opening Statement (Day 3), paras. 77-81, 82-88 and accompanying slides 40-47 and 49-56(Exhibit CAN-527 (BCI)); Canada's Responses to the First Set of Panel Questions, paras. 324-327, 328-331.

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

[798] *See* U.S. First Written Submission, paras. 472-527.

[799] Canada's First Opening Statement (Day 3), para. 87 (underline added).

[800] Canada's Responses to the First Set of Panel Questions, para. 315. *See also ibid*., paras. 321, 324-325, 328-329; Canada's First Opening Statement (Day 3), paras. 77-80, 82-86.

results.[801] Therefore, the real crux of Canada's complaint is that the transaction and benchmark prices compared were allegedly "mismatched".[802] But Canada and the United States are arguing about that issue separately from the issue of aggregating comparison results and providing offsets for negative comparison results, and the United States has demonstrated that there is no merit to Canada's arguments concerning the USDOC's selection and matching of transactions and benchmarks.[803]

320. The Panel also asked Canada "whether, in the context of transaction-to-average comparisons, an investigating authority would be required to aggregate the individual comparison results or average government stumpage prices in a situation where the average benchmark price did pertain to transactions that appropriately reflected the prevailing market conditions".[804] Canada has expressed inconsistent views on this question during the course of this dispute.

321. In its response to the Panel's question, Canada expresses the view that, in the hypothetical situation posited in the Panel's question, wherein "there was uniformity in the prevailing market conditions pertaining to the transactions used to construct the average benchmark, on the one hand, and the individual government stumpage transactions on the other", "it may not be necessary for an investigating authority, acting reasonably and objectively, to add together all of the individual comparison results in order to account for prevailing market conditions."[805] So, Canada appears to acknowledge that aggregation of comparison results with offsets for negative comparison results would not be required if the transactions and benchmarks are not "mismatched".[806]

322. Yet, in Canada's opening statement on the third day of the first substantive meeting, Canada expressed the opposite view. Canada argued that, "even if benchmark transactions had been carefully matched in New Brunswick and B.C., setting negative comparison results to zero partially unwinds that careful matching process because it changes comparisons that resulted from the careful matching process."[807] This is inconsistent with Canada's response to the Panel's question. Canada's position remains unclear.

323. Whichever view Canada ultimately takes, though, Canada's argument for aggregating comparison results and providing offsets for negative comparison results still makes no sense. If

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[801] Canada's First Written Submission, para. 929; Canada's Responses to the First Set of Panel Questions, paras. 321, 325, 326, 329.

[802] Canada's First Opening Statement (Day 3), para. 87.

[803] *See supra*, footnote 786.

[804] First Set of Panel Questions, question 115 (underline added).

[805] Canada's Responses to the First Set of Panel Questions, para. 314.

[806] Canada's First Opening Statement (Day 3), para. 87.

[807] Canada's First Opening Statement (Day 3), para. 93.

the transactions and benchmarks were carefully and correctly matched, then the separate comparisons simply reflect separate financial contributions, any of which may or may not have conferred a benefit. The comparisons were not, to use Canada's term, "already inaccurate".[808] In such a situation, aggregating the comparison results and providing offsets for negative comparison results in the overall benefit calculation would not be appropriate, as Canada appears to agree.[809] Indeed, taking such an approach could introduce inaccuracy by masking the subsidy benefit of certain transactions with other transactions that were not subsidized. Nothing in the SCM Agreement or the GATT 1994 requires such an outcome.

324. On the other hand, assuming *arguendo* that the transactions and benchmarks were not carefully and correctly matched, then aggregating the comparison results and providing offsets for negative comparison results in the overall benefit calculation nevertheless still would not fix the mismatch problem. In that case, the investigating authority would need to modify its determination and select appropriate benchmarks and properly match benchmarks and transactions. Having so fixed the purported mismatch problem, it then once again would not be necessary or appropriate for the investigating authority to aggregate the comparison results and provide offsets for negative comparison results in the overall benefit calculation, for the same reasons given in the preceding paragraph. Again, Canada appears to have acknowledged this.[810] Canada's proposed approach simply lacks any foundation in logic.[811]

325. The solution to any purported problem with selecting or matching benchmarks and transactions would be to fix the selection or matching problem. The solution would not be to impose an obligation to aggregate comparison results and provide offsets for negative comparison results that has no basis in the SCM Agreement or the GATT 1994, that has no foundation in logic, and that has been rejected previously by another panel.[812]

326. The United States stresses again that each time British Columbia and New Brunswick provided standing timber to one of the respondents for less than adequate remuneration, a benefit

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[808] Canada's First Written Submission, para. 929; Canada's Responses to the First Set of Panel Questions, paras. 321, 325, 326, 329.

[809] *See* Canada's Responses to the First Set of Panel Questions, para. 314.

[810] *See* Canada's Responses to the First Set of Panel Questions, para. 314.

[811] The U.S. first written submission discusses additional logical flaws in Canada's arguments and Canada's proposed approach. *See* U.S. First Written Submission, paras. 521-526. Canada repeats the same arguments without addressing the logical flaws that the United States has identified. *See, e.g.*, Canada's First Opening Statement (Day 3), para. 81 (arguing that the USDOC erred by failing to "isolate[] price differences" but suggesting that the USDOC could have corrected the problem simply by aggregating and averaging together "all" the transactions); *ibid.*, para. 93 (arguing simultaneously that "transactions must be carefully matched to benchmarks" and also that all comparison results must be aggregated and averaged together); Canada's Responses to the First Set of Panel Questions, para. 327 (arguing that comparing the "range of conditions" of the transactions to the "range of conditions" of the benchmark "would have better isolated any benefit amount").

[812] *See* U.S. First Written Submission, paras. 476-483 (discussing *US – Anti-Dumping and Countervailing Duties (China) (Panel)*).

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.

D. Canada Has Not Responded to the Arguments in the U.S. First Written Submission Concerning the Provisions of the SCM Agreement and the GATT 1994 under which Canada Has Made Claims

327. Canada has made claims with respect to the issue of aggregating and providing offsets for negative comparison results under Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.[813] The U.S. first written submission demonstrates that none of those provisions obligates an investigating authority to provide offsets in the benefit calculation for instances in which other financial contributions do not confer a benefit.[814] Canada has not responded to the U.S. arguments. In its opening statement on the third day of the first substantive meeting and in its responses to the first set of Panel questions, Canada only briefly mentions the provisions of the covered agreements on which its claims are based. Here, the United States provides a few additional comments in response Canada's recent statements.

328. Canada continues to contend that "the United States used a benefit calculation methodology that did not assess adequacy of remuneration in relation to prevailing market conditions, which it was required to do",[815] and Canada refers to Article 14(d) of the SCM Agreement numerous times.[816] As explained above, though, aggregating the amounts of benefit conferred by various separate transactions (without providing offsets for instances where no benefit was conferred)[817] is totally unrelated to prevailing market conditions. Such aggregation is performed after prevailing market conditions have been taken into account in the selection and matching of transactions and benchmarks, and after transactions and benchmarks have been compared. For this reason, and for the reasons given in the U.S. first written submission,[818] Article 14(d) simply does not impose the obligation for which Canada argues.

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[813] *See* Canada's Panel Request, p. 2, part. A.4; Canada's First Written Submission, paras. 921-926.

[814] *See* U.S. First Written Submission, paras. 474-515.

[815] Canada's First Opening Statement (Day 3), para. 90.

[816] *See* Canada's First Opening Statement (Day 3), paras. 75, 81, 92, and 94; Canada's Responses to the First Set of Panel Questions, paras. 314, 316, and 317.

[817] Or, as Canada puts it, "setting certain comparison results to zero". Canada's First Opening Statement (Day 3), para. 75.

[818] *See* U.S. First Written Submission, paras. 475-488.

329. The Panel asked Canada whether its claims under Articles 1.1(b), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 are consequential to Canada's claim under Article 14(d) of the SCM Agreement.[819] In its response to the Panel's question, Canada did not take the opportunity to expand on its arguments relating to each provision of a covered agreement under which it has presented a claim. Canada simply explained that its "first claim" is under Article 14(d) of the SCM Agreement and concerns the USDOC's alleged failure to assess the adequacy of remuneration in relation to prevailing market conditions.[820] The United States has addressed this claim above and in the U.S. first written submission, and demonstrated that it lacks any merit.[821]

330. Canada explained that its "second claim" is that the USDOC allegedly imposed countervailing duties in excess of the amount of subsidy found to exist in a manner inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994,[822] and Canada's "third claim" is that the USDOC allegedly imposed countervailing duties in amounts that are not "appropriate" in a manner inconsistent with Article 19.3 of the SCM Agreement.[823] The United States has addressed these claims in the U.S. first written submission and demonstrated that they lack any merit.[824] Among other things, the United States has explained that Canada's arguments fail because Canada's proposed interpretation of these provisions 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.

331. Finally, Canada explained that its claim under Article 1.1(b) of the SCM Agreement is consequential to its other claims.[825] Canada has not explained, though, <u>how</u> a breach of Article 1.1(b) would follow as a consequence of finding a breach of the other provisions of the covered agreements to which Canada has referred. As the United States observed in the U.S. first written submission,[826] Article 1.1(b) 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) is simply part of a definition, and does not, on its face impose any obligations on WTO Members. It is not clear how it would even be possible for a Member to

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[819] *See* First Set of Panel Questions, question 116.

[820] Canada's Responses to the First Set of Panel Questions, para. 317.

[821] *See* U.S. First Written Submission, paras. 475-488.

[822] Canada's Responses to the First Set of Panel Questions, para. 318.

[823] Canada's Responses to the First Set of Panel Questions, para. 319.

[824] *See* U.S. First Written Submission, paras. 492-512.

[825] *See* Canada's Responses to the First Set of Panel Questions, para. 320.

[826] *See* U.S. First Written Submission, paras. 489-491.

breach Article 1.1(b). It is Canada's burden to establish its claim, but Canada still has not even attempted to make a *prima facie* case that the United States acted inconsistently with Article 1.1(b) of the SCM Agreement.

332. For the reasons given above, as well as those in the other U.S. written submissions, statements, and responses, 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. CANADA'S ARGUMENTS AGAINST THE USDOC'S DETERMINATION CONCERNING BRITISH COLUMBIA'S AND CANADA'S LOG EXPORT RESTRAINTS CONTINUE TO LACK MERIT

333. The U.S. first written submission demonstrates that there is no merit to Canada's claims that the USDOC improperly investigated and countervailed British Columbia's and Canada's log export restraints.[827] In its statements during the first substantive meeting and in its responses to the first set of Panel questions, Canada has, for the most part, repeated arguments made in Canada's first written submission without engaging in the counterarguments presented in the U.S. first written submission. To a surprising degree, Canada simply misrepresents and mischaracterizes the USDOC's determinations and the arguments of the United States. This is unfortunate and makes the Panel's task more difficult. In this section, the United States responds to arguments Canada has presented since it filed its first written submission. As demonstrated below, Canada's claims continue to lack any merit.

A. The USDOC Did Not Take an Effects-Based Approach when Analyzing Whether British Columbia's and Canada's Log Export Restraints Result in a Financial Contribution by Means of Entrustment or Direction

334. The United States has not argued in this dispute for an effects-based approach to the analysis of entrustment or direction, and it is plain on the face of the USDOC's determination that the USDOC did not take an effects-based approach when it examined whether British Columbia's and Canada's log export restraints result in a financial contribution by means of entrustment or direction. Nevertheless, Canada has continued to make false assertions about the U.S. position in this dispute and the USDOC's analysis in the countervailing duty investigation of softwood lumber products from Canada. Canada's assertions are baseless.

335. Canada asserts that "the United States argues that the *Forest Act* somehow leads producers to increase their supply to the domestic market. However, the premise of this argument is that direction should be found to exist on the basis of the economic effects of such a provision."[828] Canada misrepresents the U.S. argument, as Canada is well aware. In Canada's

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[827] *See* U.S. First Written Submission, paras. 528-611.

[828] Canada's Responses to the First Set of Panel Questions, para. 339.

opening statement on the second day of the first substantive meeting, Canada referred to "the kind of effects-based analysis that both Canada and the United States agree is not permitted", and Canada cited the U.S. first written submission in a footnote.[829] Indeed, paragraph 578 of the U.S. first written submission, to which Canada cites, explicitly states that "[t]he 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."[830] Canada's characterization of the U.S. argument in this dispute is, thus, demonstrably false.

336. Canada further asserts that the USDOC "relied on the alleged effects of the [log export restraints] to find entrustment or direction."[831] Canada suggests that "[t]he United States does not deny that [the USDOC] employed, at least in part, an effects-based analysis".[832] Canada also contends that the United States "avoids discussion of this part of [the USDOC's] determination almost entirely. Instead, [the United States] attempts to shift the emphasis to the requirement in B.C.'s *Forest Act* that timber harvested from provincially regulated lands be used or manufactured in British Columbia, unless an exception applies."[833] Again, Canada misrepresents the U.S. argument and the analysis undertaken by the USDOC.

337. The U.S. first written submission summarizes the analysis and reasoning provided in the USDOC's preliminary decision memorandum and final issues and decision memorandum.[834] Of course, the USDOC's preliminary decision memorandum and final issues and decision memorandum speak for themselves, so the Panel does not need to rely on characterizations of those documents made by Canada, or even those made by the United States. The preliminary decision memorandum and final issues and decision memorandum, on their face, show that the USDOC examined the effects of British Columbia's and Canada's log export restraints. However, those documents also show, on their face, that the USDOC did so in response to arguments raised by Canadian interested parties.

338. Canada emphasizes the USDOC's statement that British Columbia's and Canada's log export restraints "would have a ripple effect on the volume and prices of logs through the entire province".[835] Canada contends that "[t]his is precisely the kind of effects-based analysis that …

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[829] Oral Statement of Canada at the First Substantive Meeting of the Panel – Day 2 (February 27, 2019) ("Canada's First Opening Statement (Day 2)"), para. 117 (underline added). *See also ibid*., footnote 62.

[830] U.S. First Written Submission, para. 578.

[831] Canada's First Opening Statement (Day 2), para. 117.

[832] Canada's First Opening Statement (Day 2), para. 118.

[833] Canada's First Opening Statement (Day 2), para. 118.

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

[835] Canada's First Opening Statement (Day 2), para. 117 (quoting Lumber Final I&D Memo, p. 144 (Exhibit CAN-010)).

is not permitted."[836] Canada mischaracterizes the USDOC's analysis. The USDOC referred to the "ripple effect" of the log export restraints in response to Canadian interested parties' argument that "the process for exporting logs from the province is irrelevant to the mandatory respondents in this investigation"[837] because, they contended, "the process would not impact the interior of the province where the mandatory respondents are located".[838] In the preliminary decision memorandum, the USDOC addressed this argument "[a]s an initial matter" before turning to the analysis of whether the log export restraints result in a financial contribution by means of entrustment or direction. In the final issues and decision memorandum, the USDOC addressed the Canadian interested parties' arguments in Comment 45, entitled "Whether Log Export Restraints Impact the British Columbia Interior",[839] before separately discussing in Comment 46 "Whether the Log Export Restraints in British Columbia is a Financial Contribution".[840]

339. Canada argues that the United States is trying to "change the focus" of the USDOC's entrustment or direction analysis.[841] The United States is not trying to change the focus of the USDOC's analysis; Canada is.

340. In its preliminary decision memorandum, after briefly discussing, "[a]s an initial matter", arguments made by Canadian interested parties concerning whether the process for exporting logs from the province was relevant to the mandatory respondents in the investigation, the USDOC spent the remainder of the discussion describing how British Columbia's Forest Act and Canada's Federal Notice to Exporters No. 102 operate[842], and then the USDOC set forth the conclusions it drew from its examination of those laws and regulations. The USDOC made the following preliminary conclusions:

- "[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."[843]

- "[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

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[836] Canada's First Opening Statement (Day 2), para. 117.

[837] Lumber Preliminary Decision Memorandum, p. 57 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, Comment 45, pp. 144-149 (Exhibit CAN-010).

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

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

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

[841] Canada's First Opening Statement (Day 2), para. 119.

[842] *See* Lumber Preliminary Decision Memorandum, pp. 58-60 (Exhibit CAN-008).

[843] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, p. 152 (Exhibit CAN-010).

> 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."[844]

- 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."[845]

- 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."[846]

- 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 Export and Import Permits Act ("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."[847]

341. In the final issues and decision memorandum, the USDOC explained that "there [were] no new facts that were placed on the record following the *Preliminary Determination* regarding the manner in which the log export process operates."[848] The USDOC further explained that "[t]o analyze whether the timber harvesters have been entrusted or directed to provide a financial

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[844] 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).

[845] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008).

[846] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[847] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[848] Lumber Final I&D Memo, p. 152 (Exhibit CAN-010).

contribution …, we considered the laws and regulations that govern the provision of logs within British Columbia."[849]

342. Canada asserts that the USDOC "recognized … that the cited rules do not establish the requisite link between the government action and the specific conduct of private bodies."[850] As indicated above, this is plainly untrue. The USDOC expressly found in the preliminary decision memorandum that "official governmental action compels suppliers of BC logs to supply to BC consumers, including mill operators."[851] The USDOC reiterated in the final issues and decision memorandum that "[t]imber 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."[852] Thus, contrary to Canada's assertion, the USDOC explicitly identified the "link between the government action and the specific conduct of private bodies."[853]

343. Canada, though, attempts to support its false assertion by noting that the USDOC "also pointed to:"

> i) for B.C., "the legal requirements [that logs remain in British Columbia], combined with both the lengthy process for obtaining an exception, and the fees charged by the [Government of British Columbia] upon export"; and
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> ii) for Canada, [the USDOC] pointed to "the surplus test and the legal penalties for exporting logs without an export permit".[854]

These quotations provide no support for Canada.

344. Again, the USDOC made the quoted statements in response to arguments presented by Canadian interested parties. Canadian interested parties contended that the log export restraints were "merely an administrative process through which exporters obtain authorization to export",[855] and "most applications to export logs from both federal and provincial jurisdiction

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[849] Lumber Final I&D Memo, p. 153 (Exhibit CAN-010) (underline added).

[850] Canada's First Opening Statement (Day 2), para. 120.

[851] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, p. 152 (Exhibit CAN-010).

[852] Lumber Final I&D Memo, p. 153 (Exhibit CAN-010) (underline added).

[853] Canada's First Opening Statement (Day 2), para. 120.

[854] Canada's First Opening Statement (Day 2), para. 119 (quoting Lumber Final I&D Memo, pp. 152 and 155 (Exhibit CAN-10) and Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008) (underline added by Canada)).

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

were granted."[856] Essentially, Canadian interested parties introduced effects-based arguments by asserting that the log export restraints have no effect. The USDOC examined evidence on the administrative record and determined that the assertions of the Canadian interested parties lacked foundation or otherwise were insufficient to change the conclusion that the USDOC drew from its examination of the laws and regulations that govern the provision of logs within British Columbia.

345. The USDOC's discussion of the lengthy process for obtaining an exception and the fees charged by the Government of British Columbia upon export, together with the USDOC's discussion of other evidence, such as evidence of "blocking", reflects the USDOC's engagement with the arguments of the Canadian interested parties.[857] The USDOC emphasized that its analysis was based on the "laws and regulations that govern the provision of logs within British Columbia."[858] 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."[859] In addition, the laws and regulations restrict the ability of log suppliers to enter into long-term supply agreements with foreign entities.[860] 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."[861] The USDOC's discussion of this evidence is not an indication that the USDOC took an effects-based approach to the analysis of entrustment or direction. Rather, the discussion reflects that the USDOC explained why the evidence on the record contradicts the argument of the Canadian interested parties that the log export restraints have no effect.[862]

346. It is particularly curious for Canada to suggest that the USDOC's discussion of the federal EIPA legal penalties for exporting logs without an export permit undermines the USDOC's conclusion concerning entrustment or direction. As a previous report noted, "[i]n 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."[863]

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[856] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008).

[857] *See* U.S. Responses to the First Set of Panel Questions, paras. 245-249, 360-388, 390-396.

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

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

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

[861] Lumber Final I&D Memo, pp. 154-155 (Exhibit CAN-010).

[862] *See* U.S. Responses to the First Set of Panel Questions, paras. 245-249, 360-388, 390-396.

[863] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

The EIPA legal penalty for exporting logs without authorization is a "form of threat or inducement" by the government to ensure that private log suppliers in British Columbia comply with the law requiring that they supply logs to consumers for processing in British Columbia, unless granted an exemption and export authorization. As the USDOC observed, Article 3(1)(b) of the EIPA provides that items are included on the Export Control List, *inter alia*, "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".[864] The EIPA legal penalty is precisely the kind of "threat or inducement" that can serve as "evidence of entrustment or direction"[865] to which the Appellate Body was referring, and that evidence further supports the USDOC's conclusion.

347. In sum, as the Panel will see for itself when it reviews the USDOC's preliminary decision memorandum and final issues and decision memorandum, Canada's assertion that the USDOC took an effect-based approach to the analysis of entrustment or direction is utterly baseless.

B. The Prior Panel and Appellate Body Reports on which Canada Relies Do Not Support Canada's Arguments

348. The U.S. first written submission demonstrates that Canada relies on prior panel and Appellate Body reports that are inapposite, or that otherwise do not support Canada's arguments.[866] Canada continues to do so.

349. Canada incorrectly asserts that "WTO panels have twice encountered the same arguments that the United States and [the USDOC] advance here and twice rejected them."[867] Canada suggests that, "[i]n both *US – Export Restraints* and *US – Countervailing Measures (China)*, the panels determined that any alleged increase in the domestic supply of a good as a result of an export measure does not equate to the government entrustment or direction of a private body to provide the good domestically."[868] As explained above in section IV.A, and in the U.S. first written submission,[869] the United States is not arguing in this dispute for an effects-based approach to the analysis of entrustment or direction, and the USDOC did not take an effects-based approach in the underlying investigation. Canada has mischaracterized the arguments of the United States and the analysis undertaken by the USDOC. Thus, the panel reports in *US –*

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[864] Export and Import Permits Acts, Art. 3(1)(b) (p. 10 of the PDF version of Exhibit CAN-070). *See also* Lumber Final I&D Memo, p. 143 (Exhibit CAN-010).

[865] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[866] *See* U.S. First Written Submission, paras. 573-587.

[867] Canada's First Opening Statement (Day 2), para. 114. *See also* Canada's Responses to the First Set of Panel Questions, para. 336.

[868] Canada's First Opening Statement (Day 2), para. 114.

[869] *See, e.g.,* U.S. First Written Submission, paras. 573, 578.

Export Restraints and *US – Countervailing Measures (China)*, on which Canada relies, are inapposite.

350. Canada notes that "[t]he United States disputes the relevance of the *US – Export Restraints* and *US – Countervailing Measures (China)* panel reports", but Canada maintains that the "reasons and conclusions" in those reports "offer very relevant assistance to this Panel."[870] Again, the U.S. first written submission explains why Canada's reliance on those panel reports is misplaced,[871] and Canada has not responded to the U.S. arguments.

351. Rather than responding to the arguments that the United States has made, Canada falsely asserts that the United States "ignores that many parts of the [*US – Export Restraints*] decision have been expressly endorsed by the Appellate Body."[872] Canada contends:

> For instance, the *US – Export Restraints* panel found that government entrustment or direction is "very different from the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market". The Appellate Body expressly adopted this principle, adding that "government 'entrustment' or 'direction' cannot be inadvertent or a by-product of government regulation". The panels in *US – Countervailing Measures (China)* and *US – Supercalendered Paper* found the same. As a result, this Panel should not accept the U.S. attempt to marginalize the *US – Export Restraints* decision.[873]

352. The United States most certainly has not ignored the findings quoted above. The U.S. first written submission directly addresses the findings to which Canada refers, explaining that:

> 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, 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'."

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[870] Canada's First Opening Statement (Day 2), para. 115.

[871] *See* U.S. First Written Submission, paras. 573-587.

[872] Canada's First Opening Statement (Day 2), para. 116.

[873] Canada's First Opening Statement (Day 2), para. 116 (underline added).

> 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]." 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.[874]

The U.S. first written submission further explains that:

> 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'," 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'." 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).
>
> 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. 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 products." The governments of British Columbia and Canada took explicit action to instruct private log suppliers to sell to certain

[874] U.S. First Written Submission, paras. 583-584 (footnotes omitted; underline added).

> 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.[875]

Canada ignores these U.S. arguments and has failed to respond to them.

353. With respect to the panel report in *US – Countervailing Measures (China)*, Canada once again falsely asserts that the United States argues for an effects-based approach to the analysis of entrustment or direction, and Canada contends that the panel in that dispute "explicitly *rejected* such an interpretation, stating that it is inconsistent with the idea that 'the existence of each of the four types of financial contribution is determined by reference to the action of the government concerned rather than by reference to the effects of the measure on a market'."[876] Of course, as the United States has demonstrated, Canada misrepresents the U.S. argument.

354. Furthermore, the USDOC, in fact, took precisely the analytical approach endorsed by the panel in *US – Countervailing Measures (China)*. The USDOC expressly found that "official governmental action compels suppliers of BC logs to supply to BC consumers, including mill operators"[877] and "[t]imber 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."[878] Thus, the USDOC determined that a financial contribution existed "by reference to the action of the government concerned rather than by reference to the effects of the measure on a market", which accords with the findings of the panel in *US – Countervailing Measures (China)*.[879]

355. Finally, Canada argues that "the panel in *China – GOES* held that the determination of a financial contribution must be based on the *nature* of the government action – not the alleged *effect* of that action, and that the concept of 'financial contribution' was included in the definition of subsidy 'in order to avoid an effects-based approach to the concept of a subsidy' – the very kind of approach that [the USDOC] has taken here."[880] Here again, Canada misrepresents the approach taken by the USDOC in the underlying investigation. The USDOC did not take an effects-based approach. So, these findings concerning an effects-based analysis are inapposite, and the panel report in *China – GOES* does not support Canada's argument.

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[875] U.S. First Written Submission, paras. 585-586 (footnotes omitted).

[876] Canada's Responses to the First Set of Panel Questions, para. 339 (quoting *US – Countervailing Measures (China) (Panel)*, para. 7.401; italics added by Canada).

[877] Lumber Preliminary Decision Memorandum, p. 60 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, p. 152 (Exhibit CAN-010).

[878] Lumber Final I&D Memo, p. 153 (Exhibit CAN-010) (underline added).

[879] *US – Countervailing Measures (China) (Panel)*, para. 7.401.

[880] Canada's Responses to the First Set of Panel Questions, para. 334.

356. For these reasons, Canada is wrong when it refers to the prior panel and Appellate Body reports discussed above and suggests that the Panel "should reach the same conclusion here as a matter of law."[881] The panel and Appellate Body reports to which Canada refers simply offer no support for Canada's arguments.

C. Canada's Arguments Concerning the USDOC's Entrustment or Direction Analysis Continue To Be Unavailing

357. Canada continues to argue that the USDOC's findings "were unsupported by positive record evidence".[882] The U.S. first written submission and the U.S. responses to the first set of Panel questions demonstrate that ample record evidence supports the USDOC's determination, and an objective and unbiased investigating authority could have come to the same conclusion that the USDOC did.[883] Here, the United States responds to eight arguments Canada makes in its responses to the first set of Panel questions concerning the USDOC's findings and the evidentiary support for them.

358. First, Canada continues to argue that "the LEP process does not require log suppliers to provide their logs to anyone, nor does it direct them to sell at any particular prices."[884] The United States responded to this argument in the U.S. first written submission and demonstrated that it lacks any merit.[885] The term "entrusts or directs" does not require a government to "task" – the term used in Canada's first written submission[886] – a private body.[887] 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."[888] As Canada "agrees", entrustment or direction "can encompass a range of possible government actions".[889]

359. 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.[890] The

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[881] Canada's First Opening Statement (Day 2), para. 114.

[882] Canada's First Opening Statement (Day 2), para. 121.

[883] *See* U.S. First Written Submission, paras. 590-598; U.S. Responses to the First Set of Panel Questions, paras. 355-356, 357-358, 360-388, and 390-396.

[884] Canada's Responses to the First Set of Panel Questions, para. 341.

[885] *See* U.S. First Written Submission, paras. 571-572. *See also ibid*., para. 542.

[886] Canada's First Written Submission, para. 953.

[887] The U.S. first written submission sets forth an interpretive analysis of Article 1.1(a)(1)(iv) of the SCM Agreement applying customary rules of interpretation. *See* U.S. First Written Submission, paras. 546-565.

[888] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

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

[890] *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.

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 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 in the U.S. first written submission,[891] and it has been rejected in numerous prior panel and Appellate Body reports.

360. Additionally, Canada simply is wrong as a matter of fact. On its face, the British Columbia Forest Act does "require log suppliers to provide their logs to"[892] someone: consumers of logs in British Columbia. As the USDOC explained:

> [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.[893]

With respect to the Canadian federal government, the USDOC found that the identical surplus test process to overcome the in-province use or processing requirement and the penalties potentially imposed under the EIPA compel log harvesters "to divert to mill operators some volume of logs that could otherwise be exported."[894]

361. During the USDOC's investigation, the Government of British Columbia made the same argument that Canada now makes, contending that "the export permitting processes 'does not direct the harvest or owner to provide logs to any purchaser in particular'."[895] The USDOC

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[891] *See* U.S. First Written Submission, paras. 546-565.

[892] Canada's Responses to the First Set of Panel Questions, para. 341.

[893] 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).

[894] Lumber Preliminary Decision Memorandum, p. 61 (Exhibit CAN-008) (underline added). *See also* Lumber Final I&D Memo, p. 155 (Exhibit CAN-010).

[895] Lumber Final I&D Memo, p. 153 (citing Government of British Columbia Case Brief Log Exports, p. 9) (Exhibit CAN-010).

responded that the record evidence demonstrates that "the program is designed to benefit, and in operation does benefit, downstream consumers…."[896] 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 financial contribution … because the provision of logs is the provision of a good or service, other than general infrastructure.[897]

Canada's argument fails because Canada is wrong on the law and wrong on the facts.

362. Second, Canada argues that "the U.S. assertion that 'Canada and British Columbia directly interfere with the ability of log suppliers to enter into long-term contracts with foreign purchasers' relies on complete speculation about the normal manner in which log suppliers exchange logs."[898] The United States has supported its assertion with citations to the record evidence.[899] Among other things, a 2014 study by the Fraser Institute was on the administrative record of the USDOC's softwood lumber countervailing duty investigation; it was placed before the USDOC by the petitioner as Exhibit 244 to the petition, and was prepared prior to and independent of the USDOC's countervailing duty investigation of softwood lumber from Canada.[900] The Fraser Institute study, which was citing an earlier study, "Haley (2002)", highlighted "three detrimental effects on timber owners of the current process of granting log export permits:"

> 1 it prevents log owners from securing long-term contracts with foreign buyers to shelter from price volatility;
>
> 2 it prevents log owners from sorting logs per customer request;

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

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

[898] Canada's Responses to the First Set of Panel Questions, para. 348.

[899] *See* U.S. Responses to the First Set of Panel Questions, paras. 360-387.

[900] *See* Petitioners, "Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada," dated November 25, 2016, Exhibits 242-257 (Exhibit USA-010).

> 3 it imposes time delays that increase log-handling costs and ties up capital.[901]

The USDOC concluded, based on its assessment of the totality of the record evidence, that:

> [T]he lengthy and burdensome export prohibition exemption process discourages log suppliers from considering the opportunities that may exist in the export market by significantly encumbering their ability to export, especially where there may be uncertainty about whether their logs will be found to be surplus to the requirements of mills in BC. Moreover, this process restricts the ability of log suppliers to enter into long-term supply contracts with foreign purchasers.[902]

363. Third, Canada asserts that the United States "argued at the first substantive meeting that it took '7 to 13 weeks' to obtain authorization to export", but Canada contends that "[t]his is false."[903] Contrary to Canada's assertion, the United States has pointed to evidence provided to the USDOC by the Government of British Columbia that it "<u>can take</u> between seven and thirteen weeks"[904] to obtain an export permit.[905] In addition, the Fraser Institute report explained that "the log export approval process takes around seven weeks if no domestic offer is received, but takes nine to 13 weeks if domestic offers are received."[906] The United States has not asserted that the process always takes that long.

364. Canada contends that it "submitted evidence on the length of the process based on the actual applications to export within the period of investigation, which showed that the vast majority of exports were authorized within 2.5 weeks, and that export permits were often issued the same or next day after receiving a correctly filled out application."[907] Canada's statement is misleading and conflates two separate processes. The assertion that "export permits were often issued the same or next day" refers to the federal export permit process. However, a log exporter can only commence that federal process <u>after</u> the log exporter has requested and obtained an exemption from the province. That earlier part of the process – the provincial exemption – is the part that can take longer; it necessarily would take at least two weeks to advertise the logs on the

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[901] Joel Wood, "Log Export Policy for British Columbia," Fraser Institute (June 2014), p. 10 (Exhibit 244 of the petition) (p. 26 of the PDF version of Exhibit USA-010) (underline added).

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

[903] Canada's Responses to the First Set of Panel Questions, para. 353.

[904] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008) (underline added).

[905] *See* U.S. Responses to the First Set of Panel Questions, paras. 361-366.

[906] *See* Joel Wood, "Log Export Policy for British Columbia," Fraser Institute (June 2014), p. 10 (Exhibit 244 of the petition) (p. 26 of the PDF version of Exhibit USA-010).

[907] Canada's Responses to the First Set of Panel Questions, para. 353.

bi-weekly list and give potential buyers time to make offers. If an offer is made on the logs, that offer must be reviewed by the Timber Export Advisory Committee ("TEAC") or Federal Timber Export Advisory Committee ("FTEAC"), and the process would take even longer. Nothing Canada asserts contradicts what the United States has argued or what the USDOC found.

365. Additionally, the USDOC responded to the argument Canada now makes, and the USDOC reasoned that "the fact that an application for an export permit must be filed at all introduces an additional burden on log sellers seeking to export, and the fact that the permit is not automatically approved renders exporting uncertain. This restriction, along with others …, hinders the free export of logs and discourages log sellers from considering all market options and seeking the highest price for their logs."[908]

366. Fourth, Canada argues that the United States "ignores" that "over 99% of applications to export were effectively automatically authorized in the surplus test process in 2015",[909] "30% of the Coastal harvest, and 35% of the Tidewater harvest, were permitted for export",[910] and "even *after* receiving their authorization to export, applicants often chose not to apply for export permits or to export after obtaining a permit".[911] The United States has not ignored these facts, and neither did the USDOC. In the final issues and decision memorandum, the USDOC directly addressed the very arguments that Canada continues to make:

> [T]he GOC/GBC have argued that virtually all log export requests are approved, substantial quantities of logs are exported from British Columbia, and that a significant number of export authorizations are never utilized. As an initial matter, while we do not disagree with their characterization of these facts, we find that none of these facts demonstrate that exports are not restrained. Specifically, the claim that some volume of logs were exported, or that not all authorizations were utilized does not demonstrate that the process does not restrain exports. There is no way to know how many more logs would be exported in the absence of this process. Further, as discussed above, the "blocking" system in place indicates that due to these informal arrangements the fact that most export requests are approved is not a reliable indication of how the market is impacted by the existence of the log export restraints.[912]

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

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

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

[911] Canada's Responses to the First Set of Panel Questions, para. 342 (italics in original). *See also ibid*., para. 354.

[912] Lumber Final I&D Memo, p. 141 (Exhibit CAN-010) (underline added). The United States discusses the "blocking" system and the record evidence establishing the existence of such a system at paragraphs 390-396 of the

367. The United States also has responded to Canada's arguments in the U.S. responses to the first set of Panel questions.[913] As the United States has demonstrated, it simply is not the case that applications for export authorization are essentially automatically authorized, as Canada contends. The outcome of the process through which log suppliers are required first to offer for sale to consumers in British Columbia any logs proposed for export, in which any potential purchaser may make an offer that then will be judged fair or not fair by a government committee, is unknowable in advance, even if a log supplier has made agreements to avoid "blocking" by some purchasers.[914] There is nothing at all "automatic" about such an export permit application process.

368. Canada points to affidavits from two British Columbia log suppliers who describe their experience exporting logs from British Columbia.[915] Canada contends that their experience "demonstrates that the LEP process does not have a constraining effect, and further undermines a finding that the LEP process is a mechanism through which B.C. and Canada entrust or direct these log suppliers to provide their logs to domestic suppliers."[916] As it has throughout this dispute, Canada is inviting the Panel to reweigh the evidence. The USDOC explained that it based its determination on the totality of the evidence on the record before it,[917] which included the affidavits to which Canada now refers. Additionally, these affidavits do not contradict the USDOC's reasoning quoted above, namely that "the claim that some volume of logs were exported, or that not all authorizations were utilized does not demonstrate that the process does not restrain exports. There is no way to know how many more logs would be exported in the absence of this process."[918]

369. Fifth, Canada argues that "[n]either [the USDOC] nor the United States could point to any evidence that exports were impeded by virtue of" the fees in-lieu of manufacturing.[919] In the final issues and decision memorandum, the USDOC responded to this very argument, which was

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U.S. responses to the first set of Panel questions. *See also* U.S. Responses to the First Set of Panel Questions, paras. 245-249.

[913] *See* U.S. Responses to the First Set of Panel Questions, paras. 379-380.

[914] *See* U.S. Responses to the First Set of Panel Questions, paras. 245-249 and 390-396 (discussing record evidence of the "blocking" system).

[915] *See* Canada's Responses to the First Set of Panel Questions, para. 350.

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

[917] *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).

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

[919] Canada's Responses to the First Set of Panel Questions, para. 355.

made by the Government of Canada and the Government of British Columbia, and the USDOC gave reasons for disagreeing with the argument.[920]

> First, approximately 58 percent of the logs exported from the province during the POI were under provincial jurisdiction, and thus subject to the in-Lieu-of-Fee-of-Manufacturing fees. As such, we find that the majority of exported logs are subject to these fees. Further, we find that these fees can be significant, and can substantially increase the final price a potential customer would have to pay for the logs.
>
> We also disagree with the significance that the GOC/GBC attribute to the fact that the fees for the interior of the province, where the mandatory respondents are located, are less than the fees from the coastal region of British Columbia. Although the fees for logs harvested from the interior are lower in comparison to the BC coast, we find the fact that any fee is required at all to be significant. These fees increase the cost of exporting, as compared to producing domestically, and represent another impediment (along with the "blocking" system, approval process, etc.) to export logs from British Columbia.[921]

Again, the fee in-lieu-of-manufacture is required because a log is exported and not processed in British Columbia. Ultimately, the fee simply is an export tax. Such a tax necessarily increases a log supplier's cost to export logs.

370. Canada observes that "there is no fee-in-lieu payable on logs harvested from federally regulated lands."[922] Of course, Canada neglects to mention that Notice to Exporters No. 102, which was on the USDOC's administrative record and which Canada provided to the Panel, establishes that "a fee of $14.00 will be levied for each Federal export permit", which would include logs harvested from federally regulated land.[923] While this may be a small cost, it is yet another additional cost imposed on log suppliers that wish to export logs as a result of the export restraints put in place by the Government of Canada.

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

[921] Lumber Final I&D Memo, p. 142 (Exhibit CAN-010) (footnotes omitted, underline added). Note, the USDOC again cited the joint questionnaire response of the Government of Canada and the Government of British Columbia as evidence that approximately 58 percent of the logs exported from the province during the POI were under provincial jurisdiction. *See* Lumber Final I&D Memo, p. 142, footnote 849 (Exhibit CAN-010) (citing "QNR Response, Part 1 at LEP-8", which Canada has provided to the Panel as Exhibit CAN-049 (BCI)).

[922] Canada's Responses to the First Set of Panel Questions, para. 355.

[923] *See* Notice to Exporters, Export of Logs from British Columbia, Serial No. 102 (April 1, 1998), para. 7.1 (Exhibit CAN-069).

371. Sixth, Canada argues, concerning the possibility of sanctions under the federal EIPA, that "the critical point is that any exercise of authority that Canada may undertake under the EIPA is with respect to the conditions under which exporters may export logs—not with respect to the provision of logs."[924] Canada's argument is overly formalistic and misses the point. As noted earlier, the Appellate Body has explained that, "[i]n 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."[925] The federal legal penalty for exporting logs without authorization is a "form of threat or inducement" by the government for private log suppliers in British Columbia to comply with the law requiring that they supply logs to consumers in British Columbia, unless granted an exemption and export authorization. Under provincial and federal law, a log supplier in British Columbia must sell its logs – or at least attempt to sell its logs – to consumers in British Columbia. The application process for a surplus exemption explicitly requires that a log supplier attempt to sell its logs to consumers in British Columbia before an exemption can be approved and a federal export permit issued. If a log supplier fails to follow the procedure and exports logs without a federal export permit, the log supplier would face a serious legal penalty. The legal penalty is precisely the kind of "threat or inducement" evidencing "entrustment or direction" to which the Appellate Body was referring,[926] and that evidence supports the USDOC's conclusion.

372. Seventh, the Panel asked Canada to "respond to the United States' assertion questioning the existence of the [log export restraints] policy if it did not affect the market."[927] Canada avoids responding to the Panel's question. Canada attempts to turn the question around and argues again that the USDOC took an effects-based approach to the analysis of entrustment or direction.[928] As demonstrated above, though, Canadian interested parties introduced effects-based arguments in an attempt to establish that the log export restraints have no effect. The USDOC examined the effects of British Columbia's and Canada's log export restraints and discussed the arguments of the Canadian interested parties to explain why those arguments are unavailing and lack any foundation in the record evidence.[929] The United States raised the question during the first substantive meeting for the same purpose. If Canada's argument is that the log export restraints have no effect, then why are the purportedly ineffective log export restraints in place? If any log supplier in British Columbia truly is free to sell to whomever it chooses, whether inside or outside of British Columbia, then there should be no need for the laws and regulations establishing the log export restraints. Canada has avoided responding to the U.S. point, which is telling.

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[924] Canada's Responses to the First Set of Panel Questions, para. 356.

[925] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[926] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[927] *See* First Set of Panel Questions, question 124(ii).

[928] *See* Canada's Responses to the First Set of Panel Questions, para. 346.

[929] *See supra*, section IV.A.

373. Eighth, and finally, the United States reiterates that Canada's proposed approach to the examination of the USDOC's findings concerning the record evidence is flawed. Canada contends that many of the USDOC's factual findings are "really largely irrelevant" and "the Panel need not consider them at all."[930] Plainly, the approach Canada suggests would constitute error under Article 11 of the DSU. While the text of the Forest Act itself explicitly requires "Crown timber to be used in British Columbia" unless an exemption is granted,[931] and the Forest Act alone is sufficient to demonstrate that government action results in the entrustment or direction of private log suppliers to provide logs to consumers in British Columbia, the USDOC examined all of the evidence on the record and discussed various pieces of evidence in response to arguments made by Canadian interested parties that the Forest Act has no practical effect. The USDOC expressly found that "these obstacles, <u>when considered in their totality</u>, restrain log exports from the province."[932]

374. As reflected in the findings in prior reports:

> [A] panel reviewing a determination on a particular issue that is based on the "totality" of the evidence relevant to that issue must conduct its review on the same basis. In particular, the Appellate Body held that if an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination, rather than assessing whether each piece on its own would be sufficient to support that determination.[933]

Accordingly, "in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference."[934]

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[930] Canada's First Opening Statement (Day 2), para. 121. *See also* Canada's Responses to the First Set of Panel Questions, para. 351.

[931] British Columbia Forest Act, Part 10 "Manufacture in British Columbia" (p. 95 of the PDF version of Exhibit CAN-039).

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

[933] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52. *See also Japan – DRAMs (Korea) (AB)*, para. 131.

[934] *Japan – DRAMs (Korea) (AB)*, para. 131.

375. Canada's proposed approach to examining the USDOC's factual findings – in particular, Canada's suggestion that the Panel simply "not consider" or "not address" many of them[935] – is an invitation to err. The Panel should decline Canada's invitation.

D. Canada's Arguments Concerning the USDOC's Government Function Analysis Continue To Be Unavailing

376. The U.S. first written submission demonstrates that 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"[936] is a conclusion that an objective and unbiased investigating authority could reach.[937] The arguments Canada presents against the USDOC's determination in Canada's responses to the first set of Panel questions continue to lack merit.

377. Canada argues that the USDOC was "required to show … that the provision of logs was a function normally vested in the governments of B.C. and Canada",[938] but, Canada asserts, "British Columbia does not sell logs".[939] Canada misunderstands the requisite analysis under Article 1.1(a)(1)(iv) of the SCM Agreement.

378. Article 1.1(a)(1)(iv) of the SCM Agreement provides, in relevant part, that a "financial contribution" exists where "a government … entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." The relevant function at issue here is the provision of goods,[940] and that function is illustrated in Article 1.1(a)(1)(iii) of the SCM Agreement. Article 1.1(a)(1)(iii) provides that a "financial contribution" exists where "a government provides goods or services other than general infrastructure, or purchases goods". Thus, it is relevant to examine whether the function of providing goods would normally be vested in the Government of British Columbia.

379. British Columbia provides goods.[941] Canada does not deny that British Columbia provides goods. That alone might be sufficient under Article 1.1(a)(1)(iv) of the SCM

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[935] Canada's First Opening Statement (Day 2), para. 121; Canada's Responses to the First Set of Panel Questions, para. 351.

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

[937] *See* U.S. First Written Submission, paras. 599-606.

[938] Canada's Responses to the First Set of Panel Questions, para. 358.

[939] Canada's Responses to the First Set of Panel Questions, para. 359 (underline added).

[940] *See, e.g.*, Canada's Responses to the First Set of Panel Questions, para. 332.

[941] Record evidence establishes that the Government of British Columbia sells timber, and this is not disputed. *See, e.g.*, Lumber Preliminary Decision Memorandum, pp. 24-25 (Exhibit CAN-008). The Government of British Columbia may sell or provide other goods as well. Canada has not suggested that the Government of British Columbia does not sell goods.

Agreement to establish that the relevant function at issue "would normally be vested in the government" of British Columbia. But that alone was not the basis of the USDOC's determination.

380. Record evidence before the USDOC established that 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.[942] 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. As the USDOC explained, "logs are harvested from standing timber in forests."[943] Providing a good – timber – is unquestionably a function normally vested in the Government of British Columbia, which provides access to government-owned timber through a licensing system. Given the low degree of processing required to create a log from standing timber, control over (and provision of) standing timber is closely linked to control over (and provision of) logs. 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.[944]

381. Canada argues that the U.S. observation – that "the low degree of processing required to create a log from standing timber means that control over one is closely linked to control over the other" – is an "*ex post* rationalization" and "not based in any record evidence".[945] The United States does not intend with its observation to go beyond what the USDOC determined or what the evidence shows. It seems self-evident that a low degree of processing is required to create a log from standing timber. And again, the USDOC explained that "logs are harvested from standing timber in forests."[946] The United States, though, is not arguing that the Government of British Columbia provides logs. The point is that the Government of British Columbia provides goods, including most of the timber in British Columbia; timber is used to make logs, and logs are used to make softwood lumber products.

382. The U.S. first written submission discusses the terms of Article 1.1(a)(1)(iv) of the SCM Agreement.[947] As the U.S. first written submission explains, 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"

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

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

[944] *See* SCM Agreement, Art. 1.1(a)(1)(iv).

[945] Canada's Responses to the First Set of Panel Questions, para. 360.

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

[947] *See* U.S. First Written Submission, paras. 546-565.

implies that entrustment or direction is not limited to any particular official or formal program, but also includes broader "practices" in which governments engage.

383. Furthermore, the phrase "in no real sense" also suggests that Members were seeking to avoid circumvention. The practice of a private body need not necessarily be identical to a practice of the particular government at issue or even the practices normally followed by governments, but rather must be determined to, "in no real sense," differ from such practices – *i.e.*, not differ in any real sense.

384. 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."[948] 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."[949]

385. The implication of Canada's argument is that a government must itself have previously undertaken the particular function – *i.e.*, providing the specific good – for that function ever to be considered "normally … vested in the government." Canada's position is untenable and inconsistent with the terms of Article 1.1(a)(1)(iv) of the SCM Agreement.

386. The Government of British Columbia is, without question, normally vested with the function of providing goods, including, *inter alia*, providing timber. Canada makes no attempt to argue that this is not the case. Providing a similar good – logs – that is used for a similar purpose – the production of softwood lumber products – "in no real sense, differs from the practices normally followed" by the governments of British Columbia, Canada, and governments generally, many of which provide goods.

387. Canada refers to the "second prong of the test" in Article 1.1(a)(1)(iv) of the SCM Agreement and complains that the USDOC "provided no explanation for its finding that the provision of logs is a practice that differs in no real sense from practices normally followed by governments."[950] Canada asserts that "[t]he United States attempts to add to [the USDOC's] findings on an *ex post* basis, arguing that the last part of the test is met because many governments generally provide goods."[951] Canada continues to misunderstand Article 1.1(a)(1)(iv).

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

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

[950] Canada's Responses to the First Set of Panel Questions, para. 362 (underline added).

[951] Canada's Responses to the First Set of Panel Questions, para. 362.

388. As an initial matter, once again, the relevant function here is the provision of goods, not the provision of logs. Canada's focus on the specific good – logs – is incorrect.

389. Furthermore, Canada's understanding of Article 1.1(a)(1)(iv) as a box-checking exercise is incorrect. The Appellate Body has reasoned that Article 1.1(a)(1)(iv) "is intended to ensure that governments do not evade their obligations under the SCM Agreement by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself. In other words, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision."[952] It would be counterintuitive to interpret an anti-circumvention provision as creating obstacles for investigating authorities, such as a formalistic requirement to address issues that may not be relevant or necessary for the purpose of making a determination.

390. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body examined Article 1.1(a)(1)(iv) of the SCM Agreement as context for the interpretation of the term "public body" in Article 1.1(a)(1). The Appellate Body reasoned as follows:

> This brings us to the next contextual element, namely, the phrase "which would normally be vested in the government" in subparagraph (iv). As we see it, the reference to "normally" in this phrase incorporates the notion of what would ordinarily be considered part of governmental practice in the legal order of the relevant Member. This suggests that whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body. The next part of that provision, which refers to a practice that, "in no real sense, differs from practices normally followed by governments", further suggests that the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies.[953]

391. The Appellate Body's reasoning is relevant for the interpretation and application of Article 1.1(a)(1)(iv) itself. The phrase "and the practice, in no real sense, differs from practices normally followed by governments", added to the earlier part of the sentence, suggests that the classification and functions of entities within WTO Members generally may also bear on the question of whether the entrustment or direction of a private body should be deemed a "financial contribution". It may be that the government in question does not engage in the type of function at issue, and has never engaged in the type of function at issue – not even the general type of function, broadly understood. But that would not necessarily preclude scrutiny of the government's action under the SCM Agreement if "the practice, in no real sense, differs from

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[952] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 113.

[953] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297.

practices normally followed by governments". A further inquiry into the practices normally followed by other governments would be warranted. On the other hand, where it has been established that the government in question does engage in the type of function at issue, then it may not be necessary to examine the practices normally followed by other governments to come to the conclusion that the entrustment or direction of private bodies at issue should be deemed a financial contribution.

392. The relevant question, as the Appellate Body has put it, is whether "the government [has used] a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii)."[954] As the Appellate Body has reasoned:

> 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. The particular label used to describe the governmental action is not necessarily dispositive. … The determination of entrustment or direction will hinge on the particular facts of the case.[955]

393. Canada's suggestion that Article 1.1(a)(1)(iv) requires an investigating authority to check off each box or "prong"[956] in the provision is contrary to the flexible, case-by-case approach to the analysis of entrustment or direction that is contemplated under Article 1.1(a)(1)(iv).

394. Finally, Canada continues to argue that the presence for more than 125 years of log export restraints in British Columbia "in no way suffices to establish that the function of providing logs is normally vested in the governments of Canada and British Columbia, particularly in the absence of positive evidence that Canada or British Columbia provide logs to any industry."[957] Again, Canada misses the point. The USDOC found that the "long history of government management of the forest in British Columbia" supports the conclusion that the provision of logs is the type of function that would normally be vested in the government.[958] The USDOC did not find – and was not required to find – that the governments of British Columbia and Canada actually sell logs. But those governments control and provide timber – the input used to make logs, which is the input used to make softwood lumber products – and the control and management of the timber resource is without question a government function in British Columbia.

395. As the United States has shown, there is ample record evidence supporting the USDOC's determination 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

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[954] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[955] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116 (underline added; footnote omitted).

[956] Canada's Responses to the First Set of Panel Questions, para. 362.

[957] Canada's Responses to the First Set of Panel Questions, para. 361 (underline added).

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

been reached by any other unbiased or objective investigating authority examining the same evidence.

E. Canada's Claims under Articles 11.2 and 11.3 of the SCM Agreement Still Lack Merit

396. The U.S. first written submission demonstrates that there is no merit to Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement concerning the USDOC's initiation of a countervailing duty investigation into Canada's and British Columbia's log export restraints.[959] Canada's responses to the first set of Panel questions have only further confused and weakened Canada's case.

397. Canada now argues that its claims under Articles 11.2 and 11.3 of the SCM Agreement are simultaneously consequential ("[i]f the Panel agrees with Canada's main argument" that the log export restraints do not result in a financial contribution) and also not consequential ("if the Panel disagrees with Canada's primary argument").[960] Canada writes, "[t]o be clear, under both the primary and alternative arguments, there is no financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement."[961] That statement does not make Canada's position with respect to its claims under Articles 11.2 and 11.3 any clearer.

398. Article 11.2 of the SCM Agreement provides, *inter alia*, that:

> An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.

Article 11.2 then goes on to specify particular information that shall be contained in an application for a countervailing duty investigation.

399. Article 11.3 of the SCM Agreement provides that "[t]he authorities shall review 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."

400. The obligations in Articles 11.2 and 11.3 of the SCM Agreement concerning the initiation of a countervailing duty investigation are separate and apart from the obligations in Article 1.1(a)(1) of the SCM Agreement concerning the situations in which a "financial contribution" is deemed to exist. If an investigating authority were found to have acted

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[959] *See* U.S. First Written Submission, paras. 607-611.

[960] Canada's Responses to the First Set of Panel Questions, paras. 363-364.

[961] Canada's Responses to the First Set of Panel Questions, para. 365.

inconsistently with Article 1.1(a)(1), or any of its subparagraphs, it would not necessarily follow as a consequence that the investigating authority also acted inconsistently with the separate requirements in Articles 11.2 and 11.3, which, again, concern the contents of the application for a countervailing duty investigation and the investigating authority's review of 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.

401. Canada that has sought a finding from the DSB regarding alleged WTO-inconsistent action by the United States and, accordingly, Canada, as the complaining party, bears the burden of demonstrating that the United States acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement. Further, 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."[962] Canada has not even attempted to make the requisite showing. Canada seeks 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. As the United States has shown, 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.

402. Furthermore, even if the Panel were to find that the USDOC's financial contribution determination is inconsistent with Article 1.1(a)(1)(iv), it would not necessarily follow that the USDOC failed to properly review 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."[963] To justify initiation, "adequate evidence, tending to prove or indicating the existence of" a subsidy is required.[964] 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.[965]

403. As explained in the U.S. first written submission,[966] 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 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, and the petitioners

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

[963] SCM Agreement, Art. 11.3.

[964] *China – GOES (Panel)*, para. 7.55.

[965] *See China – GOES (Panel)*, para. 7.51.

[966] *See* U.S. First Written Submission, paras. 610-611.

supported their allegation with sufficient evidence that was reasonably available to them, including the British Columbia 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.[967]

404. An unbiased and objective investigating authority could have come to the same conclusion that the USDOC did that the evidence in the application was sufficient to justify the initiation of an investigation. Accordingly, Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement fail.

V. CANADA STILL HAS FAILED TO SHOW THAT THE USDOC DETERMINATIONS WITH RESPECT TO GRANTS PROVIDED FOR SILVICULTURE AND FOREST MANAGEMENT ARE INCONSISTENT WITH ARTICLES 1.1(A)(1)(I), 1.1(B), 14(D), 19.3, AND 19.4 OF THE SCM AGREEMENT

405. The USDOC found that the payments for silviculture and forest management to JDIL provided by New Brunswick and the payments for partial cut restrictions to Resolute provided by Quebec constitute financial contributions in the form of a direct transfer of funds. The USDOC also found that the payments provided by the provincial governments to the recipients conferred a benefit because they provided funds that otherwise would not have been received. As already demonstrated,[968] the USDOC's conclusions are such as an unbiased and objective investigating authority could have reached and are not inconsistent with Articles 1.1(a)(1)(i), 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement.

406. Canada argues that because the payments involve "reciprocal obligations," they necessarily constitute "purchases of services" and thus cannot be considered a "financial contribution", as that term is defined under Article 1.1(a)(1) of the SCM Agreement.[969] Canada also continues to contend that even if these payments are financial contributions as defined under Article 1.1(a), they conferred no benefit because the expenses that the recipients incurred for performing legally-required silviculture and forest management exceeded the payments they received.[970]

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[967] *See* Petition, pp. 116-131 (pp. 133-148 of the PDF version of Exhibit CAN-005); Petition Exhibit 93 (Petition Exhibit 93 is the text of the Forest Act, which Canada has placed before the Panel as Exhibit CAN-039); and Petition Exhibits 242-257 (Exhibit USA-010).

[968] *See* U.S. First Written Submission, paras. 612-667; U.S. First Opening Statement (Day 2), paras. 36-49; U.S. Responses to the First Set of Panel Questions, paras. 404-413.

[969] *See* Canada's First Opening Statement (Day 2), paras. 88-103; Canada's Responses to the First Set of Panel Questions, paras. 367-373.

[970] *See* Canada's First Opening Statement (Day 2), paras. 108-111.

407. Section V.A below demonstrates that the provincial governments provided payments for silviculture and forest management to the recipients absent any reciprocal obligation or expectation that anything would be provided to the government in return for the payments.

408. Section V.B demonstrates that these payments conferred a benefit to the recipients in the full amount of the payments made, because the recipients were "better off" than they otherwise would have been absent the payments for silviculture and forest management.

A. The Payments Provided by the Governments of New Brunswick and Quebec for Silviculture and Forest Management Did Not Involve Reciprocal Obligations on the Part of the Recipients

409. Governments generally establish through laws and regulations a host of obligations that businesses must comply with as part of their operational costs of doing business. Some of these legally-required obligations may safeguard employees in the workplace, others may protect the environment, while others may set production parameters. Failure to perform such legally-required obligations normally constitutes a violation of the law or regulation that established the obligations. Therefore, as demonstrated below, even where the Governments of New Brunswick and Quebec may decide to reduce the costs associated with a legally-required obligation, the performance of such an obligation by a business normally cannot be considered voluntary or reciprocal, because business operations conducted in the absence of this performance would likely violate the law or regulation that established the obligation.

1. The Evidence Demonstrated that New Brunswick Reduced the Costs JDIL Incurred for Silviculture and Forest Management without Getting Anything in Return

410. Canada is mistaken when it argues that "there is no evidentiary basis for the United States' claim that Irving was required to undertake license management and silviculture services as a condition for accessing Crown timber in New Brunswick."[971]

411. The Government of New Brunswick obligated JDIL to perform silviculture and forest management as a condition for providing JDIL access to Crown stumpage. Section 28(b) of the *Crown Lands and Forests Act* ("*CLFA*") required that JDIL enter into a forest management agreement with the Minister of the New Brunswick Department of Natural Resources.[972] Section 30(2) of the *CLFA* required JDIL to manage the Crown Lands described in its license in

[971] Canada's Responses to the First Set of Panel Questions, para. 367. Canada is also mistaken when it argues that "Irving voluntarily undertook … [silviculture and forest management] obligations as a matter of contract." Canada's Responses to the First Set of Panel Questions, para. 368.

[972] GNB Non-Stumpage QR, Exhibit NB-SVC-2 (*CLFA*, section 28(b)) (Exhibit CAN-242).

accordance with the forest management agreement, the *CLFA*, and any pertinent regulations.[973] Section 38(1) of the *CLFA* held JDIL "responsible for all expenses of forest management on Crown Lands described in his license."[974] Therefore, if JDIL wanted to cut trees from the Crown lands described in License 7,[975] it had to conduct and bear the expense of basic silviculture and forest management on the designated Crown lands.[976]

412. Canada is also mistaken in its contention that JDIL would not lose access to, and be unable to harvest from, the designated Crown lands if it failed to satisfy its silviculture and forest management obligations.[977] The Government of New Brunswick may terminate JDIL's forest management agreement and revoke its access and ability to harvest Crown timber "upon the breach … of any term, condition, requirement, obligation, direction or undertaking set out in this agreement."[978] New Brunswick further required JDIL to furnish a bond in the amount of approximately C$3.1 million as security for its performance of its forest management obligations.[979] Therefore, if JDIL failed to perform its silviculture and forest management obligations, it could lose access to Crown lands described in License 7 and forfeit the bond posted as security.

413. Canada's assertion that "it is inconsistent with commercial logic to assume that a for-profit company would incur the costs of managing the property of a third party for free"[980] ignores the fact that JDIL will only profit from the license to harvest timber on Crown lands if it harvests according to the terms set forth in that license. As Canada notes, "access rights alone are not valuable to Irving"[981] – "[t]he value of Crown land to Irving is the timber it harvests from

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[973] GNB Non-Stumpage QR, Exhibit NB-SVC-2 (*CLFA*, section 30(2)) (Exhibit CAN-242). The forest management agreement "set out the responsibilities of the Minister and the licensee for the management and use of Crown lands." GNB Non-Stumpage QR, Exhibit NB-SVC-2 (*CLFA*, section 29(1)) (Exhibit CAN-242).

[974] GNB Non-Stumpage QR, Exhibit NB-SVC-2 (*CLFA*, section 38(1)) (Exhibit CAN-242).

[975] JDIL has operated on New Brunswick provincial Crown land for over 50 years and is currently a licensee with respect to Licenses 6 and 7. 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).

[976] GNB Non-Stumpage QR, Exhibit NB-SVC-4 (JDIL's Forest Management Agreement, para. 13.1) (Exhibit CAN-250 (BCI)). *See also* U.S. First Written Submission, paras. 621-627. Canada's argument about JDIL's allocations as a sublicensee with respect to Licenses 1, 3, 5, and 9 is inapposite because the USDOC's subsidy determination concerns just the grant that JDIL received from New Brunswick with respect to the timber it harvested from the Crown lands described in License 7.

[977] *See* Canada's Responses to the First Set of Panel Questions, paras. 367-368.

[978] GNB Non-Stumpage QR, Exhibit NB-SVC-4 (JDIL's Forest Management Agreement, para. 14.9) (Exhibit CAN-250 (BCI)).

[979] JDIL QR, Exhibit STUMP-01, p. 11 (Exhibit CAN-262 (BCI)).

[980] Canada's First Opening Statement (Day 2), para. 104.

[981] Canada's Responses to the First Set of Panel Questions, para. 382.

it."[982] Therefore, the fact that JDIL did not own the Crown lands described in License 7 is not germane to the question before the Panel, because New Brunswick legally required JDIL to perform silviculture and forest management as a precondition to JDIL's ability to harvest timber from Crown land.

414. In sum, JDIL was legally responsible for performing and bearing the expense of silviculture and forest management. JDIL's performance of these legally-required obligations cannot be considered voluntary or reciprocal, because JDIL would have violated the law and the terms of its forest management agreement if it had harvested timber from the designated Crown lands without performing these obligations. Therefore, the USDOC appropriately found that the payments at issue 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.[983]

2. The Evidence Demonstrated that Quebec Reduced the Costs Incurred by Resolute for the Partial Cut Prescriptions without Getting Anything in Return

415. Canada is also mistaken when it argues that "Resolute is not 'required to undertake partial cut prescriptions as a condition to its access to and right to harvest Quebec provincial Crown timber'."[984]

416. The Government of Quebec obligated Resolute 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.[985] The regulations accompanying the *Sustainable Forest Development Act* ("*SFDA*") prohibit "any cutting without regeneration and soil protection."[986] This prohibition precludes holders of timber supply guarantees from harvesting timber using cost-efficient clear cutting techniques in certain harvest areas.[987] Timber in these areas must be harvested using partial cutting techniques such as "block cutting".[988] Indeed, as Canada acknowledged in its response to Panel question 129, "[i]f companies harvest

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[982] Canada's First Opening Statement (Day 2), para. 106.

[983] *See* Lumber Preliminary Decision Memorandum, pp. 67-68 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 183-186 (Exhibit CAN-010). *See also* U.S. First Written Submission, paras. 621-627.

[984] Canada's Responses to the First Set of Panel Questions, para. 369 (footnote omitted).

[985] *See* Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010).

[986] GOQ QR, Exhibit QC-STUMP-22 (*SFDA* Regulations, chapter A-18.1, r.7, section 89 of the regulation respecting standards of forest management for forests in the domain of the State) (Exhibit USA-075).

[987] GOQ QR, p. 18 (Exhibit CAN-204). *See* Lumber Final I&D Memo, p. 189 (Exhibit CAN-010).

[988] GOQ QR, Exhibit QC-STUMP-22 (*SFDA* Regulations, chapter A-18.1, r.7, section 1 of the regulation respecting standards of forest management for forests in the domain of the State. The *SFDA* regulations define "block cutting" 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.") (Exhibit USA-075).

these blocks, they must perform the partial cut …,"[989] meaning that the only way for Resolute to avoid this legally required obligation is to forgo cutting harvest timber from such a block.[990] Finally, Quebec may either suspend or cancel a timber supply guarantee "if the guarantee holder fails to perform the obligations set out in this Act or the guarantee."[991] Therefore, if Resolute failed to perform forest development prescribed by Quebec, including the use of partial cutting techniques for certain harvest blocks, it could lose access to Crown lands covered by those obligations.

417. In sum, Resolute was legally responsible for performing and bearing the expense of forest development prescribed by Quebec, including partial cuts on certain harvest blocks. Resolute's performance of these legally-required obligations cannot be considered voluntary or reciprocal, because Resolute would have violated the law if it had harvested timber from areas in which it was required to use partial cutting techniques without performing these obligations. Therefore, the USDOC appropriately found that the payments at issue 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.

3. Canada's Effort to Transform the Grants for Silviculture and Forest Management into Purchases by the Provincial Governments Grossly Distorts the Evidentiary Record

418. Buyers and sellers choose to engage in purchase transactions. The dictionary defines the term "purchase," in part, as "the action or an act of buying."[992] The action or act of buying (and conversely selling) involves choice; *i.e.*, a choice by the buyer to buy something that is possessed by a seller and a choice by the seller to sell to the buyer the something that it possesses.

419. JDIL had no choice but to enter into the transaction to perform silviculture and forest management on the Crown lands described in License 7. The Government of New Brunswick obligated JDIL to provide silviculture and forest management as part of JDIL's purchase of standing timber from New Brunswick. As a licensee, JDIL was legally responsible for all expenses related to silviculture and forest management on the designated Crown lands. Since JDIL had no choice about whether it wanted to enter into this transaction or not, this transaction did not involve the action or an act of buying silviculture and forest management.

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[989] Canada's Responses to the First Set of Panel Questions, para. 369.

[990] *See* Canada's Responses to the First Set of Panel Questions, paras. 370-371.

[991] GOQ OR, Exhibit QC-STUMP-20 (*SFDA*, section 109) (Exhibit CAN-169). *See also* GOQ OR, Exhibit QC-STUMP-20 (*SFDA*, section 110) (Exhibit CAN-169).

[992] Definition of "purchase" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2418, part 6 *spec* a ("Acquisition by payment of money or some other valuable equivalent; the action or an act of buying") (Exhibit USA-076).

420. Resolute also had no choice but to enter into the transactions involving the use of a partial cutting technique on certain harvest stands. The Government of Quebec obligated Resolute to use a partial cutting technique as part of Resolute's purchase of standing timber from Quebec. As a timber supply guarantee holder, Resolute was legally responsible for the added expenses associated with using a partial cutting technique on the designated Crown lands. Since Resolute had no choice about whether it wanted to enter into this transaction or not, this transaction did not involve the action or act of buying the use of a partial cutting technique.

421. That the provincial governments extended to JDIL and to Resolute the opportunity to qualify for grants to reduce some of the costs incurred with respect to silviculture and forest management does not transform these transactions into the action or an act of buying. Governments normally set requirements that entities must meet before they qualify and become a recipient of a grant. For example, grants for conducting research often constitute financial contributions under Article 1.1(a)(i) of the SCM Agreement. To become eligible for such a grant, an entity must agree to perform the research activity specified by the grant. However, that the entity engages in the research activity so as to become eligible for the grant, and may not have otherwise done so absent the grant, does not transform the grant into a purchase, even if the government profits from the research performed by the grant recipient.

422. In sum, Canada has failed to make out its claims. Canada does not challenge the USDOC's determination that the provincial grants for silviculture and forest management exist as transactions distinct from the provision of stumpage.[993] Contrary to Canada's arguments, there was no exchange of rights and obligations in respect of the provincial grants for silviculture and forest management, because the grants involved the conveyance of funds from the provincial governments absent a reciprocal obligation on the part of the recipients. None of Canada's arguments establish that the USDOC's determination regarding the provincial grants for silviculture and forest management were inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement. The USDOC's determinations are such as could have been reached by an unbiased and objective investigating authority and thus are not inconsistent with Article 1.1(a)(1)(i).

B. Canada Has Failed to Establish that the USDOC's Benefit Findings are Inconsistent with Article 1.1(b) of the SCM Agreement

423. Canada continues to argue that no benefit could have been conferred as a result of the provincial silviculture and forest management payments because the payments did not fully recompense JDIL and Resolute for the costs they incurred in performing legally-required silviculture and forest management.[994]

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[993] *See* U.S. First Written Submission, paras. 638, 645-646. *See also 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).

[994] *See* Canada's First Opening Statement (Day 2), paras. 109-110.

424. Canada's argument is nonsensical because it is indisputable that JDIL and Resolute were "better off" than they otherwise would have been absent the provincial silviculture and forest management payments.[995] As the panel in *EC – Large Civil Aircraft* reasoned, "where a subsidy takes the form of a grant, the amount of the financial contribution and the amount of the benefit are the same."[996] The silviculture and forest management payments thus conferred a benefit in the full amount of the payments because the payments intrinsically made JDIL and Resolute better off than they would otherwise have been absent the payments.[997] Canada has failed to demonstrate that the USDOC acted in a manner inconsistent with an obligation set out in the SCM Agreement when it declined to offset the benefit conferred by any costs JDIL and Resolute may have incurred in the performance of legally-required silviculture and forest management.

425. Finally, Canada has explained that it "no longer makes any claims pursuant to Article 14(d) with respect to the PCIP, license management, and silviculture payments."[998] Therefore, it is not necessary for the Panel to issue any findings or recommendations under Article 14(d) of the SCM Agreement with respect to these matters.

VI. CANADA STILL HAS FAILED TO SHOW THAT THE USDOC'S DETERMINATIONS THAT THE PROVINCIAL ELECTRICITY SUBSIDIES CONFERRED BENEFITS ON THE RECIPIENTS ARE 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

426. Canada continues to put forward arguments about the provincial electricity subsidies that rely on fictional narratives or flawed legal analysis.

427. For example, Canada argues that "the government mandates that direct BC Hydro and Hydro-Quebec to include biomass-based electricity in their supply mixes mean that this type of electricity is not substitutable with other kinds of electricity in these provinces at the wholesale level, or critically with electricity in the retail markets."[999] Canada also continues to assert that an investigating authority can dispense with the requirement to define a benchmark under Article 14(d) of the SCM Agreement and simply examine the terms and conditions of the financial

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[995] *See 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").

[996] *EC – Large Civil Aircraft (Panel)*, para. 7.1969, footnote 5724.

[997] *See* U.S. First Written Submission, para. 653 ("Based on the ordinary meaning of 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." (footnote omitted)).

[998] Canada's Responses to the First Set of Panel Questions, para. 387.

[999] Canada's First Opening Statement (Day 2), para. 141. *See also* Canada's First Opening Statement (Day 2), paras. 138-140.

contribution to see if it conferred a benefit.[1000] Finally, Canada asserts that the United States "fundamentally misunderstands the LIREPP, and … ignores the record evidence relating to the purchases of electricity by NB Power at the LIREPP renewable energy price."[1001] Canada's arguments are without merit.

428. Section VI.A below demonstrates that neither British Columbia nor Quebec intervened in the supply side of the electricity market to create renewable energy markets that otherwise would not exist in such a market, but rather intervened through countervailable subsidy programs designed to support certain players in already existing and well-established renewable energy markets.

429. Section VI.B demonstrates that every comparison under Article 14(d) of the SCM Agreement requires a benchmark in order to identify the artificial advantage resulting from the government's financial contribution.

430. Section VI.C demonstrates that the Net LIREPP adjustment is provided to participating Irving companies, including JDIL, as credits applicable to the companies' total electricity charges after NB Power purchases electricity from the Irving companies, thereby comprising revenue foregone.[1002]

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

431. Canada is mistaken in its arguments concerning the biomass electricity markets in British Columbia and Quebec.[1003]

432. In British Columbia, biomass-generated electricity is substitutable with clean and renewable electricity in both the wholesale and retail electricity markets. The *Clean Energy Act* defined "clean or renewable resource" to mean "biomass, biogas, geothermal heat, hydro, solar, ocean, wind or any other prescribed resource."[1004] The *Clean Energy Act* thus did not distinguish biomass from resources that could be used to achieve the government's objective "to generate at least 93% of the electricity in British Columbia from clean or renewable resources

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[1000] Canada's Responses to the First Set of Panel Questions, para. 401.

[1001] Canada's Responses to the First Set of Panel Questions, para. 407.

[1002] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010). The USDOC verified that the credits reflected on the monthly electricity bills are based on the electricity sales of the previous month. *See* JDIL Verification Report, p. 18 (CAN-241 (BCI)). *See also* LIREPP Regulation, §§ 4(1) and 4(2) (Exhibit CAN-439) (the regulations for the LIREPP show that the government must ensure that the participating large industrial enterprise's electricity bills are reduced (via an invoice credit) based on the target discount).

[1003] Canada's First Opening Statement (Day 2), para. 141. *See also* Canada's First Opening Statement (Day 2), paras. 138-140.

[1004] *Clean Energy Act*, 1(1) Definitions (Exhibit CAN-403).

…."[1005] The 2007 BC Energy Plan further reported that, as of 2004, over 93 percent of the electricity generated in British Columbia originated from renewable resources (including biomass), which confirms that the clean and renewable energy market in British Columbia was already well established as of the time period covered by the USDOC's investigation.[1006] The Electricity Purchase Agreements ("EPA") process promoted the purchase of electricity mostly from existing renewable energy markets[1007] and from renewable energy operating facilities already in existence.[1008] Lastly, BC Hydro confirmed that it does "not distinguish between electricity supply sources (*e.g.*, electricity generated from biomass vs. hydro, wind or natural gas)."[1009] Therefore, while British Columbia may have sought as part of the EPA process to procure new energy from biomass generation resources as part of its overall effort to procure new energy from clean and renewable resources, it did so to support certain players in the already well-established renewable energy market and not to create a new market.

433. Similarly in Quebec, biomass-based electricity is also substitutable with clean and renewable electricity in both the wholesale and retail electricity markets. As of 2015, over 99 percent of the electricity generated in Quebec originated from renewable resources (including biomass), which confirms that the renewable energy market in Quebec was already well established as of the time period covered by the USDOC's investigation.[1010] Indeed, the Quebec Energy Strategy 2006-2015 notably excludes biomass from its discussion of "New Energy Technologies to Prepare the Future," focusing instead on "the development of renewable fuels [*i.e.*, ethanol and biodiesel], geothermal energy, passive and active solar energy and hydrogen fuels."[1011] Quebec mostly promoted the purchase of electricity from renewable energy facilities

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[1005] *Clean Energy Act*, Part 1, 2(c) British Columbia's energy objectives (Exhibit CAN-403).

[1006] *See* The BC Energy Plan: A Vision for Clean Energy Leadership, p. 26 (Exhibit CAN-402); GBC QR, BC Volume II, p. 32 (Exhibit CAN-395). British Columbia already had "50 per cent of Canada's biomass electricity generating capacity." The BC Energy Plan: A Vision for Clean Energy Leadership, p. 18 (Exhibit CAN-402).

[1007] *See* GBC QR, BC Volume II, pp. 62-63 (Exhibit CAN-395) (most of BC Hydro's contractual commitments under the EPA process – 68 percent – were with hydroelectric facilities).

[1008] *See* GBC QR, BC Volume II, p. 33 (Exhibit CAN-395) (as of October 2015, of the 128 EPAs, 105 – or 82 percent – were with facilities already in operation; only 23 – or 18 percent – were with facilities in development).

[1009] BC QR Volume II, p. 49 (Exhibit CAN-395).

[1010] *See* Hydro-Quebec Annual Report, p. 3 (Exhibit CAN-437) ("Our electricity—more than 99% of which is produced from a clean, renewable source …."). *See also* Quebec Energy Strategy 2006-2015, p. 6 (Exhibit CAN-429) ("Practically all of Québec's electricity is generated from hydroelectricity – a renewable energy source that creates almost no greenhouse gas emissions.… Wind energy is another form of renewable energy widely available in Québec …."); *ibid.*, p. 10 (indicating that hydroelectricity makes up to 94 percent of all of Quebec's electricity capacity).

[1011] Quebec Energy Strategy 2006-2015, p. 60 (Exhibit CAN-429). *See also ibid.*, pp. 60-73. The only reference to biomass appears on page 72 in a list of other renewable energy resources, where Quebec discusses the Regie de l'energie's 2006 decision to encourage self-generating electricity, "whereby certain clients … give their surplus self-generated energy to Hydro-Québec and receive a reduction of their electricity invoice in return. Acceptable renewable energy sources include hydroelectricity, wind energy, photovoltaics, biogas, forest biomass and

already in existence;[1012] in fact, Resolute's PAE 2011-01 agreements with Hydro-Quebec involved already-existing forest biomass cogeneration power plants.[1013] Quebec also promoted the purchase of electricity mostly from existing renewable energy markets.[1014] Lastly, Quebec specifically reported that, from its perspective, "there is no distinction between sources of electricity generated."[1015] Therefore, Quebec did not intervene in the marketplace to create a renewable energy market that otherwise would not exist but for the PAE 2011-01 process, but rather intervened through Power Purchase Agreements ("PPAs") to support certain players in renewable energy markets that already existed in Quebec.

434. Canada's other related arguments have no bearing on a benefit analysis under Article 14(d) of the SCM Agreement. For example, Canada's statement about the high cost of production associated with the generation of electricity from biomass[1016] is a *non sequitur*. First, it is wrong for Canada to aver based on West Fraser's decision to build biomass facilities that the costs associated with the generation of electricity from biomass are generally higher than the costs associated with other methods of generation. In fact, more broad-based evidence shows that the estimated cost to generate electricity from biomass is similar to the estimated cost to generate electricity from other renewable resources, including run-of-river small hydro and wind.[1017] And, as already noted, the Tolko and Resolute facilities existed before they received provincial electricity subsidies. In sum, there is no support in the record for Canada's argument that "the relative newness of [certain] biomass facilities"[1018] supports the proposition that the provinces sought to create a new energy market.

435. Canada's statement about the low volume of biomass-generated electricity in the electricity blends sold by the provinces,[1019] including its "mixed nuts" analogy,[1020] is also a *non sequitur*. As the USDOC noted in the final issues and decision memorandum:

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geothermal energy – for electricity production only." Quebec Energy Strategy 2006-2015, p. 72 (Exhibit CAN-429).

[1012] *See* GBC QR, BC Volume II, p. 33 (Exhibit CAN-395) (as of December 31, 2015, most of the long-term contracts awarded to Hydro-Quebec Distribution – 53 contracts or 71 percent – were with facilities already in service; only 22 – or 29 percent – were with facilities under development).

[1013] *See* Resolute's QR Section III, p. 56 (Exhibit CAN-434 (BCI)).

[1014] *See* GOQ QR, Volume III-a, p. 4 (Exhibit CAN-424 (BCI)) (most of the long-term contracts awarded to Hydro-Quebec Distribution – 68 percent – were with hydroelectric and wind facilities).

[1015] GOQ QR, Volume III-a, p. 12 (Exhibit CAN-424) (BCI). *See also* Lumber Final I&D Memo, p. 172 (Exhibit CAN-010).

[1016] *See* Canada's Responses to the First Set of Panel Questions, para. 393.

[1017] *See* The BC Energy Plan: A Vision for Clean Energy Leadership, p. 25 (Exhibit CAN-402).

[1018] Canada's Responses to the First Set of Panel Questions, para. 393.

[1019] *See* Canada's Responses to the First Set of Panel Questions, para. 394.

[1020] Canada's Responses to the First Set of Panel Questions, para. 395.

> 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.[1021]

In other words, in reality, there are no mixed nuts in Canada's analogy; just nuts that are all physically alike and fungible.

436. 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 have reached.[1022] Similarly, the USDOC's conclusion that Hydro-Quebec's purchase of electricity conferred a benefit on Resolute is also one an unbiased and objective investigating authority could have reached.[1023] Canada has failed to establish that the United States acted inconsistently with its obligations under Articles 1.1(b) and 14(d) of the SCM Agreement.

B. Canada Has Failed to Demonstrate that the Benchmarks Selected by the USDOC to Measure the Provincial Electricity Subsidies are Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

437. There is no legal support for Canada's contention that "[n]ot every comparison under Article 14(d) [of the SCM Agreement] requires a benchmark."[1024]

438. 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." These conditions, which "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices,"[1025] establish a baseline standard, or benchmark, used to determine whether the recipient is "'better off' than it would otherwise have been, absent … [a financial] contribution"[1026] (*i.e.*, whether a "benefit" has been conferred pursuant to Article 1.1 of the SCM Agreement). Article 14(d) does not specify the benchmark to be used when determining the adequacy of remuneration, so long as, in the first instance, the benchmark is "connected with the prevailing market conditions in the country of provision."[1027] However, "the *primary* benchmark, and therefore the *starting point* of the

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[1021] Lumber Final I&D Memo, p. 167 (Exhibit CAN-010)

[1022] *See* U.S. First Written Submission, paras. 674-686.

[1023] *See* U.S. First Written Submission, paras. 687-697.

[1024] Canada's Responses to the First Set of Panel Questions, para. 401.

[1025] *US – Carbon Steel (India) (AB)*, para. 4.150.

[1026] *Canada – Aircraft (AB)*, para. 157.

[1027] *US – Carbon Steel (India) (AB)*, para. 4.159. 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." *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 89). Also, the reference to

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."[1028] Article 14(d) should therefore be interpreted to achieve an appropriate comparison of the financial contribution to the marketplace, and as such, a comparison source – a benchmark – will always be needed to ascertain if the financial contribution results in an artificial advantage.

439. The Appellate Body report in *US – Large Civil Aircraft (Second Complaint)*, on which Canada relies in part,[1029] supports the U.S. position that every comparison under Article 14(d) requires a benchmark that identifies the artificial advantage resulting from a government's financial contribution. The Appellate Body in *US – Large Civil Aircraft (Second Complaint)* found that "US law constrains NASA's and the USDOD's ability to negotiate ownership over any intellectual property developed under the relevant contracts and agreements" (*i.e.*, "there is no bargaining over the ownership of intellectual property rights").[1030] The Appellate Body defined a benchmark to evaluate this constraint, specifically "a transaction between two market actors, [where] the party undertaking the research would have to bargain to obtain ownership of any intellectual property."[1031] When the Appellate Body compared its benchmark against the facts, it found that "the party undertaking research commissioned by NASA or the USDOD—in this case, Boeing—obtains ownership rights over intellectual property that it would otherwise have had to bargain for if the counterparty were a market actor."[1032] For this reason, when compared against the market benchmark, the arrangement in question conferred a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement.[1033] Therefore, while the Appellate Body did not look to prices for purposes of its comparison between the financial

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"any" method in the chapeau of Article 14 implies that more than one method is available to investigating authorities for purposes of calculating the benefit to the recipient. *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 91).

[1028] *US – Carbon Steel (India) (AB)*, para. 4.154 (italics in original). *See also US – Softwood Lumber IV (AB)*, para. 90.

[1029] *See* Canada's Responses to the First Set of Panel Questions, para. 402.

[1030] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 661. The Appellate Body found that NASA and the USDOD could not "obtain title to any inventions discovered as part of the work conducted under the NASA procurement contracts and USDOD assistance instruments." *US – Large Civil Aircraft (Second Complaint)*, para. 661 (footnote omitted).

[1031] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 661.

[1032] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 661.

[1033] *See US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 662, 666. According to the Appellate Body, "[h]ad the Panel sought to estimate the amount of the benefit, it would have had to focus on the advantage conferred on Boeing as compared to what it would have obtain in a market transaction." *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 691. The Appellate Body found that the Panel's failure to do so may not have constituted legal error because that dispute involved an adverse effects claim and the Appellate Body had previously stated that a "'precise, definitive quantification of the subsidy is not required' for purposes of a serious prejudice analysis." *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 697 (quoting *US – Upland Cotton (AB)*, para. 467).

contribution and marketplace transactions, it did define a benchmark separate from the financial contribution.

440. The view of the panel in *US – Supercalendered Paper* also should not be read as broadly as Canada suggests.[1034] The panel in *US – Supercalendered Paper* did say that it did "not read the Appellate Body as requiring the use of a benchmark for the purpose of Article 14(d)."[1035] However, this statement is in response to the argument that the Appellate Body in *US – Softwood Lumber IV* framed this requirement in paragraph 89 of its report.[1036] The panel thus is only voicing its opinion about one paragraph in one Appellate Body report, as is evident from the next sentence, where the panel opines that "[t]he Appellate Body was simply addressing the type of benchmark … that could be used, without considering whether or not a benchmark had to be used."[1037] And unlike the finding of the panel in *US – Supercalendered Paper*, the evidence here confirms that the USDOC did fully consider whether the prices resulting from New Brunswick's EPA process[1038] or Quebec's Merrimack study[1039] should be used as benchmarks.

441. The United States otherwise fundamentally disagrees with Canada's argument, and the support Canada tries to draw from the panel report in *US – Supercalendered Paper*, that the adequacy of remuneration under Article 14(d) of the SCM Agreement can be determined in the absence of a benchmark. "[T]he word 'benefit,' as used in Article 1.1(b), implies some kind of comparison."[1040] A "comparison" requires at least two separate and independent objects before it can be determined how one object is similar or dissimilar to the other. According to the Appellate Body, "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[1041] Evidence purporting to validate that a financial contribution is based on market principles thus cannot, in and of itself, demonstrate that the contribution is consistent with prevailing market

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[1034] *See* Canada's Responses to the First Set of Panel Questions, para. 403.

[1035] *US – Supercalendered Paper (Panel)*, para. 7.76, footnote 161. The panel report in *US – Supercalendered Paper* has not yet been adopted by the DSB.

[1036] *See US – Supercalendered Paper (Panel)*, para. 7.76, footnote 161.

[1037] *US – Supercalendered Paper (Panel)*, para. 7.76, footnote 161.

[1038] *See* U.S. First Written Submission, paras. 676-678, 684. *See also* Lumber Final I&D Memo, pp. 163-164 (Exhibit CAN-010) (the USDOC reviewed arguments made both by respondents and the petitioner as to why the prices from the EPA process should or should not be used as a benchmark).

[1039] *See* U.S. First Written Submission, paras. 689-690, 696. *See also* Lumber Final I&D Memo, pp. 170-171 (Exhibit CAN-010) (the USDOC reviewed arguments made both by respondents and the petitioner as to why the Merrimack study should or should not be used as a benchmark).

[1040] *Canada – Aircraft (AB)*, para. 157.

[1041] *Canada – Aircraft (AB)*, para. 157. *See also US – Large Civil Aircraft (Second Complaint)*, para. 662 (quoting *Canada – Aircraft (AB)*, para. 157); *EC – Large Civil Aircraft (AB)*, para. 705 (quoting *Canada – Aircraft (AB)*, para. 157); *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 93).

conditions under Article 14(d) of the SCM Agreement. A comparison must take place whereby the financial contribution is compared to a market-determined transaction for the same or similar goods or services that is separate and independent from the financial contribution.[1042] There is simply no other way to ascertain if the financial contribution is reflective of the prevailing market conditions in which such goods or services would otherwise be exchanged.

442. Canada's interpretation of Article 14(d) of the SCM Agreement is completely at odds with the concept of benefit. The trade-distorting potential of a financial contribution cannot be identified by comparison to prices determined by that very financial contribution. In contrast, the USDOC provided a reasoned and adequate explanation for its selection of the price at which BC Hydro and Hydro-Quebec sold electricity to the recipients as the benchmark to compare against the price at which BC Hydro and Hydro-Quebec purchased electricity from the recipients.[1043] The USDOC's conclusion is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it. Therefore, the Panel should find that Canada has failed to establish that the United States acted inconsistently with its obligations under Articles 1.1(b) and 14(d) of the SCM Agreement.

C. The USDOC's Determination Concerning the Benefit Conferred 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

443. Canada asserts that the United States "fundamentally misunderstands the LIREPP, and … ignores the record evidence relating to the purchases of electricity by NB Power at the LIREPP renewable energy price."[1044] According to Canada, the LIREPP "credits represent *money owed* to Irving enterprises for renewable electricity that they supplied and that NB Power purchased under the LIREPP Agreement."[1045]

444. Canada's arguments continue to be unavailing. Article 1.1(b) of the SCM Agreement provides that the benefit associated with the "revenue foregone" is the amount of revenue not collected, *i.e.*, the "cash that [the recipient] can keep in its account, rather than spending on its …

[1042] *See Canada – Aircraft (AB)*, para. 158 (finding that Article 14 of the SCM Agreement supports the Appellate Body's "view that the marketplace is an appropriate basis for comparison").

[1043] *See* U.S. First Written Submission, paras. 674-697. Indeed, as Canada itself explained in its counter-memorial before the International Centre for Settlement of Investment Disputes, the benchmark selected by the USDOC appropriately identified whether the provincial electricity subsidies placed the recipients in a more advantageous position than would have been the case but for these subsidies. *See* Government of Canada Counter-Memorial, ICSID Case No. ARB(AF)/12/3, para. 91 (Aug. 22, 2014) (excerpted) (Exhibit USA-077) ("the financial incentive provided to the self-generator by the EPA corresponds to the difference between the price offered for the self-generated energy under the EPA and the relatively low price of electricity supplied by BC Hydro") (Canada's complete Counter-Memorial is available online at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2181/DC5119_en.pdf).

[1044] Canada's Responses to the First Set of Panel Questions, para. 407.

[1045] Canada's First Opening Statement (Day 2), para. 147 (italics in original).

bill."[1046] In this regard, the Appellate Body has reasoned that "cash that the recipient may keep in its accounts as a result of tax credits and other forms of revenue forgone, are normally obtained after the recipient has become entitled to receive them or has carried out the eligible activity."[1047] Even in the arguments Canada presents,[1048] the Net LIREPP adjustment is provided to participating Irving companies, including JDIL, as credits applicable to the companies' total electricity charges after NB Power purchases electricity from the Irving companies.[1049] An unbiased and objective investigating authority therefore could conclude that "while the program does encompass, in part, the purchase of a good or service, the credits reduce the participating Irving Companies' monthly electricity bills,"[1050] thereby comprising revenue foregone.

445. The fact that the LIREPP involves NB Power purchasing electricity from the participating Irving companies – a fact recognized by the USDOC[1051] – does not mean, as Canada suggests,[1052] that the USDOC erred in finding that the Net LIREPP adjustment is a financial contribution in form of revenue foregone as defined under Article 1.1(a)(1)(ii) rather than the purchase of a good as defined under Article 1.1(a)(1)(iii). As the Appellate Body noted in *Canada – Renewable Energy*:

> transactions may be complex and multifaceted. This may mean that different aspects of the same transaction may fall under different types of financial contribution. It may also be the case that the characterization exercises does not permit the identification of a single category of financial contribution and, in that situation, … a transaction may fall under more than one type of financial contribution.[1053]

Therefore, even if the Panel were to find that the LIREPP involved the purchase of a good, such a finding would not exclude the possibility that the LIREPP also constitutes a financial

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[1046] *US – Washing Machines (Panel)*, para. 7.303.

[1047] *US – Washing Machines (AB)*, para. 5.272.

[1048] *See* Canada's Responses to the First Set of Panel Questions, para. 408.

[1049] The USDOC verified that the credits reflected on the monthly electricity bills are based on the electricity sales of the previous month. *See* JDIL Verification Report, p. 18 (CAN-241 (BCI)). *See also* LIREPP Regulation, §§ 4(1) and 4(2) (Exhibit CAN-439) (the regulations for the LIREPP show that the government must ensure that the participating large industrial enterprise's electricity bills are reduced (via an invoice credit) based on the target discount).

[1050] Lumber Final I&D Memo, p. 213 (Exhibit CAN-010).

[1051] *See* Lumber Final I&D Memo, pp. 212-213 (Exhibit CAN-010).

[1052] *See* Canada's Responses to the First Set of Panel Questions, para. 409; Canada's First Written Submission, paras. 1096-1118.

[1053] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.120 (referencing a situation described in the Appellate Body report in *US – Large Civil Aircraft (Second Complaint)*).

contribution in form of revenue foregone as defined under Article 1.1(a)(1)(ii) of the SCM Agreement.

446. 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."[1054] 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."[1055] The credit thereby decreases the amount of NB Power's revenue as a Crown corporation, thereby comprising revenue foregone.[1056] The USDOC's conclusions are such as an unbiased and objective investigating authority could have reached and thus are not inconsistent with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement.

VII. CANADA STILL HAS FAILED TO ESTABLISH THAT THE USDOC'S ATTRIBUTION OF PROVINCIAL ELECTRICITY SUBSIDIES TO PRODUCERS OF SOFTWOOD LUMBER IS INCONSISTENT WITH ARTICLES 10, 19.1, 19.3, AND 19.4 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

447. A Member's investigating authority may examine a subsidy to a recipient and determine that it is appropriate to treat that subsidy as essentially "untied" – *i.e.*, not tied to a particular product – for attribution purposes.[1057] 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.[1058] As Canada previously has noted:

> In the case of an untied cash subsidy, because money is fungible, the assumption is that a producer receiving the subsidy would

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[1054] Lumber Final I&D Memo, p. 212 (Exhibit CAN-010).

[1055] Lumber Preliminary Decision Memorandum, pp. 79-80 (Exhibit CAN-008) (footnote omitted).

[1056] *See* U.S. First Written Submission, paras. 702-710; U.S. First Opening Statement (Day 2), paras. 60-64.

[1057] *See, e.g.*, *US – Washing Machines (AB)*, para. 5.273; *US – Upland Cotton (Panel)*, para 7.644; *US – Softwood Lumber IV (Panel)*, para. 7.116.

[1058] GATT 1994, Art. VI:3; SCM Agreement, Art. 10, footnote 36 ("The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.").

> spread the total amount of the subsidy across the total volume of production. Accordingly, a rational and relatively easy way of determining the subsidy per unit rate would be to divide the total amount of the subsidy by the total volume of the recipient's sales.[1059]

A Member thus may find that a subsidy that is not tied to the production or sale of a particular product is essentially "untied" when calculating the rate of subsidization, and may divide the total benefit conferred by the subsidy by the recipient's combined sales of all products.[1060]

448. Alternatively, an investigating authority may determine that it is appropriate to attribute a subsidy to a particular product. A Member may examine a subsidy and determine that there is a product-specific "tie," for example, where the nature and structure of the subsidy reveal bestowal upon a particular product. As Canada also has noted:

> In the case of a tied subsidy, as paragraph 3 of Annex IV [of the SCM Agreement] sets out, the amount of a subsidy specifically earmarked for the production or sale of a product should be the amount divided by the value of that product, to yield a per unit rate.[1061]

Based on such a determination, the investigating authority may allocate the subsidy that has been specifically earmarked for the production or sale of a product to that product and, in calculating the rate of subsidization, divide the benefit by only the sales of the product that is "tied" to that subsidy.

449. As Canada and previous reports have noted, Annex IV of the SCM Agreement (though now lapsed) provides contextual guidance with respect to both approaches.[1062] Paragraphs 2 and 3 of Annex IV helped inform the calculation that would form the basis for the presumption in

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[1059] *US – Softwood Lumber IV (Panel)*, Annex B-1, Canada Responses to Questions from the Panel at the Second Meeting, para. 48.

[1060] The United States would like to clarify that the U.S. response to Panel question 144 was not meant to imply that a Member's investigating authority never needs to perform an analysis of the subsidized products if an alleged subsidy was provided to a corporation that produces several products. *See* U.S. Responses to the First Set of Panel Questions, paras. 431-432. An investigating authority would first analyze whether a subsidy is tied to a product or untied. If the investigating authority determines that the alleged subsidy is not tied to the production or sale of a particular product, it may find that the subsidy is effectively "untied" and divide the total benefit conferred by the subsidy by the recipient's combined sales of all products.

[1061] *US – Softwood Lumber IV (Panel)*, Annex B-1, Canada Responses to Questions from the Panel at the Second Meeting, para. 47 (underline added).

[1062] *See US – Upland Cotton (Panel)*, para. 7.1186. *See also EC – Large Civil Aircraft (Panel)*, para. 7.1226 (although expired, Article 8.2(b) of the SCM Agreement provides important context for interpreting other provisions of the SCM Agreement).

Article 6.1(a) that a five percent subsidization rate causes serious prejudice.[1063] Paragraph 2 of Annex IV provides the general rule that, for untied subsidies, the *ad valorem* subsidization rate is based on the total value of the recipient's sales.[1064] In contrast, paragraph 3 of Annex IV provides that "[w]here the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted."[1065] In other words, "where a 'subsidy [is] tied to the production or sale of a given product,' the amount of that subsidy would be compared only to the value of a firm's sales of that product."[1066]

450. The Appellate Body in *US – Washing Machines* likewise reasoned "that a subsidy is 'tied' to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the production or sale of the product concerned."[1067] However, as the Appellate Body further notes, such an assessment "will inevitably depend on the specific circumstances of each case."[1068] According to the Appellate Body:

> 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. Based on this assessment, a subsidy that does not restrict the recipient's use of the proceeds of the financial contribution may, nonetheless, be found to be tied to a particular product if it induces the recipient to engage in activities connected to that product.[1069]

[1063] Article 6.1 of the SCM Agreement provides: "Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of: (a) the total ad valorem subsidization of a product exceeding 5 per cent; …." Footnote 14 to this provision confirms that "[t]he total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV." Negotiators "indicated their awareness that the creation of such a presumption dependent upon the existence of a precise numerical benchmark would require guidance as to how the numerical benchmark would be established." *US – Upland Cotton (Panel)*, para. 7.1187.

[1064] Paragraph 2 of Annex VI of the SCM Agreement provides that, "[e]xcept as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's sales in the most recent 12-month period for which sales data is available, preceding the period in which the subsidy is granted." (underline added)).

[1065] Underline added.

[1066] *US – Upland Cotton (Panel)*, para. 7.1187 (defining the specifications set out by negotiators in paragraph 3 of Annex IV of the SCM Agreement).

[1067] *US – Washing Machines (AB)*, para. 5.270 (footnote omitted) (underline added).

[1068] *US – Washing Machines (AB)*, para. 5.270 (footnote omitted).

[1069] *US – Washing Machines (AB)*, para. 5.273.

451. The United States does not dispute that the design, structure, and operation of the provincial electricity subsidies involved the production or sale of electricity from facilities that did not separately engage in the production or sale of softwood lumber. For example, the USDOC understood that the Resolute facilities that produced the electricity purchased by Hydro-Quebec did not specifically produce softwood lumber.[1070]

452. But it is also clear from the design, structure, and operation of the provincial electricity subsidies that these subsidies were to recipients that do produce softwood lumber, and that these subsidies, at the point of bestowal, did not require or induce the recipients to engage in any activities connected to the production or sale of a processed product other than softwood lumber. For example, the USDOC correctly understood from the record that:

- Hydro-Quebec did not enter into PPAs with Resolute to induce its Gatineau newsprint mill or Dobeau specialty paper mill to engage in activities relative to the production of paper at those facilities.[1071] The electricity that Resolute sold to Hydro-Quebec during the period of investigation was not tied to the production of paper by those mills.

- NB Power did not provide LIREPP credits to the Irving companies to induce the production of pulp and paper at either IPL or LUP.[1072] The credit that the Irving companies received from NB Power for electricity produced during the period of investigation was not tied to the production of pulp and paper by those entities.

- BC Hydro did not enter into EPAs with Tolko or West Fraser to induce their facilities to engage in certain production activities relative to those facilities.[1073]

453. The USDOC also correctly understood from the evidence of record that subsidies that induced the recipients to engage in activities connected to the production or sale of electricity (*i.e.*, the subsidies received pursuant to the PPAs, LIREPP, and EPAs) provided a benefit to all aspects of the recipients' manufacturing operations, including softwood lumber production.[1074] The GATT 1994 and the SCM Agreement both contemplate the application of countervailing

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[1070] *See* Verification of the Questionnaire Responses of Resolute FP Canada Inc., pp. 16-17 (Exhibit CAN-174 (BCI)).

[1071] *See* U.S. First Written Submission, paras. 728-729; U.S. Responses to the First Set of Panel Questions, paras. 433-434.

[1072] *See* U.S. First Written Submission, para. 733; U.S. Responses to the First Set of Panel Questions, para. 435.

[1073] *See* U.S. First Written Submission, paras. 724-725.

[1074] *See* Lumber Final I&D Memo, pp. 161, 169-170, 214-216 (Exhibit CAN-010).

duties for subsidies that may benefit more than the product under investigation,[1075] and Members may impose countervailing duties to offset subsidies that are "bestowed" or "granted" either "directly or indirectly."[1076] In this regard, Members may offset countervailable subsidies received by a producer with respect to inputs used in the production of a product processed from such inputs.[1077] Canada does not dispute that electricity is an input utilized in every aspect of the recipients' manufacturing operations, including the production of softwood lumber. The subsidies provided by Quebec, New Brunswick, and British Columbia with respect to electricity thus provided a benefit to every aspect of the recipients' manufacturing operations.

454. Canada's arguments to the contrary open the door to circumvention of the disciplines set out in the GATT 1994 and the SCM Agreement. For example, Canada has argued that the USDOC improperly attributed any benefit conferred by BC Hydro's EPAs to the production of softwood lumber because the EPAs are connected to, and conditioned on, the sale of electricity.[1078] Such an interpretation should be rejected because it would permit Members to escape the scrutiny of the disciplines set out in the GATT 1994 and the SCM Agreement by simply bestowing otherwise countervailable subsidies on inputs used to produce processed products.

455. The USDOC's determination that the provincial electricity subsidies were provided to the overall operations of the recipients – and therefore attributable to the sales of all products produced by the recipients, including softwood lumber – is one an unbiased and objective investigating authority could have reached in light of the facts and arguments that were before

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[1075] *See* U.S. First Written Submission, paras. 719-721.

[1076] GATT 1994, Art. VI:3; SCM Agreement, Art. 10, footnote 36 (""The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.").

[1077] *See US – Softwood Lumber IV (AB)*, para. 140 ("The phrase 'subsid[ies] bestowed…*indirectly*', as used in Article VI:3 [of the GATT 1994], 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*." (italics in original)). Indeed, where the producer of the input is the same entity as the producer of the processed product, a Member should be able to presume that the subsidy bestowed on the input passes through to the processed product. *Cf. US – Softwood Lumber IV (AB)*, para. 140 (finding that it cannot be presumed that the subsidy bestowed on an input passes through to the processed product where the input and processed product producers are unaffiliated implies that a Member can presume that such a subsidy does pass through where the input and processed product producers are the same or affiliated).

[1078] For example, Canada has argued that the USDOC improperly attributed any benefit conferred by BC Hydro's EPAs to the production of softwood lumber because the EPAs are conditioned on, and connected to, the sale of electricity. *See* Canada's First Written Submission, paras. 1129-1133. BC Hydro did not enter into EPAs simply to induce independent power producers to generate electricity, but rather to advance BC Hydro's all-encompassing goal of securing a long-term supply of electricity at stable prices. *See* U.S. First Written Submission, paras. 724-725. As such, 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.

the USDOC.[1079] Canada has failed to establish that the United States acted inconsistently with its obligations under Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement.

VIII. CANADA STILL HAS FAILED TO SHOW THAT THE USDOC'S TREATMENT OF THE ACCELERATED CAPITAL COST ALLOWANCE TAX PROGRAM AS *DE JURE* SPECIFIC IS INCONSISTENT WITH ARTICLES 2.1(A) AND 2.1(B) OF THE SCM AGREEMENT

456. Canada erroneously argues that the Accelerated Capital Cost Allowance tax program for Class 29 assets ("ACCA Class 29 assets program") cannot be *de jure* specific because the explicit limitation set out in this program supposedly relates only to machinery and equipment and the activities for which such machinery or equipment is primarily used, and therefore cannot be limited to certain recipients.[1080] Canada also mischaracterizes the U.S. position when it asserts that "[t]he United States argues that [the USDOC] was not required to explicitly identify an industry or enterprise under Article 2.1(a), and instead a limitation on eligibility may simply 'favor' certain enterprises."[1081] Finally, Canada continues to argue that evidence concerning usage of the subsidy does not support the USDOC's *de jure* specificity finding.[1082]

457. Canada's arguments are unavailing. Sections VIII.A and VIII.B below demonstrate that USDOC's *de jure* specificity finding is not inconsistent with Article 2.1(a) of the SCM Agreement because the ACCA Class 29 assets program contains an explicit limitation on access (*i.e.*, tax deductions only on property primarily used for "manufacturing and processing") and the enterprises and industries that have access to the tax benefits are known and particularized (*i.e.*, enterprises and industries that engage in "manufacturing and processing"). Section VIII.C demonstrates that Article 2.1(a) of the SCM Agreement does not require an investigating authority to conduct a *de facto* specificity analysis as part of a *de jure* specificity analysis.

[1079] *See* U.S. First Written Submission, paras. 722-736.

[1080] *See* Canada's First Opening Statement (Day 2), para. 160; Canada Responses to the Panel's Questions, para. 418.

[1081] Canada's First Opening Statement (Day 2), para. 159. *See also* Canada's Responses to the First Set of Panel Questions, paras. 418-419.

[1082] *See* Canada's First Opening Statement (Day 2), paras. 157, 161, 162, 163; Canada's Responses to the First Set of Panel Questions, paras. 423, 424, 425.

A. Measures that Limit Eligibility for a Subsidy Based on Activities of the Recipients Fall within the Scope of Article 2.1 of the SCM Agreement

458. The plain text of Article 2.1(a) of the SCM Agreement does not require that the "certain enterprises" that have access to a subsidy be explicitly identified.[1083] Article 2.1(a) states that the subsidy "shall be specific" where the granting authority or its operating legislation "explicitly limits access" to certain enterprises, not where it "identifies" certain enterprises. Further, the term "certain enterprises" refers to "an enterprise or industry or group of enterprises or industries", and a "group" is simply "a number of people or things that are located close together or are considered or classed together."[1084] As previous reports have reasoned, "certain enterprises" may include "enterprises or industries that are known and particularized."[1085] Therefore, if a measure limits eligibility for a subsidy based on the type of activities conducted by the recipients, those recipients are "considered or classed together", and the recipients will be "known and particularized". That measure accordingly falls within the scope of Article 2.1(a).

459. For example, in addressing the term "certain enterprises" under Article 2.2, the Appellate Body in *US – Washing Machines* reasoned that, "in order for a subsidy to be specific, the group of eligible enterprises must be something less than the whole of the economy of a Member."[1086] According to the Appellate Body, "the notion of 'certain enterprises' does not depend on the legal personality of the subsidy recipients."[1087] Instead, "the inquiry under Article 2 hinges on limitations on '*eligibility* for a subsidy' in respect of certain recipients [and therefore] [e]ligibility may be limited in 'many different ways', e.g. by virtue of the type of activities conducted by the recipients or the region where the recipients run those activities."[1088] Therefore, because the term "certain enterprises" only requires that the enterprises and industries can be ascertained through a limitation on those recipients that have access to a subsidy, the word "to" before "certain enterprises" cannot be understood, as Canada suggests,[1089] to revise the definition of "certain enterprises" so as to require that a subsidy explicitly identify enterprises

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[1083] *See US – Carbon Steel (India) (AB)*, para. 4.365 ("The ordinary meaning of the terms 'group' and 'certain' … suggest … that the relevant enterprises must be 'known and particularized', but not necessarily 'explicitly identified' …." (footnote omitted)).

[1084] Definition of "group" from Oxford English Dictionary Online (Exhibit USA-078).

[1085] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373. *See US – Carbon Steel (India) (AB)*, para. 4.365.

[1086] *US – Washing Machines (AB)*, para. 5.220.

[1087] *US – Washing Machines (AB)*, para. 5.221. The Appellate Body based this reasoning in part on a comparison of the term "certain enterprises" as it appears in Article 2.2 with the definition of that term as it appears in the chapeau of Article 2.1.

[1088] *US – Washing Machines (AB)*, para. 5.223 (footnotes omitted; italics in original; underline added).

[1089] *See* Canada's First Opening Statement (Day 2), para. 160; Canada's Responses to the First Set of Panel's Questions, para. 418.

and industries by name before the subsidy can be considered *de jure* specific under Article 2.1(a).[1090]

460. Although Canada asserts as a factual matter that any company in any industry has access to the subsidy,[1091] Canada is unable to disprove the USDOC's finding that, as a matter of law, enterprises and industries exclusively engaged in the activities excluded from the definition of "manufacturing and processing" would be precluded from claiming the tax benefits. It is for this reason that the USDOC found the ACCA Class 29 assets program to be *de jure* specific, and Canada has failed to demonstrate that an unbiased and objective investigating authority could not have reached such a conclusion in light of the facts and arguments before the USDOC.

B. The ACCA Class 29 Assets Program Excluded Certain Enterprises from Eligibility for a Tax Deduction under this Program

461. Canada is mistaken when it asserts that the United States has argued before the Panel that Article 2.1(a) of the SCM Agreement allows a Member to focus its inquiry on whether a subsidy "favor[s]" certain recipients.[1092] The USDOC found that the ACCA Class 29 assets program is *de jure* specific because the *Income Tax Act* and *Income Tax Regulations* contain an explicit limitation on access to tax benefits under the program to enterprises and industries that engage in the activities enumerated in the definition of "manufacturing and processing."[1093] This finding is consistent with the analysis required under Article 2.1(a). The USDOC thus did not simply find that the ACCA Class 29 assets program is *de jure* specific because it "favor[s]" certain enterprises, and the United States has never argued that it did.[1094]

462. The USDOC separately considered whether the subsidy shall be regarded as non-specific pursuant to Article 2.1(b) of the SCM Agreement, because the granting authority or legislation establishes objective criteria or conditions governing the eligibility for the subsidy. Footnote 2 to Article 2.1(b) describes objective criteria or conditions as "criteria or conditions which are

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[1090] Canada's arguments to the contrary also open the door to circumvention of the disciplines set out in Article 2 of the SCM Agreement by precluding a finding of *de jure* specificity when the granting authority or legislation, without identifying industries and enterprises by name, clearly limits access to a subsidy.

[1091] *See* Canada's First Opening Statement (Day 2), paras. 162-163; Canada's Responses to the First Set of Panel's Questions, paras. 423-424.

[1092] Canada's First Opening Statement (Day 2), para. 159. *See also* Canada's Responses to the First Set of Panel's Questions, paras. 418-419.

[1093] *See* Lumber Final I&D Memo, pp. 197-199 (Exhibit CAN-010).

[1094] The verb "favor" appears seven times in the U.S. argument involving the ACCA Class 29 assets program. It appears six times in U.S. arguments involving Article 2.1(b) of the SCM Agreement, which, as discussed in the next paragraph, is appropriate given that footnote 2 to Article 2.1(b) defines objective criteria or conditions to mean, in part, "criteria or conditions … which do not favour certain enterprises over others." SCM Agreement, Art. 2.1(b), footnote 2. The verb "favor" appears just once in the context of arguments regarding the USDOC's determination pursuant to Article 2.1(a) of the SCM Agreement, where it is preceded by the adverb "explicitly." U.S. First Written Submission, para. 742. It is thus clear that Canada has mischaracterized the U.S. argument.

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."[1095] The USDOC found that the *Income Tax Act* and *Income Tax Regulations* do not establish objective criteria or conditions governing eligibility for the ACCA Class 29 assets program because the criteria favor enterprises and industries that are engaged in qualifying manufacturing and processing activities over enterprises and industries that are not engaged in such activities.[1096] Accordingly, the USDOC found that the subsidy is not non-specific by virtue of objective criteria or conditions.

C. Canada's *De Facto* Specificity Arguments are Not Relevant to an Analysis of *De Jure* Specificity under Article 2.1(a) of the SCM Agreement

463. Canada continues to assert that the facts concerning the subsidy recipients under the ACCA Class 29 assets program undercut a *de jure* specificity finding. 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."[1097] Article 2.1(a) of the SCM Agreement expressly states that, if the granting authority or its operating legislation "explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific." Nothing else in Article 2 requires an investigating authority to engage in a *de facto* specificity analysis if the evidence under consideration establishes that the subsidy in question is *de jure* specific.[1098] Canada's position[1099] 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.

464. In sum, the USDOC concluded that the ACCA Class 29 assets program is *de jure* specific given that the definition of "manufacturing and processing" set out in Canada's *Income Tax Act* and *Income Tax Regulations* expressly excludes enterprises and industries engaged in numerous activities from eligibility for a tax deduction under this program.[1100] The USDOC's

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[1095] SCM Agreement, Art. 2.1(b), footnote 2 (underline added).

[1096] *See* Lumber Final I&D Memo, pp. 199-200 (Exhibit CAN-010).

[1097] *US – Countervailing Measures (China) (AB)*, para. 4.146.

[1098] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.

[1099] According to Canada, evidence concerning usage of the subsidy is relevant for the purpose of showing that "[the USDOC's] assertion that limitations on equipment used for particular activities are equivalent to limitations on enterprises or industries is incorrect." Canada's First Opening Statement (Day 2), para. 164. Canada also again argues that the USDOC "failed to engage in a *de facto* specificity analysis." Canada's Responses to the First Set of Panel's Questions, para. 425.

[1100] *See* U.S. First Written Submission, paras. 747-748. *See also* Lumber Preliminary Decision Memorandum, p. 72 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 197-200 (Exhibit CAN-010); GOC QR, Exhibit GOC-CRA-ACCA-1 (*Income Tax Act* and *Income Tax Regulations*) (Exhibit CAN-466).

determination to treat the ACCA Class 29 assets program as *de jure* specific is one an unbiased and objective investigating authority could have reached.[1101]

IX. CANADA'S CLAIM REGARDING THE ALLEGED MARITIMES STUMPAGE BENCHMARK MEASURE CONTINUES TO LACK MERIT

465. Canada has argued that something it calls the "Maritimes Stumpage Benchmark" is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.[1102] The United States has demonstrated that there is no measure, as alleged, and Canada's claims lack merit.[1103]

466. In particular, the United States has demonstrated that the so-called "Maritimes Stumpage Benchmark" is not susceptible to WTO dispute settlement because, while Canada has described the alleged measure as one of "present and continued application", Canada has failed to establish the three required elements of the claim it has presented. First, Canada has failed to establish that the measure is attributable to the United States because, in fact, the alleged measure does not exist.[1104] Second, Canada also has failed to identify the precise content of the alleged measure, instead describing it in various internally inconsistent ways.[1105] Third, Canada has failed to identify any evidence that the alleged measure is presently being applied and will continue to be applied.[1106] Furthermore, the so-called "Maritimes Stumpage Benchmark" cannot be challenged as "ongoing conduct", as that concept has been elaborated previously by the Appellate Body.[1107] 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.[1108]

467. Canada has not made any additional arguments concerning these claims since its first written submission.[1109] Accordingly, the United States has nothing more to add at this time concerning Canada's claims.

[1101] *See* U.S. First Written Submission, paras. 737-761; U.S. First Opening Statement (Day 2), paras. 65-72; U.S. Responses to the First Set of Panel's Questions, paras. 437-443.

[1102] *See generally* Canada's First Written Submission, paras. 1184 and 1189-1200.

[1103] *See generally* U.S. First Written Submission, paras. 762-790; U.S. First Opening Statement (Day 3), paras. 20-26; U.S. Responses to the First Set of Panel Questions, paras. 445-447.

[1104] *See* U.S. First Written Submission, para. 766; U.S. First Opening Statement (Day 3), para. 21.

[1105] *See* U.S. First Written Submission, paras. 767-769; U.S. First Opening Statement (Day 3), para. 22.

[1106] *See* U.S. First Written Submission, paras. 770-777; U.S. First Opening Statement (Day 3), para. 23.

[1107] *See* U.S. First Written Submission, paras. 778-788; U.S. First Opening Statement (Day 3), para. 24.

[1108] *See* U.S. First Written Submission, paras. 789-790.

[1109] *See generally* Canada's Responses to the First Set of Panel Questions, paras. 427-434. *See also ibid.*, para. 428 (citing Oral Statement of Canada at the First Substantive Meeting of the Panel – Day 3 (BCI) (February 28, 2019) ("Canada's First Opening Statement (Day 3)"), para. 23, referring to Canada's First Written Submission, para. 1193); para. 429, Table 4 (citing Canada's First Written Submission, para. 1192, Table 30) (reproducing Table 30

X. CONCLUSION

468. For the reasons set forth above, and in other U.S. written submissions and oral statements, the United States respectfully requests that the Panel reject Canada's claims in their entirety.

from first written submission); para. 430 (citing Canada's PowerPoint Presentation (Day 3), Exhibit CAN-528, pp. 94-104).