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1 ARTICLE 14

1.1 Text of Article 14

Article 14

*Calculation of the Amount of a Subsidy in Terms
of the Benefit to the Recipient*

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

- (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
- (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
- (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
- (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

1.2 General

1. In *US – Softwood Lumber IV*, the Appellate Body stated that:

"The chapeau of Article 14 requires that 'any' method used by investigating authorities to calculate the benefit to the recipient shall be provided for in a WTO Member's legislation or regulations ... The reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.

We agree with the Panel that the term 'shall' in the last sentence of the chapeau of Article 14 suggests that calculating benefit consistently with the guidelines is mandatory. We also agree that the term 'guidelines' suggests that Article 14 provides the 'framework within which this calculation is to be performed', although the 'precise detailed method of calculation is not determined'. Taken together, these terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government."¹

2. In *Japan – DRAMs (Korea)*, the Appellate Body made the following findings regarding the requirements of the chapeau of Article 14:

"The chapeau of Article 14 sets out three requirements. The first is that 'any method used' by an investigating authority to calculate the amount of a subsidy in terms of benefit to the recipient shall be provided for in the national legislation or implementing regulations of the Member concerned. The second requirement is that the 'application' of *that* method in each particular case shall be transparent and adequately explained. The third requirement is that 'any such method' shall be consistent with the guidelines contained in paragraphs (a)-(d) of Article 14.

The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)-(d) of Article 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations.

We observe that the first requirement of the chapeau of Article 14 is that the method used be provided for in a WTO Member's national legislation or implementing regulations. Although the chapeau of Article 14 states that the calculation of benefit must be consistent with the guidelines in paragraphs (a)-(d) of that provision, it does not, in our view, contemplate that the method be set out in detail. The requirement of the chapeau would be met if the method used in a particular case can be derived from, or is discernable from, the national legislation or implementing regulations. We believe that this view strikes an appropriate balance between the flexibility that is needed for adapting the benefit calculation (consistent, however, with the guidelines of paragraphs (a)-(d) of Article 14) to the particular factual situation of an investigation, and the need to ensure that other Members and interested parties are made aware of the method that will be used by the Member concerned, under Article 14 of the *SCM Agreement*.²

3. The Panel in *Mexico – Olive Oil* noted that certain provisions of the SCM Agreement leave considerable discretion to Members to define their own procedures:

"We also note that other provisions in the *SCM Agreement* leave considerable discretion to Members to define their own procedures; e.g. Articles 12, 14 and 23. This leads us to believe that, in general, unless a specific procedure is set forth in the

¹ Appellate Body Report, *US – Softwood Lumber IV*, paras. 91-92.

² Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 190-192. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152.

Agreement the precise procedures for how investigating authorities will implement those obligations are left to the Members to decide."³

4. In *Mexico – Olive Oil*, the Panel observed that:

"By its own terms, Article 14 concerns the 'method' to be used in a countervailing duty investigation to *calculate* the *amount* of benefit to a recipient, and sets forth three basic requirements in this regard. The first has to do with the legislative framework, the second has to do with the application of the law to particular cases, and the third has to do with the general guidelines for how to determine the benefit to the recipient from four basic forms of government financial contributions: equity infusions, loans, loan guarantees, and government provision of goods or services or government purchase of goods."⁴

5. In *Mexico – Olive Oil*, the European Communities claimed that Mexico failed to apply the method used to calculate the benefit conferred on the recipient to each particular case in a transparent way which was adequately explained, in violation of Article 14. The Panel rejected the European Communities' claim, and found that the investigating authority provided a sufficiently adequate and transparent explanation of its method to calculate benefit in respect of the subsidy programmes at issue.⁵

6. The Panel in *Mexico – Olive Oil* also rejected the European Communities' related argument that the Mexican investigating authority's failure to conduct a pass-through analysis amounted to inconsistency with the transparency and explanation requirements of Article 14. The Panel explained that it saw "nothing in this provision that requires a Member to conduct a pass-through analysis." Even if Article 14 required a pass-through analysis, the Panel did not find any reason that the investigating authority had acted inconsistently, based on the evidence.⁶

1.3 Article 14(a): "usual investment practice ... of private investors"

1.3.1 General

7. The Panel in *EC – Countervailing Measures on DRAM Chips* observed that:

"Article 14(a) of the *SCM Agreement* does not provide a precise method for calculating benefit. It simply states that a benefit is conferred if the investment decision can be regarded as inconsistent with the usual investment practice – including for the provision of risk capital – of private investors in the territory of that Member."⁷

8. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body provided the following guidance on the interpretation of Article 14(a):

"Article 14(a) states that equity capital provided by a government shall not be considered to confer a benefit unless it is inconsistent with what is termed the 'usual investment practice' of private investors in the territory of that Member. The two words 'usual' and 'practice' are in a sense reinforcing, with the former signifying '{c}ommonly or customarily observed or practised' and the latter 'usual or customary action or performance'. Thus, we understand the term 'usual practice' to describe common or customary conduct of private investors in respect of equity investment. We also observe that Article 14(a) focuses the inquiry on the 'investment decision'. This reflects an *ex ante* approach to assessing the equity investment by comparing the decision, based on the costs and expected returns of the transaction, to the usual investment practice of private investors at the moment the decision to invest is undertaken. The focus in Article 14(a) on the 'investment decision' is thus critical, in our view, because it identifies *what* is to be compared to a market benchmark, and *when* that comparison is to be situated. With this understanding in mind, we turn to

³ Panel Report, *Mexico – Olive Oil*, fn 63.

⁴ Panel Report, *Mexico – Olive Oil*, para. 7.169.

⁵ Panel Report, *Mexico – Olive Oil*, para. 7.156.

⁶ Panel Report, *Mexico – Olive Oil*, paras. 7.159 and 7.168.

⁷ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.211.

consider whether the Panel set out the proper standard under Article 1.1(b) of the *SCM Agreement*.

...

As we have previously noted, Article 14(a) of the *SCM Agreement* focuses the inquiry on the 'investment decision'. This reflects an *ex ante* assessment of the equity investment, taking into account the costs and expected returns of the transaction as compared to the usual investment practice of private investors at the moment the decision to invest is undertaken. As we stated, the focus of Article 14(a) on the 'investment decision' is a critical step in the analysis because it identifies *what* is to be compared to the market benchmark, and *when* that comparison is to be situated. Thus, in assessing the European Union's claims on appeal, we first seek to identify the 'investment decision' that the Panel was to compare against the market benchmark consisting of the usual investment practice."⁸

1.3.2 Relevance of distinction between inside investor vs. outside investor

9. In *Japan – DRAMs (Korea)*, the Panel addressed arguments on whether the amount of benefit conferred by the restructuring of insolvent companies should be established from the perspective of inside/existing investors, or outside/new investors. Ultimately, the Panel found that there was no need for it to rule on whether or not the inside / existing investor standard was an appropriate market benchmark, since the parties agreed that it was. The Panel was reversed by the Appellate Body. The Appellate Body made the following findings on the matter:

"We do not consider the distinction between inside and outside investors to be helpful in order to determine the appropriate benchmark for calculating the amount of benefit under Articles 1.1(b) and 14 of the *SCM Agreement*. The terms of a financial transaction must be assessed against the terms that would result from unconstrained exchange in the relevant market. The relevant market may be more or less developed; it may be made up of many or few participants. By way of example, there are now well-established markets in many economies for distressed debt, and a variety of financial instruments are traded on these markets. In some instances, the market may be more rudimentary. In other instances, it may be difficult to establish the relevant market and its results. But these informational constraints do not alter the basic framework from which the analysis should proceed. We also do not consider that there are different standards applicable to inside and to outside investors. There is but one standard—the market standard—according to which rational investors act.

Article 14 of the *SCM Agreement*, entitled 'Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient', provides guidance as to how the relevant market shall be identified. Specifically, with respect to 'government provision of equity capital', Article 14(a) stipulates that such equity infusions 'shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice of private investors in the territory of that Member'. In respect of loans, Article 14(b) provides that 'a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market.' In the latter case, 'the benefit shall be the difference between these two amounts.' Thus, under Article 14(a), the benchmark is 'the usual investment practice of private investors', and under Article 14(b), the benchmark is 'the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market.' Neither of these benchmarks makes a distinction between 'outside' or 'inside' investors. Rather, they suggest that the investigating authority calculate the amount of benefit conferred on the recipient by comparing the terms of the financial contribution to the terms that the relevant market—consisting of rational investors, be they inside or outside investors or both—would have offered. As the Appellate Body has previously said:

⁸ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 999 and 1019.

Article 14, which ... is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A 'benefit' arises under each of the guidelines if the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.

We therefore disagree with the Panel's approach in this case, which consisted only of examining 'whether or not the JIA applied [the inside investor] standard in an appropriate manner.' As we see it, the Panel should have identified the appropriate benchmark to apply for the purpose of assessing whether the JIA calculated the amount of benefit for the October 2001 and December 2002 Restructurings consistently with Articles 1.1(b) and 14 of the *SCM Agreement*. Instead, the Panel held that, since the parties had agreed that the inside investor standard constituted a valid benchmark, 'there [was] no need for [the Panel] to make any findings on whether or not the inside investor perspective constituted [the] valid market benchmark' for purposes of its analysis."⁹

1.4 Article 14(b): loans

10. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that the Panel did not commit an error in the interpretation of Article 14(b) in finding that "inherent in Article 14(b), as in Article 14(d), is sufficient flexibility to permit the use of a proxy in place of observed rates in the country in question where no 'commercial' benchmark can be found"¹⁰:

"We start by considering the constituent elements of a benchmark loan under Article 14(b), that is 'comparable', 'commercial', and a 'loan which the firm could actually obtain on the market'.

A benchmark loan under Article 14(b) must be a loan that is 'comparable' to the investigated government loan. Comparable is defined as 'able to be compared', 'worthy of comparison', and 'fit to be compared (to)'. This, in our view, suggests that something can be considered 'comparable', when there are sufficient similarities between the things that are compared as to make that comparison worthy or meaningful. Thus, a benchmark loan under Article 14(b) should have as many elements as possible in common with the investigated loan to be comparable. The Panel noted that, ideally, an investigating authority should use as a benchmark a loan to the same borrower that has been established around the same time, has the same structure as, and similar maturity to, the government loan, is about the same size, and is denominated in the same currency. The Panel, however, also considered that, in practice, the existence of such an ideal benchmark loan would be extremely rare, and that a comparison should also be possible with other loans that present a lesser degree of similarity. We agree with both of these observations by the Panel.

...

A loan only confers a benefit when and to the extent that it has been granted on terms that are not otherwise available in the marketplace.¹¹ A key element in ensuring a meaningful comparison under Article 14(b) is that a benchmark loan be 'commercial'. The comparison between an investigated loan and a commercial loan, therefore, reveals whether a benefit has been conferred, and its amount. We observe that the term 'commercial' is defined as 'interested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business'. Thus the term 'commercial' does not speak of the identity of the provider of the loan.

⁹ Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 172 -174.

¹⁰ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 490.

¹¹ (footnote original) Appellate Body Report, *Canada – Aircraft*, paras. 155-158.

Although the Panel did not explicitly rule on the issue, it stated that one possible interpretation of 'commercial' could be that any loan made by the government would *ipso facto* not be 'commercial'. In our view, it would not be correct to conclude that any loan made by the government (or by private lenders in a market dominated by the government) would *ipso facto* not be 'commercial'. We see nothing to suggest that the notion of 'commercial' is *per se* incompatible with the supply of financial services by a government. Therefore, the mere fact that loans are supplied by a government is not in itself sufficient to establish that such loans are not 'commercial' and thus incapable of being used as benchmarks under Article 14(b) of the *SCM Agreement*. An investigating authority would have to establish that the government presence or influence in the market causes distortions that render interest rates unusable as benchmarks.

Finally, a benchmark loan under Article 14(b) must be a 'loan which the firm could actually obtain on the market'. The use of the conditional tense, 'could', suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can *in fact* be obtained in the market. In this respect, we agree with the Panel that this refers 'first and foremost' to the borrower's risk profile, that is, whether the benchmark loan is one that could be obtained by the borrower receiving the investigated government loan. Thus, we consider that Article 14(b) does not preclude the possibility of using as benchmarks interest rates on commercial loans that are not actually available in the market where the firm is located, such as, for instance, loans in other markets or constructed proxies."¹²

11. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body upheld the Panel's conclusion that the Appellate Body's interpretation of benchmarks under Article 14(d) in *US – Softwood Lumber IV* (i.e. as permitting the rejection of in-country private prices as benchmarks in certain circumstances) was in some respects equally applicable to Article 14(b). The Appellate Body reasoned as follows:

"We observe that, under Article 14(b), the benchmark to measure benefit is 'the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market', while, under Article 14(d), it is the 'prevailing market conditions for the good or service in question in the country of provision or purchase'. In contrast to Article 14(d), which clearly connects the relevant 'market' to "the country of provision or purchase", Article 14(b) does not specify expressly any geographical or national scope for what is the relevant 'market' within which a comparable commercial loan should be identified.¹³ We, therefore, agree with China that the relevant question under Article 14(b) is not whether an investigating authority may resort to an 'out-of-country' benchmark as opposed to an 'in-country' benchmark. It is, rather, to what extent Article 14(b) requires strict and formalistic compliance with *all* of the conditions specified therein, even when doing so would frustrate the purpose of that provision and prevent any calculation of the benefit. Thus, the relevant question is whether there is enough flexibility in Article 14(b), as the Appellate Body found that there is in Article 14(d), to allow for the use of a benchmark other than one that is always, and in every respect, 'a comparable commercial loan which the firm could actually obtain on the market'.

...

It seems to us that, notwithstanding the differences between Article 14(b) and (d), there may also be under Article 14(b) limited circumstances where an excessively formalistic interpretation of this provision could frustrate its purpose and prevent the calculation of the benefit. Reading Article 14(b) as always requiring a comparison

¹² Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 475-480.

¹³ (*footnote original*) We consider that Article 14(b) may well accommodate, in any given case, a conception of the relevant market as one defined on the basis of the particular product or service (a loan), as well as one defined on a geographic basis. In some cases, the product market may be a national market, such as when loans in a particular currency are available only within a particular country. It seems to us that the word "comparable", and some of the factors that the Panel identified as indications of comparability—the timing, structure, maturity, and currency of loans—may equally well be factors relevant to the identification of the product market as well as the geographic market for the loan.

with loans denominated in the same currency as the investigated loans, even in circumstances where all loans in the same currency are distorted by government intervention, would lead to a comparison with government distorted loans, thus frustrating the purpose of Article 14(b). If loans in a given market and in a given currency are distorted by government intervention, an investigating authority should be permitted, in certain circumstances also under Article 14(b), to use a benchmark other than 'a comparable commercial loan which the firm could actually obtain on the market'. However, such a benchmark would have to approximate 'a comparable commercial loan which the firm could actually obtain on the market'.

We observe that the Panel reasoned that the identification of an appropriate benchmark under Article 14(b) can be seen as a 'series of concentric circles', where the investigating authorities should first seek commercial loans to the same borrower that are identical or nearly identical to the investigated loan. As the Panel stated, it is not reasonable to assume that, when there is no actually obtainable commercial loan that is comparable in every respect, an investigating authority must conclude that there is no benchmark, and that, therefore, no benefit amount can be determined. In the absence of an identical or nearly identical loan, an investigating authority should seek, in turn, other similar commercial loans held by the same borrower, then similar commercial loans granted to another borrower with a similar credit risk profile to the investigated borrower. In this process, an investigating authority will need to make adjustments to reflect differences from investigated loans, such as date of origination, size, maturity, currency, structure, or borrower's credit risk. Yet, there may be situations where the actual differences between any of the existing commercial loans and the investigated government loan are so significant that it is not realistically possible to address them through adjustments. In such situations, the Panel considered that an investigating authority should be allowed to use proxies as benchmarks.

We agree that selecting a benchmark under Article 14(b) involves a progressive search for a comparable commercial loan, starting with the commercial loan that is closest to the investigated loan (a loan to the same borrower that is nearly identical to the investigated loan in terms of timing, structure, maturity, size and currency) and moving to less similar commercial loans while adjusting them to ensure comparability with the investigated loan.

We see no inherent limitations in Article 14(b) that would prevent an investigating authority from using as benchmarks interest rates on loans denominated in currencies other than the currency of the investigated loan, or from using proxies instead of observed interest rates, in situations where the interest rates on loans in the currency of the investigated loan are distorted and thus cannot be used as benchmarks. In fact, to read Article 14(b) as imposing such limitations on the selection of a benchmark would potentially frustrate the purpose of that provision, as no suitable benchmarks could be identified in situations where the interest rates on loans in a given currency were distorted by government presence or influence in the market and no loan in that currency exists in other markets. We further note that, as already discussed above, the possibility of resorting to a proxy under Article 14(b) is consistent with the use of the conditional tense: '*would* pay' and '*could* actually obtain on the market'. In the absence of an actual comparable commercial loan that is available on the market, an investigating authority should be allowed to use a proxy for what '*would*' have been paid on a comparable commercial loan that '*could*' have been obtained on the market.

We also consider that the further away an investigating authority moves from the ideal benchmark of the identical or nearly identical loan, the more adjustments will be necessary to ensure that the benchmark loan approximates the 'comparable commercial loan which the firm could actually obtain on the market' specified in Article 14(b). As discussed above, we consider this to be consistent with, and parallel to, the requirement affirmed by the Appellate Body in *US – Softwood Lumber IV* under Article 14(d), that, in situations where an investigating authority does not use the private prices in the market of the country of provision, it should nevertheless select a

method for calculating the benefit that relates or refers to, or is connected with, the prevailing market conditions in the country of provision.¹⁴

In sum, we consider that, in spite of the different formulations used in Article 14(b) and (d), some of the reasoning of the Appellate Body in *US – Softwood Lumber IV* concerning the use of out-of-country benchmarks and proxies under Article 14(d) is equally applicable under Article 14(b). In particular, we are of the view that a certain degree of flexibility also applies under Article 14(b) in the selection of benchmarks, so that such selection can ensure a meaningful comparison for the determination of benefit. At the same time, when an investigating authority resorts to a benchmark loan in another currency or to a proxy, it must ensure that such benchmark is adjusted so that it approximates the 'comparable commercial loan'. Moreover, in accordance with the chapeau of Article 14, any such method, as well as how it approximates the loan in another currency or the proxy to a 'comparable commercial loan which the firm could actually obtain on the market', must be transparent and adequately explained."¹⁵

12. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body noted that the Panel characterized the LA/MSF measures as "unsecured loans" and that neither participant had challenged this characterization on appeal, and stated "[a]ccordingly, the most relevant 'guideline' of Article 14 of the *SCM Agreement* is that provided in subparagraph (b)".¹⁶ The Appellate Body then proceeded to provide further guidance on the interpretation and application of Article 14(b):

"A panel relying on Article 14(b) would thus examine whether there is a difference between the amount that the recipient pays on the government loan and the amount the recipient would pay on a comparable commercial loan, which the recipient could have actually obtained on the market.¹⁷ There is a benefit—and therefore a subsidy—where the amount that the recipient pays on the government loan is less than what the recipient would have paid on a comparable commercial loan that the recipient could have obtained on the market. There is no benefit—and therefore no subsidy—if what the recipient pays on the government loan is equal to or higher than what it would have paid on a comparable commercial loan. The amount the recipient would have paid on a commercial loan is a function of the size of the loan, the interest rate, the duration, and other relevant terms of the transaction. The participants agreed at the oral hearing that Article 14(b) of the *SCM Agreement* provides useful guidance for purposes of the assessment of whether the LA/MSF measures confer a benefit.

Article 14(b) of the *SCM Agreement* calls for a comparison of the 'amount the firm receiving the loan pays on the government loan' with 'the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market'. As we have already discussed in general terms above, we read this as suggesting that the comparison is to be performed as though the loans were obtained at the same time. In other words, the comparable commercial loan is one that would have been available to the recipient firm at the time it received the government loan.

Because the assessment focuses on the moment in time when the lender and borrower commit to the transaction, it must look at how the loan is structured and how risk is factored in, rather than looking at how the loan actually performs over time. Such *ex ante* analysis of financial transactions is commonly used and appropriate financial models have been developed for these purposes. The analysis from a financial perspective proceeds as follows. The investor commits resources to an investment in the expectation of a future stream of earnings that will provide a

¹⁴ (footnote original) Appellate Body Report, *US – Softwood Lumber IV*, para. 96.

¹⁵ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 482-489.

¹⁶ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 834.

¹⁷ (footnote original) Article 14(b) of the *SCM Agreement* says that the comparison should be to a comparable commercial loan that the recipient "could actually obtain on the market." This suggests that where the recipient could not have obtained a commercial loan, then the granting of a loan by the government would be deemed to confer a benefit irrespective of the terms of that loan. As the European Union underscored at the oral hearing, the United States did not argue before the Panel that Airbus would have been unable to obtain a commercial loan. Instead, the United States premised its case on Airbus having to pay less for the LA/MSF than it would have paid for a commercial loan.

positive return on the investment made. In deciding whether to commit resources to a particular investment, the investor will consider alternative investment opportunities. The investor will make its decision to invest on the basis of information available at the time the decision is made about market conditions and projections about how those economic conditions are likely to develop (future demand and price for the product, future costs, etc.). The information available will be, in most cases, imperfect. The investor does not have perfect foresight and thus there is always some likelihood, in some instances a sizeable one, that the investor's projections will deviate significantly from what actually transpires. Hence, determining whether the investment was commercially rational is to be ascertained based on the information that was available to the investor at the time the decision to invest was made.¹⁸ The commercial rationality of an investment cannot be ascertained on the basis of how the investment in fact performed because such an analysis has nothing useful to say about the basis upon which the investment was made. The investment could have earned a rate of return that exceeded, or was less than, the going market rate, but it was not predetermined to do so.

We note, moreover, that from a practical perspective, a requirement to look at the actual performance of a loan would mean that such measures could not be challenged until performance is fully completed. In the case of long-term loans, this would mean that any challenge of such measures would have to be deferred for years. Requiring a WTO Member to wait so long to mount a challenge would limit the effectiveness of Part II and Part III of the *SCM Agreement* also in the light of the prospective nature of WTO remedies.¹⁹

Therefore, in our view, the assessment of benefit must examine the terms and conditions of a loan at the time it is made and compare them to the terms and conditions that would have been offered by the market at that time. The European Union and the United States agreed at the oral hearing with this approach."²⁰

13. In *US – Carbon Steel (India)*, the Appellate Body disagreed with the Panel's view that a benefit is conferred, within meaning of Article 14(b), when there is a difference between the amount the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan on the market, and that no other credits or adjustments are required:

"[A] proper assessment under Article 14(b) examines what the total cost of the investigated loan is to the loan recipient, and whether there is a difference between that and the total cost of a comparable commercial loan. The distinction that the Panel draws between costs associated with the interest or repayment terms of a loan, and other costs arising from entry or administrative charges, does not seem to reflect accurately the cost of the relevant loans from the perspective of the recipient. Moreover, depending on the manner in which a particular commercial loan is structured, the costs associated with obtaining a loan could be significant and should be factored into a market assessment of that loan. In this respect, failing to take into account a cost that potentially alters a commercial actor's valuation of a loan simply because it does not relate to interest or repayment terms appears unduly artificial and contrary to the requirements of Article 14(b). Thus, we do not agree with the Panel's conclusion that investigating authorities are not required to take account of the costs incurred by recipients in participating in the programme under which the loans are provided.

Article 14(b) entails a 'progressive search' for a comparable loan that begins with the commercial loan that is 'closest' to the investigated loan and moves to 'less similar' commercial loans. In examining whether the particular terms of a loan programme are

¹⁸ (*footnote original*) Such an *ex ante* approach is wholly consistent with the manner in which financial methods have been developed to test projections through sensitivity analysis and scenario building.

¹⁹ (*footnote original*) It may also affect the ability of Members to apply countervailing measures under Part V of the *SCM Agreement*.

²⁰ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 834-838.

in accordance with market terms, a benchmark must be selected that ensures that there are sufficient similarities between the investigated loan and the benchmark 'as to make that comparison worthy or meaningful'. To the extent that the terms associated with a loan programme are determined by the conditions of funding for the programme, such terms should also be taken into account if a failure to do so would render the comparison meaningless."²¹

1.5 Article 14(c): loan guarantees

14. In *Canada – Aircraft Credits and Guarantees*, the Panel noted the relevance of Article 14(c) of the SCM Agreement for the purpose of establishing the existence of a "benefit" in the framework of equity guarantees. It noted that a "benefit" could arise if there was a difference between the cost of equity with and without an equity guarantee programme, to the extent that such difference was not covered by the fees charged by the programme for providing the equity guarantee. If it is established that the programme's fees were not market-based, the Panel said, such a cost difference would not be covered by the programme's fees:

"[A]lthough Article 14(c) is expressly concerned with 'benefit' in the context of loan guarantees, there are perhaps sufficient similarities between the operation of loan guarantees and equity guarantees for it to be appropriate to rely on Article 14(c) for the purpose of establishing the existence of 'benefit' in the context of equity guarantees in certain circumstances. Thus, a 'benefit' could arise if there is a difference between the cost of equity with and without an *IQ* equity guarantee, to the extent that such difference is not covered by the fees charged by *IQ* for providing the equity guarantee. In our opinion, it is safe to assume that such cost difference would not be covered by *IQ*'s fees if it is established that *IQ*'s fees are not market-based."²²

15. Regarding the loan guarantee programmes under consideration, the Panel in *Canada – Aircraft Credits and Guarantees* also referred to the findings of the Panel and the Appellate Body in *Canada – Aircraft*²³ and considered that Article 14(c) of the SCM Agreement provided "contextual guidance for interpreting the term "benefit" in the context of loan guarantees." On this basis, the Panel stated that there would be a "benefit" when the cost-saving for the company's customer for securing a loan with a loan guarantee programme is not offset by the programme's fees, for example, if it was established that the programme's fees were not market-based.²⁴ The Panel stated:

"In our view, and taking into account the contextual guidance afforded by Article 14(c), we consider that an *IQ* loan guarantee will confer a 'benefit' when 'there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by [*IQ*] and the amount that the firm would pay on a comparable commercial loan absent the [*IQ*] guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees."²⁵

1.6 Article 14(d): provision of goods or services and purchases of goods

16. The Panel in *US – Coated Paper (Indonesia)* described the relationship between the first and second sentences of Article 14(d) as follows:

"The first sentence of Article 14(d) establishes that the provision of goods by a government shall not be considered as conferring a benefit unless the goods are provided for 'less than adequate remuneration'. How to determine whether adequate remuneration was paid is dealt with in the second sentence of Article 14(d), which provides that the adequacy of remuneration shall be determined in relation to prevailing market conditions in the country of origin. The second sentence of Article 14(d) thus makes clear that a benchmark for adequate remuneration must be

²¹ Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.347-4.348.

²² Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.345.

²³ Appellate Body Report, *Canada – Aircraft*, para. 155, regarding the contextual relevance of Article 14 for the purpose of determining the existence of "benefit".

²⁴ Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.397.

²⁵ Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.398.

determined 'in relation to prevailing market conditions', and that the relevant conditions are those existing 'in the country of provision'. Prevailing market conditions in the country of provision is thus the standard for assessing the adequacy of remuneration."²⁶

1.6.1 "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"

17. The Panel in *US – Carbon Steel (India)* explained the comparative analysis to determine whether remuneration is "less than adequate" under Article 14(d):

"[T]he comparative analysis envisaged by Article 14(d) concerns the question of whether the remuneration is 'less than' adequate. The phrase 'less than' is comparative in nature, requiring a comparison between the government price and a price that is representative of adequate remuneration in the market, as determined in relation to the prevailing market conditions. The fact that Article 14(d) does not use the term 'difference' does not detract from the comparative nature of the analysis inherent in the first sentence of Article 14(d)."²⁷²⁸

18. Further, in *US – Carbon Steel (India)*, the Appellate Body stated that a determination of whether remuneration is "less than adequate" involves the selection of a comparator, or a benchmark price, to be compared with the government price for the good in question:

"[A] determination of whether remuneration is 'less than adequate' within the meaning of Article 14(d) involves the selection of a comparator – i.e. a benchmark price – with which to compare the government price for the good in question. If the result of this comparison is that the government price is less than the benchmark price, the difference between the two prices reflects the benefit conferred under Article 14(d)."²⁹

19. The Appellate Body, in upholding the Panel's conclusions, in *US – Carbon Steel (India)*, rejected India's argument that, under Article 14(d) an investigating authority must, as a threshold matter, address the adequacy of remuneration prior to an examination of benefit.³⁰ The Appellate Body stated:

"[W]e consider that Article 14(d) of the SCM Agreement establishes the adequacy of remuneration as the lens through which 'benefit', within the meaning of that provision, must be assessed. Thus, Article 14(d) prescribes a unitary assessment in which a determination of benefit is reached through an analysis of the adequacy of remuneration for government-provided goods. Accordingly, we consider that, contrary to India's assertions, separate analyses of 'benefit' and 'remuneration' are not required under Article 14(d) of the SCM Agreement."³¹

20. Further, the Appellate Body in *US – Carbon Steel (India)* agreed with the Panel that, under Article 14(d), "the adequacy of remuneration is to be assessed from the perspective of the recipient, rather than the government provider of the good in question." Based on the title of Article 14(d) (i.e., "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient") and the text of its second sentence, the Appellate Body concluded that "[a]lthough the concept of 'remuneration' reflects a payment for goods or services that could be viewed from the perspective of either the person providing or receiving the payment, other interpretative

²⁶ Panel Report, *US – Coated Paper (Indonesia)*, para. 7.32.

²⁷ (footnote original) The comparative analysis required by Article 14(d) is similar to that required by Article 14(a) which, while not using the term "difference", nevertheless requires a comparison of the "investment decision" with "usual investment practice".

²⁸ Panel Report, *US – Carbon Steel (India)*, para. 7.32.

²⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.148.

³⁰ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.117.

³¹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.126.

elements lead us to consider that this assessment must properly be conducted from the perspective of the recipient."³²

21. In *US – Countervailing Measures (China)*, the Appellate Body did "not consider that the fact that the SCM Agreement establishes a single definition for the term 'government' means that, under Article 14(d), a proper analysis for selecting a benefit benchmark is dependent on an examination of whether any relevant entities in the market fall within the definition of 'government', including on the basis of a finding that [a state owned enterprise] is a public body."³³ The Appellate Body explained:

"We observe ... that the term 'government' appears only in the first sentence of Article 14(d), which establishes that 'the provision of goods ... by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration'. The first sentence of Article 14(d) thus provides guidance for assessing whether the provision of goods confers a benefit, following a previous affirmative determination that such provision of goods constitutes a financial contribution under Article 1.1(a)(1)(iii) that was carried out by a 'government' as defined in Article 1.1(a)(1)."³⁴

22. Acknowledging that there is no single definition of the term "government" for purposes of the SCM Agreement, the Appellate Body in *US – Countervailing Measures (China)* emphasized "it does not follow that, in determining the appropriate benefit benchmark under Article 14(d), investigating authorities are required to limit their analysis to an examination of the role played in the market by government-related entities that have been properly found to be government in the narrow sense or public bodies." The Appellate Body continued:

"[T]he selection of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of in-country prices from any particular source, including government-related prices other than the financial contribution at issue. This is because the issue of 'whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source, but rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision.' As a consequence, prices of government-related entities other than those of the entity providing the financial contribution at issue need to be examined to determine whether they are market determined and can therefore form part of a proper benchmark."³⁵

23. Recalling the Appellate Body's statement in *US – Carbon Steel (India)* that a government, in its role as a provider of a good, may distort in-country prices by setting an artificially low price, the Appellate Body in *US – Countervailing Measures (China)* explained:

"In such circumstances, those prices cannot be said to be market determined. We emphasize that the ability of a government provider to have such an influence on in-country private prices presupposes that it has sufficient market power to do so."³⁶ The Appellate Body explained that, in such a situation, 'the government's role in providing the financial contribution [may be] so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.' Because this would lead to a calculation of benefit that is artificially low, or even zero, the right of Members to countervail subsidies could be undermined or circumvented in such a scenario."³⁷

³² Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.127-4.129.

³³ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.43.

³⁴ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.43.

³⁵ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.64.

³⁶ (*footnote original*) Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444). We also do not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself.

³⁷ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.50.

24. The Panel in *US – Softwood Lumber VII* noted that, in determining whether the "remuneration" for a good is "less than adequate", any charges paid by the recipient other than the price of the good may constitute part of the "remuneration", as well as mandatory obligations that the recipient of the good in question must furnish to receive the good. Specifically, the Panel stated that:

"The Appellate Body has observed that the determination of whether the remuneration for the good in question is 'less than adequate' within the meaning of Article 14(d), involves the selection of a comparator – i.e. a benchmark price – with which to compare the government price for the good in question. If the result of this comparison is that the government price is less than the benchmark price, the difference between the two prices reflects the benefit conferred under Article 14(d). The panel in *US – Countervailing Measures (China) (Article 21.5 – China)* understood the term 'remuneration', that the Appellate Body referred to as 'government price', as follows:

Depending on the circumstances, the remuneration, i.e. '[t]he act of paying or compensating', may encompass something other or more than the price paid for the goods (compensation in kind, for example). In most cases however, the price paid by the producer/exporter would typically constitute the remuneration for the provision of the good in question.

We agree with this finding of that panel and consider that charges other than the price of the good, or mandatory obligations that the receiver of the good in question must furnish in order to receive the good, may also constitute part of the 'remuneration' for the good in question that an investigating authority must take into account when determining benefit by comparing the government price to the benchmark. We consider that the assessment of whether such charges or obligations give rise to costs that must be included in the remuneration for the good in question will depend on the facts and circumstances of each case."³⁸

25. The Panel subsequently considered whether the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by declining to consider, as part of the "remuneration", certain payments made by harvesters for timber that they purchased. For at least some of these payments, the Panel considered that the USDOC should have adjusted the stumpage price in the provinces at issue because they did not represent the full remuneration paid by the harvesters to the provinces for the timber, which included in-kind costs and mandatory charges:

"We agree with Canada that the USDOC ought to have adjusted the stumpage price in the provinces at issue to account for various mandatory in-kind costs and mandatory charges that harvesters were required to incur as a condition to access Crown timber. This is because the USDOC was under the obligation to determine the adequacy of remuneration for standing timber based on the full remuneration paid by the harvesters to the provinces in question.

[W]e consider that an investigating authority must take into account the full remuneration paid for the good in question when determining benefit by comparing the government price to the benchmark price. Further, the stumpage price may represent only a certain percentage of the overall payment made by a purchaser of timber, with the remaining percentage of the payment being potentially incurred in the form of other charges or in-kind expenses. The percentage of the overall payment for timber that the stumpage price represents in each of the other provinces may not be the same as the percentage of overall payment for timber that the stumpage price in Nova Scotia represents. For example, while one province may decide to recover half of the value of timber through stumpage prices and the other half through other means such as in-kind obligations, another province may decide to recover the full value through stumpage price alone, thus not needing to impose any other charges or in-kind payment obligations on the purchaser. In the absence of a finding by the USDOC that the stumpage price component of the overall payment made for standing timber represented the same percentage of the overall payment made for standing

³⁸ Panel Report, *US – Softwood Lumber VII*, paras. 7.434-7.435.

timber in all provinces, the USDOC's reasoning that other charges and in-kind payments could be disregarded because it was looking at the stumpage prices in all provinces would therefore not ensure a fair comparison. We thus consider that the USDOC either should have ascertained that the stumpage prices represented the same percentage of overall payment made for standing timber by a purchaser in all provinces, or should have considered all kinds of payments made for purchasing timber in all provinces to properly determine the adequacy of remuneration. Since the USDOC did neither, we find that the USDOC was mistaken in considering that it could disregard other payments made by timber purchasers because it was looking at the stumpage price alone for Nova Scotia, as well as the other provinces."³⁹

1.6.2 "in relation to prevailing market conditions for the good or service in question in the country of provision"

26. In *US – Softwood Lumber IV*, the Appellate Body concluded that, in certain circumstances, an investigating authority may use a benchmark, under Article 14(d) of the SCM Agreement, other than private prices in the country of provision for determining if goods have been provided by a government for less than adequate remuneration. Regarding the threshold issue of whether a benchmark other than private prices may be used, the Appellate Body found:

"Although Article 14(d) does not dictate that private prices are to be used as the *exclusive* benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. In this case, both participants and the third participants agree that the starting-point, when determining adequacy of remuneration, 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. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods. However, this may not always be the case. As will be explained below, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods."⁴⁰

27. As for the issue of when investigating authorities may use a benchmark other than private prices, the Appellate Body in *US – Softwood Lumber IV* reasoned:

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

³⁹ Panel Report, *US – Softwood Lumber VII*, paras. 7.439-7.440.

⁴⁰ Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

It appears to us that the language found in Article 14(d) ensures that the provision's purposes are not frustrated in such situations. Thus, while requiring investigating authorities to calculate benefit 'in relation to' prevailing conditions in the market of the country of provision, Article 14(d) permits investigating authorities to use a benchmark other than private prices in that market. When private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers will align their prices with those of the government-provided goods, it will not be possible to calculate benefit having regard exclusively to such prices.

We emphasize once again that the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited. We agree with the United States that '[t]he fact that the government is a significant supplier of goods does not, in itself, establish that all prices for the goods are distorted'. Thus, an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision. The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."⁴¹

28. The Appellate Body in *US – Softwood Lumber IV* recalled that the USDOC had constructed an alternative benchmark based on prices of stumpage in bordering states of the northern United States, adjusted to take into account market conditions prevailing in Canada. Having reversed the Panel's interpretation of Article 14(d) of the SCM Agreement, the Appellate Body concluded that there were insufficient factual findings by the Panel and undisputed facts in the Panel record to enable it to examine the WTO-consistency of the benchmark used by USDOC.⁴² The Appellate Body observed:

"[W]hen choosing an alternative method for determining the adequacy of remuneration, it has to be kept in mind that prices in the market of a WTO Member would be expected to reflect prevailing market conditions in that Member; they are unlikely to reflect conditions prevailing in another Member. Therefore, it cannot be presumed that market conditions prevailing in one Member, for instance the United States, relate or refer to, or are connected with, market conditions prevailing in another Member, such as Canada for example. Indeed, it seems to us that it would be difficult, from a practical point of view, for investigating authorities to replicate reliably market conditions prevailing in one country on the basis of market conditions prevailing in another country. First, there are numerous factors to be taken into account in making adjustments to market conditions prevailing in one country so as to replicate those prevailing in another country; secondly, it would be difficult to ensure that all necessary adjustments are made to prices in one country in order to develop a benchmark that relates or refers to, or is connected with, prevailing market conditions in another country, so as to reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale in that other country.

It is clear, in the abstract, that different factors can result in one country having a comparative advantage over another with respect to the production of certain goods. In any event, any comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision. This is because countervailing measures may be used only for the purpose of offsetting a subsidy bestowed upon a product, provided that it causes injury to the domestic

⁴¹ Appellate Body Report, *US – Softwood Lumber IV*, paras. 100-103.

⁴² Appellate Body Report, *US – Softwood Lumber IV*, para. 118.

industry producing the like product. They must not be used to offset differences in comparative advantages between countries."⁴³

29. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body upheld the Panel's finding that China had not established that the investigating authority's rejection of in-country private prices as benchmarks was inconsistent with Article 14(d).⁴⁴

30. In *US – Carbon Steel (India)*, the Appellate Body interpreted the phrase "prevailing market conditions" in the context of Article 14(d) to consist of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices", based on a textual analysis and by reference to Article 6.3(c) of the SCM Agreement.⁴⁵ Further, the Appellate Body, recalling its statement in *EC and certain member States – Large Civil Aircraft*, emphasized the "market orientation" of the inquiry under Article 14(d):

"As the Appellate Body stated in *EC and certain member States – Large Civil Aircraft*, the language found in the second sentence of Article 14(d) 'highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, *under market conditions*, be exchanged'.⁴⁶⁴⁷

31. The Appellate Body in *US – Carbon Steel (India)* elaborated on the use of benchmark prices for the purposes of Article 14(d). It noted that, while prices at which the same or similar goods are sold by private suppliers in arm's length transactions constitute the primary benchmark and a starting point of the analysis, there is no "hierarchy" between in-country prices that may be relied upon in arriving at a benchmark:

"We emphasize that whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision. Accordingly, while the prices at which the same or similar goods are sold by private suppliers in the country of provision may serve as a starting point of analysis, this does not mean that, having found such prices, the analysis must necessarily end there. For example, prices on record of government-related entities other than the entity providing the financial contribution at issue also need to be considered to assess whether they are market determined and can therefore form part of a proper benchmark. Article 14(d) establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis. Rather, Article 14(d) requires an analysis of the market in the country of provision to determine whether particular in-country prices can be relied upon in arriving at a proper benchmark.

...

[W]hat an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record."⁴⁸

32. The Appellate Body in *US – Carbon Steel (India)* addressed India's argument that the Panel's reliance on "isolated import transactions" on an "as delivered basis" to establish that these transactions reflect the "prevailing market conditions" in India was based on an incorrect understanding of the term "prevailing market conditions" of Article 14(d). The Appellate Body

⁴³ Appellate Body Report, *US – Softwood Lumber IV*, paras. 108-109.

⁴⁴ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458.

⁴⁵ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150.

⁴⁶ (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 975. (emphasis added).

⁴⁷ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151. See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.44.

⁴⁸ Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.154 and 4.157.

explained that "[t]he crux of India's claim is that 'prevailing market conditions', within the meaning of Article 14(d) of the SCM Agreement, refers to the conditions prevailing in the market in general, as opposed to isolated acts of individual players in the market in question."⁴⁹ The Appellate Body then recalled its findings that "an assessment of 'prevailing market conditions' ... necessarily involves an analysis of the market generally" and that "any [adjustments for delivery charges] must reflect the generally applicable delivery charges for the good in question in the country of provision."⁵⁰ Based on these considerations, the Appellate Body concluded that "in order to assess the adequacy of remuneration in relation to prevailing market conditions in the country of provision ... it may be necessary for an investigating authority to seek, and engage with, evidence concerning the prevailing market conditions for the good in question, including the generally applicable delivery charges for that good."⁵¹ Turning to India's contention that one isolated transaction cannot be expanded to reflect general market conditions in India, the Appellate Body agreed that, while the price inclusive of international delivery charges may "as an evidentiary matter, provide some indication as to the generally applicable delivery charges for that good in the country of provision", it cannot be "inferred, without more, that a single, isolated import transaction for a particular good reflects or relates to prevailing market conditions for that good in the country of provision."⁵²

33. The Appellate Body in *US – Countervailing Measures (China)* observed that "[t]he second sentence of Article 14(d) ... clarifies that the relevant benchmark must be determined 'in relation to prevailing market conditions', and that such conditions are those existing 'in the country of provision'."⁵³

34. Further, the Appellate Body in *US – Countervailing Measures (China)* clarified the sources of benchmark prices for the purposes of establishing "prevailing market conditions" under Article 14(d):

"Proper benchmark prices would normally emanate from the market for the good in question in the country of provision. To the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d). Such in-country prices could emanate from a variety of sources, including private or government-related entities."⁵⁴

35. In *US – Countervailing Measures (21.5 - China)*, the Panel recognized that the disagreement between the parties concerned "the USDOC's determination that in-country prices in China are not 'market-determined' and thus cannot be used as a benchmark for the purpose of determining the adequacy of remuneration under Article 14(d)."⁵⁵ The Panel rejected China's argument that an investigating authority may resort to an out-of-country benchmark only when it has established that in-country prices are effectively determined by the government, *de jure* or *de facto*. Relying on earlier jurisprudence, the Panel found that there is no defined, exhaustive set of circumstances in which an authority may reject in-country prices and resort to an out-of-country benchmark:

"Consistent with our understanding that Article 14(d) requires a comparison of the terms of the financial contribution provided to the producer/exporter under investigation and the terms 'that would have been available to the recipient on the market', we consider that the 'other circumstances' contemplated by the Appellate Body [in *US – Carbon Steel (India)*] refer to the multiplicity of situations in which in-country prices might not be suitable for determining the terms on which the goods at issue are offered on the domestic market. This may encompass a variety of situations in which in-country prices for the goods at issue are either not available or not verifiable or cannot, for other reasons, be used to determine 'whether the recipient is better off absent the financial contribution'. These circumstances, even if very limited,

⁴⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.304.

⁵⁰ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.304.

⁵¹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.306.

⁵² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.309.

⁵³ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.45.

⁵⁴ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.46.

⁵⁵ Panel Report, *US – Countervailing Measures (Article 21.5 - China)*, para. 7.158.

in our view go beyond the sole circumstance in which prices are determined, *de jure* or *de facto*, by the government."⁵⁶

36. The Panel in *US – Countervailing Measures (China) (Article 21.5 – China)* stated that an "investigating authority may reject in-country prices if there is evidence of price distortion, and not only if there is evidence that a government effectively determines the prices of goods at issue ...because the existence of price distortion may well ... preclude a proper comparison of the terms of the financial contribution with market terms. This may be the case when the government is the sole or predominant provider of a good, but it may also be the case in other circumstances that render the comparison equally impossible or irrelevant."⁵⁷

37. In discussing the recourse to out-of-country prices as a benefit benchmark in the event of price distortion, the Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)* rejected China's interpretation that limits such recourse to circumstances "in which the government effectively determines the price at which the good is sold, either *de jure* or *de facto*."⁵⁸⁵⁹ Instead, the Appellate Body agreed with the Panel and stated that an investigating authority may reject in-country prices in the case of government intervention that does not directly determine in-country prices but "may have similar distortive impact on those prices, such that they no longer represent a proper benchmark for adequate remuneration."⁶⁰

38. Therefore, the Appellate Body concluded that "[c]entral to the inquiry under Article 14(d) of the SCM Agreement in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention."⁶¹ The Appellate Body further explained that price distortion does not encompass "any impact on prices as a result of any government intervention,"⁶² that recourse to out-of-country prices may be warranted where the investigating authority finds evidence of "price distortion resulting from government intervention",⁶³ and that "[t]he determination must be made case by case, based on the relevant evidence in the particular investigation, and taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record."⁶⁴

39. The Appellate Body went on to discuss the type of analysis and evidence required for a finding of price distortion and considered that these will vary "depending upon a number of factors, including the circumstances of the case and the characteristics of the market."⁶⁵ The Appellate Body found that quantitative assessment, price comparison methodology, or a counterfactual analysis, as well as qualitative analysis may be appropriate,⁶⁶ but "in the absence of evidence of a direct impact of the government intervention on prices, ... a more detailed analysis and explanation may be required" as to how price distortion actually results from government intervention in the market.⁶⁷

40. The Appellate Body clarified that for the purposes of establishing whether prices are market-determined, the investigating authority's analysis must take into account the following:

"[I]ndependently of the method chosen by the investigating authority, it has to engage with and analyse the methods, data, explanations, and supporting evidence put forward by interested parties, or collected by the investigating authority, in order to ensure that its finding of price distortion is supported, and not diminished or contradicted, by evidence and explanations on the record. In turn, it is the role of panels to assess whether the investigating authority's explanation for its determination is reasoned and adequate by critically reviewing that explanation, in

⁵⁶ Panel Report, *US – Countervailing Measures (Article 21.5 - China)*, para. 7.164.

⁵⁷ Panel Report, *US – Countervailing Measures (Article 21.5 - China)*, para. 7.168.

⁵⁸ (*footnote original*) China's other appellant's submission, para. 189.

⁵⁹ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.144.

⁶⁰ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.145.

⁶¹ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.147.

⁶² Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.146.

⁶³ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.147.

⁶⁴ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.147.

⁶⁵ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.154.

⁶⁶ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.154.

⁶⁷ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.159.

depth, and in light of the facts and explanations presented by the interested parties."⁶⁸

41. The Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)* agreed with the Panel's view that various forms of government intervention could lead to price distortion, and that whatever method, type of analyses or evidence is chosen, the investigating authorities must provide an adequate explanation as to how price distortion actually results from government intervention in the market.⁶⁹

42. In this light, the Appellate Body rejected the United States' contention that prices in China cannot be used as benefit benchmarks, and found that the Panel correctly considered that the USDOC did not provide a "reasoned and adequate explanation" on "how" the government of China's interventions described in the Benchmark Memorandum "influenced pricing decisions regarding the inputs at issue and actually resulted in price distortion with respect to the determinations at hand."⁷⁰ Instead, the United States' argument concerning the rejection of in-country prices was based on country-wide findings about market distortion throughout the entire steel sector and "did not engage sufficiently with the price data on the record, which appeared on its face relevant to the analysis of price distortion and was specific to the three inputs at issue."⁷¹ According to the Appellate Body, it would have been relevant to take into account the input-specific Mysteel pricing data on the record and examine the extent to which it affected its overall inference of price distortion.⁷²

43. In a separate opinion in *US – Countervailing Measures (China) (Article 21.5 – China)*, one Division member disagreed with the Appellate Body's finding that the USDOC did not provide an "explanation of how government intervention actually results in price distortion",⁷³ noting that the US "sufficiently explained why it considers the respective government interventions to have distorted domestic prices" and should not have been "required to rely on or further analyse such in-country prices in the context of a benchmarking analysis."⁷⁴ The Division member considered the majority's application of the standard for recourse to out-of-country prices as requiring a quantification of the impact of government intervention and thus as being "overly narrowed", and pointed out:

"In endorsing the Panel's standard, the majority appears also to have required an analysis of in-country prices as a condition for recourse to an alternative benchmark, even in cases where in-country prices are not available on the record. In this way, the result of the majority's analysis contradicts its stated understanding of Article 14(d) as allowing for different types of analysis and evidence for purposes of arriving at a proper benchmark, depending on the circumstances of the case."⁷⁵

44. In *US – Coated Paper (Indonesia)*, Indonesia alleged that the USDOC had acted inconsistently with Article 14(d) by not using domestic prices of standing timber as the basis to calculate the benchmark price. The Panel rejected this claim. The Panel observed that the Indonesian government was the "predominant supplier of timber harvested during the [period of investigation] – with over 93% of the market", which "made it likely that private prices would be distorted and that owners of private land would align their prices for the harvesting of standing timber to those established by the [government of Indonesia]". From this fact, the Panel found that the position of the Indonesian government was closer to that of a "sole supplier" than a "significant supplier" of this good." According to the Panel, "in such a situation, other evidence would carry limited weight."⁷⁶

45. The Panel in *US – Softwood Lumber VII* addressed the issue of whether Article 14(d) required the USDOC to consider using, as a starting point in its benefit assessment, the market-determined

⁶⁸ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.155.

⁶⁹ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.160-5.161.

⁷⁰ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.172.

⁷¹ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.189.

⁷² Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.201.

⁷³ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.250.

⁷⁴ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.254.

⁷⁵ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.266.

⁷⁶ Panel Report, *US – Coated Paper (Indonesia)*, para. 7.61.

benchmark prices that it had derived from five other regions in Canada before it could use stumpage benchmarks from the region in which the government provided the good in question.⁷⁷

46. The Panel first examined the text of Article 14(d) and determined that the "good" with respect to which the adequacy of remuneration must be determined, in relation to the prevailing market conditions, is the government-provided good:

"The first sentence of Article 14(d) pertains to the provision of goods by a government and requires that the provision of goods must not be considered as conferring a benefit unless it is made for less than adequate remuneration. The second sentence relates to the method for determining the adequacy of remuneration for 'the good in question'. It follows from reading the first and second sentences of Article 14(d) together that 'the good in question' referred to in the second sentence of Article 14(d) is the government-provided good. In other words, the 'good in question' is *the good that the government actually sold* and for which the investigating authority seeks to determine the adequacy of remuneration."⁷⁸

47. The Panel then stated that an investigating authority must select a benchmark that reflects the "factual situation", or the "prevailing market conditions", in which the government provided the good in question:

"To determine the adequacy of remuneration for the government-provided good in question, Article 14(d) requires that an investigating authority use a benchmark that relates to the 'prevailing market conditions' for *that* good in the country of provision. Article 14(d) therefore requires that an investigating authority select a benchmark that relates to the *prevailing market conditions for the government-provided good* in question in the country of provision. In other words, as a previous panel observed, the benchmark must reflect the 'factual situation' found to exist in respect of the government-provided good.

We consider that a benchmark price that reflects the factual situation of the government-provided good, will generally emanate from the prevailing market conditions for that good. Because that price *results from* the same or similar market conditions as those for the government-provided good, it therefore inherently *relates* to the prevailing market conditions for the government-provided good."⁷⁹

48. In the context of these statements, the Panel considered that choosing as a benchmark a private, market-determined price of a good, from *anywhere* in the country of provision, would not suffice for purposes of Article 14(d). The Panel considered that such a benchmark would not necessarily reflect the same prevailing market conditions as those encountered by the government-provided good.⁸⁰ Specifically, the Panel stated the following:

"Simply because goods that are the same as or similar to the government-provided good are sold across the country of provision, it is not necessary that market-determined prices for those goods will reflect the same prevailing market conditions as those for the government-provided good. For instance, it is not necessarily true that the same good, say stumpage, sold in different parts of the country of provision, will have the same quality, availability, marketability, transportation-related costs, and conditions of sale – all prevailing market conditions as set out under Article 14(d)."⁸¹

49. The Panel considered that whether an investigating authority could select a private, market-determined price of a good from anywhere in the country of provision as a benchmark for the price of a good provided by the government in a particular region would depend on whether

⁷⁷ Panel Report, *US – Softwood Lumber VII*, para. 7.20.

⁷⁸ Panel Report, *US – Softwood Lumber VII*, para. 7.21.

⁷⁹ Panel Report, *US – Softwood Lumber VII*, paras. 7.22-7.23.

⁸⁰ Panel Report, *US – Softwood Lumber VII*, para. 7.23.

⁸¹ Panel Report, *US – Softwood Lumber VII*, para. 7.24.

the prevailing market conditions for the former reflected the prevailing market conditions for the latter⁸²:

"Where the record evidence before the investigating authority shows that the prevailing market conditions for the government-provided good reflect the prevailing market conditions for the same or similar goods sold across the country of provision, in that case, a market-determined benchmark price selected from *anywhere* in the country of provision would satisfy the requirements of Article 14(d). This is so because considering that the prevailing market conditions would be the same everywhere in the country of provision, no matter where the market-determined benchmark is picked from in the country of provision, that benchmark will relate to the prevailing market conditions for the government-provided good.

Where the record evidence before the investigating authority shows, however, that the prevailing market conditions for the government-provided good differ from the prevailing market conditions for the same or similar goods sold in other parts of the country of provision, it is not sufficient for purposes of Article 14(d) that the investigating authority uses as a benchmark a market-determined price from anywhere in the country of provision. In that case, the investigating authority will need to do more to ensure that, as Article 14(d) requires, the selected benchmark relates to the *prevailing market conditions for the government-provided good* in question, that is, the factual situation found to exist in respect of the government-provided good."⁸³

50. The Panel stated that an investigating authority may use a market-determined price as a benchmark so long as it relates to the prevailing market conditions for the government-provided good in question. The Panel noted that an investigating authority, in certain instances, could take the market-determined price for the same or similar good from anywhere in the country of provision and make appropriate adjustments to it so that it would subsequently relate to the prevailing market conditions for the government-provided good.⁸⁴ The Panel noted, however, that "market-determined prices that *result from the prevailing market conditions for the government-provided good itself* would more accurately reflect the prevailing market conditions for that good".⁸⁵ The Panel drew this conclusion on the following basis:

"[S]uch [market-determined] prices emanate from the same or similar market conditions as the government-provided good, and therefore intrinsically relate to the prevailing market conditions for the government-provided good. We take the view that such prices will have the necessary connection with the prevailing market conditions for the government-provided good. In contrast, market-determined prices for goods that are the same or similar to the government-provided good but that result from prevailing market conditions different from those for the government-provided good, must be carefully selected and adjusted so that they reflect the prevailing market conditions for the government-provided good. We understand, in light of the Appellate Body's observations, that practically speaking, it would be difficult for investigating authorities to 'replicate reliably', by way of adjustments, a price reflecting prevailing market conditions for the government-provided good based on another price, which, although for the same or similar good, results from prevailing market conditions different from those for the government-provided good."⁸⁶

51. The Panel considered, therefore, that making adjustments to prices for goods that are the same as or similar to the government-provided good, but that result from prevailing market conditions different from those for the government-provided good, even when those prices are

⁸² Panel Report, *US – Softwood Lumber VII*, para. 7.26.

⁸³ Panel Report, *US – Softwood Lumber VII*, paras. 7.26-7.27.

⁸⁴ Panel Report, *US – Softwood Lumber VII*, para. 7.27.

⁸⁵ Panel Report, *US – Softwood Lumber VII*, para. 7.27.

⁸⁶ Panel Report, *US – Softwood Lumber VII*, para. 7.27.

market-determined and "in-country", is not the preferred way of arriving at an appropriate benchmark.⁸⁷ The Panel further elaborated on the underlying reasons for its conclusion:

"The underlying reasons are similar to the Appellate Body's consideration that making adjustments to 'out-of-country' prices is not the preferred way to arrive at an appropriate benchmark. In that context, the Appellate Body has suggested that using 'out-of-country' prices by making adjustments to them, may be an alternative to be relied on only where 'in-country' prices for the government-provided good are distorted."⁸⁸

52. The Panel further elaborated upon the preferred approach where the record shows that the prevailing market conditions for the government-provided good differ from those for the same or similar goods sold in other parts of the country of provision. In such a case, an investigating authority would be required, as a starting point in its benefit analysis, to consider using as a benchmark the prices resulting from the prevailing market conditions for the government-provided good. The Panel further elaborated as follows:

"Where the record shows that the prevailing market conditions for the government-provided good span, and are limited to, a particular geographical area, say a specific region within the country of provision, the benchmark price must reflect the prevailing market conditions in that region, because it is those prevailing market conditions that constitute the prevailing market conditions for the transactions concerning the government-provided good being investigated. The investigating authority would therefore be required to consider using, at least as a starting point in its benefit assessment, a benchmark price resulting from the prevailing market conditions within that region, because that price would necessarily relate to the prevailing market conditions for the government-provided good."⁸⁹

53. The Panel ultimately considered, therefore, that an investigating authority must first determine, before using a market-determined benchmark from one region of a particular country, whether the record shows that the prevailing market conditions differ across regions in the country of provision. More specifically, the Panel stated the following:

"[W]here the record evidence suggests that the country of provision has regionally different prevailing market conditions, the investigating authority would need to provide a reasoned and adequate explanation regarding whether the record demonstrates that the prevailing market conditions for the government-provided good are limited, for instance, to a specific region. Indeed, the obligation that the investigating authority consider using as a starting point a benchmark price resulting from the prevailing market conditions for the government-provided good, would make it incumbent upon the investigating authority to first provide that reasoned and adequate explanation regarding whether that region has its own distinct prevailing market conditions before the authority can turn to using benchmarks from outside that region. If the investigating authority adequately explains that the prevailing market conditions for that region are not distinct from other region(s) in the country of provision, it need not consider using a benchmark from that region and could select a benchmark external to that region. Absent that reasoned and adequate explanation, the investigating authority would not have properly considered whether the region in question has its own distinct prevailing market conditions and would not have met its obligation to first consider using a benchmark resulting from the prevailing market conditions for the government-provided good. Unless the authority provides that reasoned and adequate explanation, it would therefore remain under an obligation to consider using as a starting point a benchmark price resulting from the prevailing market conditions for the government-provided good, before it can use an external benchmark."⁹⁰

⁸⁷ Panel Report, *US – Softwood Lumber VII*, para. 7.28.

⁸⁸ Panel Report, *US – Softwood Lumber VII*, para. 7.28.

⁸⁹ Panel Report, *US – Softwood Lumber VII*, para. 7.30.

⁹⁰ Panel Report, *US – Softwood Lumber VII*, para. 7.31.

54. The Panel then outlined a case in which an investigating authority may use a benchmark price that is "as comparable as possible" to the price of the government-provided good:

"Upon consideration of such prices resulting from the prevailing market conditions for the government-provided good as the starting point in its benefits analysis, should the investigating authority find them to be distorted as a result of the government's role as a predominant or significant supplier in the market, the investigating authority may decline using those prices as benchmarks and may instead use a benchmark price that is 'as comparable as possible' to that price, including by making appropriate adjustments, if necessary. This would include using as a benchmark a price for a good that is the same as or similar to the government-provided good, but which results from prevailing market conditions different to those for the government-provided good, provided that it is adjusted to reflect prevailing market conditions for the government-provided good."⁹¹

55. The Panel subsequently referred to the text of Article 14(d) to elaborate upon the scope of the phrase "prevailing market conditions" with respect to which the adequacy of remuneration under Article 14(d) would be measured:

"[W]e recall that Article 14(d) of the SCM Agreement provides that when determining whether a government provision of goods is made for less than adequate remuneration (thereby conferring a benefit), the adequacy shall be determined in relation to the prevailing market conditions for the good in question in the country of provision. The inclusive list of the prevailing market conditions identified in the second sentence of Article 14(d) – price, quality, availability, marketability, transportation, and other conditions of purchase or sale – describe factors that may affect the comparability of the financial contribution at issue with a benchmark. The assessment of 'prevailing market conditions', within the meaning of Article 14(d) ..., necessarily involves an analysis of the market generally, rather than isolated transactions in that market. The investigating authority can draw only[,] through such an analysis[,] conclusions regarding the conditions that are 'prevailing' in the market of the country of provision. '[O]ther conditions of purchase or sale' is a factor included in the illustrative list of prevailing market conditions in Article 14(d)."⁹²

56. In a later section of the panel report in *US – Softwood Lumber VII*, the Panel considered that, while the central inquiry under Article 14(d) in choosing an appropriate benchmark for assessing benefit is whether government intervention results in price distortion, such that the recourse to out-of-country prices is warranted, the market from which the benchmark is selected need not be completely free of any government intervention.⁹³ The Panel stated the following:

"The Appellate Body has found that the concept of 'price distortion' is not equivalent to any impact on prices as a result of any government intervention. Rather, an investigating authority must determine whether in-country prices are distorted on a case-by-case basis, taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record. Price distortion can be established based on quantitative as well as qualitative methods, provided that the investigating authority engages with and analyses the methods, data, explanations, and supporting evidence put forward by interested parties, or collected by the investigating authority, in order to ensure that its finding of price distortion is supported, and not diminished or contradicted, by evidence and explanations on the record. The Appellate Body has noted that in cases of government intervention that indirectly impact prices, a more detailed analysis and explanation of how prices are distorted as a result of such government intervention may be required. We therefore consider that whether an export regulation could constitute a form of government intervention that distorts prices is a case-by-case assessment."⁹⁴

⁹¹ Panel Report, *US – Softwood Lumber VII*, para. 7.32.

⁹² Panel Report, *US – Softwood Lumber VII*, para. 7.534.

⁹³ Panel Report, *US – Softwood Lumber VII*, para. 7.145.

⁹⁴ Panel Report, *US – Softwood Lumber VII*, para. 7.145.

57. In another section of the panel report in *US – Softwood Lumber VII*, the Panel addressed whether the USDOC's methodology to determine the adequacy of remuneration, i.e. the use of an out-of-country benchmark based on Washington-state log prices, was flawed *per se*.⁹⁵ The Panel recalled that the relevant inquiry under Article 14(d) is whether the benchmark used by an investigating authority to assess if a good has been provided by the government for less than adequate remuneration relates to prevailing market conditions for the good in the country of provision.⁹⁶ The Panel further elaborated as follows:

"In cases where the investigating authority uses out-of-country prices to assess the adequacy of remuneration, as discussed above, it needs to make appropriate adjustments to ensure that the resulting benchmark relates to the prevailing market conditions in the country of provision. If the investigating authority fails to make the necessary adjustments, that benchmark will not relate to the prevailing market conditions in the country of provision and would not allow the investigating authority to assess the adequacy of the government's remuneration in a manner consistent with Article 14(d) ...

However, the need to make such type of adjustments obviously arises only because the out-of-country prices without such type of adjustments do not relate to prevailing market conditions. In such a scenario, one would expect differences in the prices initially selected (and not yet adjusted) and the financial contribution at issue. The more significant the differences, the more challenging it may be for an investigating authority to adjust the prices to reflect prevailing market conditions. However, what is relevant for the purpose of our determination here is whether the benchmark *ultimately used* by the investigating authority in assessing the adequacy of remuneration under Article 14(d) reflects the prevailing market conditions in the country of provision, such that ... the benchmark is comparable to the financial contribution at issue."⁹⁷

58. The Panel considered that, in ensuring that the chosen benchmark relates to the prevailing market conditions in the country of provision, nothing in Article 14(d) suggests that an investigating authority must investigate the causes of differences in the benchmark and the financial contribution at issue⁹⁸:

"[W]e consider that while to make a benefit assessment consistent with Article 14(d), an investigating authority must ensure that the benchmark ultimately used to make that assessment relates to the prevailing market conditions in the country of provision, nothing in this provision suggests that an investigating authority must *investigate the causes* of differences in the benchmark and the financial contribution at issue. If Article 14(d) did impose such a requirement an investigating authority may well be required to undertake a *quasi-causation* analysis answering *why* the benchmark price differs from the financial contribution at issue, and show that the only reason it differs is because of a subsidy (and not other possible reasons).⁹⁹ In particular, we consider that such a requirement would impose a significant burden on an investigating authority (which is required to complete its investigation within a maximum period of 18 months), and a burden that Canada has not shown is envisaged under Article 14(d) of the SCM Agreement. Therefore, we disagree with Canada's argument that in selecting the Washington log benchmark the USDOC relied on a false premise that log prices are constant across geographical regions."¹⁰⁰

59. In a subsequent section of the panel report in *US – Softwood Lumber VII*, the Panel set out to determine whether the USDOC acted inconsistently with Article 14(d) of the SCM Agreement when it converted an out-of-country benchmark, reported in price per thousand board feet (MBF), to price per cubic metre, using a single conversion rate of 5.93.¹⁰¹ Canada contended that the single

⁹⁵ Panel Report, *US – Softwood Lumber VII*, para. 7.464.

⁹⁶ Panel Report, *US – Softwood Lumber VII*, para. 7.465.

⁹⁷ Panel Report, *US – Softwood Lumber VII*, paras. 7.465-7.466.

⁹⁸ Panel Report, *US – Softwood Lumber VII*, para. 7.473.

⁹⁹ (*footnote original*) Such an analysis would also be somewhat circular considering the purpose of the benefit analysis is to establish whether a subsidy was provided.

¹⁰⁰ Panel Report, *US – Softwood Lumber VII*, para. 7.473.

¹⁰¹ Panel Report, *US – Softwood Lumber VII*, para. 7.488.

conversion rate of 5.93 that the USDOC had used in the underlying investigation and had sourced from a particular study was outdated and imprecise. Canada referred, *inter alia*, to comments in two reports that highlighted the demerits of the study relied upon by the USDOC.¹⁰² The Panel noted that the USDOC had been presented with explanations as to how the two reports cited by Canada had selected certain scaling sites, which would have altered the methodology applied by the USDOC. Thus, the Panel considered that "it was incumbent on the USDOC, as an unbiased and objective investigating authority, to seek additional clarifications it considered necessary regarding the methodology used for selecting the scaling sites".¹⁰³

60. In another section of the panel report in *US – Softwood Lumber VII*, the Panel set out to determine whether the USDOC had acted inconsistently with Article 14(d) in using a benchmark price that was specific to a particular species of logs (species-specific benchmark). In Canada's view, this benchmark price was not sufficiently adjusted to reflect the prevailing market conditions in British Columbia.¹⁰⁴ The Panel noted that an investigating authority may be required to make appropriate adjustments to the benchmark to ensure that it reflects prevailing market conditions, but that Article 14(d) does not prescribe how such adjustments must be made:

"Article 14(d) of the SCM Agreement provides that when determining whether government provision of goods is made for less than adequate remuneration (thereby conferring a benefit), the adequacy shall be determined in relation to prevailing market conditions for the good in question in the country of provision (including price and quality). Therefore, the second sentence of Article 14(d) clarifies that the benchmark used for ascertaining whether there is a benefit conferred through government provision of goods must be determined in relation to the prevailing market conditions in the country of provision, here, Canada. The investigating authority ... may be required to make appropriate adjustments to the benchmark to ensure it reflects prevailing market conditions, and such adjustments must be made in light of the factors set out in Article 14(d). However, Article 14(d) does not prescribe how such adjustments must be made, and investigating authorities have the discretion to choose a methodology, which is consistent with the SCM Agreement."¹⁰⁵

61. In resolving this question, the Panel considered that it was incumbent upon the USDOC to ensure that its out-of-country benchmark was consistent with Article 14(d) by adjusting the benchmark to reflect prevailing market conditions in the country of provision¹⁰⁶:

"The USDOC's obligation to act consistently with Article 14(d) of the SCM Agreement is not diminished because the data source that it selects ... has limitations ... that make such adjustments difficult. In particular, while the USDOC was free to select a methodology that allowed it to make such type of adjustments, and the SCM Agreement is not prescriptive in this regard, the failure to make such type of adjustments in this particular case is not consistent with Article 14(d) of the SCM Agreement, which requires that the adequacy of remuneration be determined in relation to prevailing market conditions for the good in the country of provision."¹⁰⁷

62. The Panel also set out to determine whether the USDOC acted inconsistently with its obligation under Article 14(d) to ensure that its out-of-country benchmark reflected prevailing market conditions by appropriately adjusting it to include beetle-killed timber prices. The Panel stated that it was required to examine whether the USDOC provided a reasoned and adequate basis in its determination for its refusal to make such an adjustment to its benchmark.¹⁰⁸

¹⁰² Panel Report, *US – Softwood Lumber VII*, paras. 7.488-7.489.

¹⁰³ Panel Report, *US – Softwood Lumber VII*, para. 7.494.

¹⁰⁴ Panel Report, *US – Softwood Lumber VII*, para. 7.507.

¹⁰⁵ Panel Report, *US – Softwood Lumber VII*, para. 7.508.

¹⁰⁶ Panel Report, *US – Softwood Lumber VII*, para. 7.515.

¹⁰⁷ Panel Report, *US – Softwood Lumber VII*, para. 7.515.

¹⁰⁸ Panel Report, *US – Softwood Lumber VII*, para. 7.521.

63. The Panel ultimately considered that, in having selected a certain set of data as the basis for its benchmark, it was incumbent on the USDOC to ensure that it reflected the prevailing market conditions in British Columbia, specifically the existence of beetle-killed logs¹⁰⁹:

"Even if, as the United States contends, MPB and spruce beetle infestations were existent in Washington, like in British Columbia, it is not clear from the USDOC's determination whether the USDOC verified that its data source, i.e. the WDNR data adequately reflected market conditions existent in British Columbia on account of beetle infestation. In particular, we note that the Canadian interested parties made submissions before the USDOC contending that the WDNR data provided by the petitioners, and ultimately used by the USDOC, could not reflect beetle-killed log prices. Therefore, it was incumbent on the USDOC (not the Canadian respondents) to do the necessary investigation to ensure that its benchmark reflected the prevailing market conditions in British Columbia. We recall in this regard that the obligation under Article 14 to calculate the amount of subsidy in terms of benefit to the recipient encompasses a requirement to conduct a sufficiently diligent investigation into, and solicitation of relevant facts, while basing its determination on positive evidence. However, nothing in the USDOC's determination suggests that the USDOC did indeed conduct such an investigation. In this regard, we consider that even assuming the USDOC was justified in rejecting the price quotes for beetle-killed timber from Washington provided by Jendro and Hart, that did not remove the obligation on the USDOC as an investigating authority to use a benchmark that was adequately adjusted to reflect the prevailing market conditions in British Columbia."¹¹⁰

64. In a subsequent section of the panel report in *US – Softwood Lumber VII*, the Panel set out to determine whether the USDOC acted inconsistently with Article 14(d) in not taking into account the higher transportation cost paid by the Canadian respondents to bring their lumber products to major lumber-consuming markets relative to producers from outside of the country.¹¹¹ The Panel ultimately considered that the USDOC did not act inconsistently with Article 14(d) in not having done so, as the cost of transporting finished lumber products to the lumber market is not part of the inquiry required by an investigating authority under Article 14(d):

"[T]he question here is whether the USDOC should have provided an adjustment for the difference in costs for transporting lumber, a product further downstream, from sawmills to major lumber-consuming markets incurred by producers in British Columbia compared to the relatively lower transportation costs incurred by lumber producers in eastern Washington. In our view, costs incurred by that sawmill subsequently, such as the cost for transporting finished lumber products to the lumber market, are not a part of the inquiry that an investigating authority is required to undertake under Article 14(d). ... Therefore, we do not consider that Canada has shown why the USDOC acted inconsistently with Article 14(d) in failing to make adjustments for higher transportation expenses incurred in bringing lumber to market in British Columbia compared to the corresponding costs in Washington.

While it may well be undisputed that, as Canada submits, the value of logs and stumpage is affected by the cost to transport lumber to the market, this does not necessarily mean that the USDOC was required pursuant to Article 14(d) to make an adjustment for such a cost. Indeed, it is entirely possible that costs to transport not just lumber but also downstream products made from lumber may ultimately affect the price of stumpage. However, as discussed above, Article 14(d) specifically refers to prevailing market conditions of the 'good' (and not the downstream products) and therefore does not require investigating authorities to take into account costs associated with transporting downstream products such as lumber to market.

Finally, considering such type of transportation expenses are not uniform but would vary depending on how far a particular lumber producer is from one or more of the major lumber-consuming markets, it is doubtful that an investigating authority could

¹⁰⁹ Panel Report, *US – Softwood Lumber VII*, para. 7.525.

¹¹⁰ Panel Report, *US – Softwood Lumber VII*, para. 7.525.

¹¹¹ Panel Report, *US – Softwood Lumber VII*, para. 7.547.

make its benefit determination with any degree of precision if it were required to make adjustments for such type of costs to the benchmark."¹¹²

65. In another section of the panel report in *US – Softwood Lumber VII*, the Panel further examined a claim that the USDOC acted inconsistently with, *inter alia*, Articles 14(d), 19.3, and 19.4 of the SCM Agreement, when it calculated the amount of benefit conferred on investigated producers in certain Canadian provinces. Specifically, when the USDOC compared the price of each examined transaction with the corresponding benchmark price, and the price of certain examined transactions was less than the corresponding benchmark price, the USDOC set all such negative comparison results to zero.¹¹³ The Panel further detailed the manner in which the USDOC applied the zeroing methodology to its calculations:

"In calculating the benefit conferred by New Brunswick's provision of standing timber to Irving, i.e. the investigated producer in New Brunswick, the USDOC compared each of Irving's individual purchases of Crown-origin timber to Irving's monthly average private stumpage purchase prices in Nova Scotia. For purchases where the transaction-specific Crown stumpage price in New Brunswick was higher than the corresponding monthly average private market price in Nova Scotia, the USDOC set the benefit amount to zero. The USDOC then summed the remaining transaction-specific benefits to calculate the total benefit.

In the case of British Columbia, the USDOC determined the annual average price for Crown timber purchased by investigated producers, classifying purchases based on timbermark and species. The USDOC compared these annual average timbermark/species-specific prices for each investigated producer in British Columbia to the corresponding annual average species-specific benchmark prices from Washington State interior. Where the annual average timbermark/species-specific stumpage price in British Columbia was more than the annual average benchmark price for that species in Washington State, the USDOC set the benefit conferred to zero. The USDOC then added together all timbermark/species-specific benefits for each investigated producer to calculate the overall benefit."¹¹⁴

66. The Panel began its analysis on this issue by considering the applicability of Article 14(d) *vis-à-vis* Articles 19.3 and 19.4 of the SCM Agreement to the USDOC's decision to set certain comparison results to zero. Canada claimed that the setting of certain comparison results to zero by the USDOC violated Articles 19.3 and 19.4 because it resulted in the imposition of countervailing duties in amounts that were not "appropriate" and were "in excess of the amount of subsidy found to exist", respectively. The Panel considered that Canada's claim under Articles 19.3 and 19.4 depended on the existence of an obligation under Article 14(d) that the USDOC was alleged to have violated.¹¹⁵ Specifically, the Panel stated the following:

"We consider that if an obligation due to which the USDOC was required to aggregate all comparison results, positive and negative, does not exist in Article 14(d) itself, the USDOC cannot be found to have violated Articles 19.3 or 19.4 for that reason. In this regard, we agree with the United States' argument that reading an obligation concerning an aspect of benefit calculation methodology into Articles 19.3 or 19.4 if that obligation does not exist in Article 14 itself, would be tantamount to overriding a provision that bears specifically upon benefit calculation (i.e. Article 14), with provisions that do not explicitly bear upon benefit calculation (i.e. Articles 19.3 and 19.4). Thus, an obligation concerning a benefit calculation methodology that is not present in Article 14(d) of the SCM Agreement cannot be read into Article 19.3 or Article 19.4 of the SCM Agreement, as doing so would run contrary to the principle that a general provision cannot override a specific provision."¹¹⁶

67. Considering Canada's claim under Article 14(d) to be its principal claim in respect of the setting of certain comparison results to zero, the Panel began its analysis by examining whether

¹¹² Panel Report, *US – Softwood Lumber VII*, paras. 7.548-7.550.

¹¹³ Panel Report, *US – Softwood Lumber VII*, para. 7.554.

¹¹⁴ Panel Report, *US – Softwood Lumber VII*, paras. 7.555-7.556.

¹¹⁵ Panel Report, *US – Softwood Lumber VII*, para. 7.560.

¹¹⁶ Panel Report, *US – Softwood Lumber VII*, para. 7.560.

Canada had established that Article 14(d) required the USDOC to aggregate all comparison results, positive as well as negative.¹¹⁷

68. In its analysis, the Panel considered that the four subparagraphs of Article 14 set out guidelines for the establishment of the basic framework for the calculation of benefit. In the Panel's view, these "guidelines" leave discretion to investigating authorities to determine how the calculation of benefit is to be undertaken, depending on the specific facts under consideration. Specifically, the Panel stated the following:

"We note that the text of Article 14(d) of the SCM Agreement does not explicitly require an investigating authority to follow any particular method for determining the adequacy of remuneration. The *chapeau* of Article 14 explicitly characterizes the rules set forth in the four subparagraphs of Article 14 as 'guidelines'. In this respect, we note that past panels and the Appellate Body have consistently found that these 'guidelines' establish the basic framework for the calculation of benefit, but also leave a considerable amount of leeway to investigating authorities as to precisely how those calculations are to be undertaken in any given case, depending on the specific facts under consideration. We agree and consider that nothing in Article 14(d) of the SCM Agreement sets out a general rule requiring investigating authorities to aggregate all transaction-to-benchmark comparison results, positive as well as negative (aggregate all comparison results)."¹¹⁸

69. The Panel also referred to a panel report stating that, so long as the adequacy of remuneration is determined in relation to prevailing market conditions, an investigating authority can exercise the methodological flexibility accorded to it under Article 14:

"This interpretation of Article 14(d) ... is the same as that adopted by the panel in *US – Anti-Dumping and Countervailing Duties (China)*, which was a case where the question whether Article 14(d) ... requires aggregation of all comparison results was examined. We note that the panel in that case found that within the basic 'guideline' that '[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions', an investigating authority can exercise the methodological flexibility accorded to it under Article 14 so as to appropriately take into account the specific facts of the investigation. The panel further noted that the term 'prevailing market conditions for the good in question' means that the benchmark selected by the investigating authority must correspond to a factual situation found to exist in respect of the government-provided good – a requirement that circumscribes the methodological flexibility afforded to investigating authorities. Although the panel in that case did not find Article 14(d) to set out a general obligation requiring investigating authorities to aggregate all comparison results, the panel also foresaw the possibility that *in certain factual circumstances*, an investigating authority might be required to undertake such aggregation. The panel found:

We consider that there could be certain situations in which some sort of grouping or averaging of transactions might be necessary in order to arrive at a determination of the amount of the benefit. Examples might include where a given set of transactions was made pursuant to a contract, or possibly where the actual prices paid to the government fluctuated slightly around the market benchmark(s) over the entire period of investigation.

We agree with this finding of the panel in *US – Anti-Dumping and Countervailing Duties (China)*. We consider that the question before us is whether, despite there being no general rule requiring aggregation of comparison results, anything in the fact pattern of the case before the USDOC suggested that the USDOC ought to have aggregated all comparison results in this particular case. We note in this regard that

¹¹⁷ Panel Report, *US – Softwood Lumber VII*, para. 7.561.

¹¹⁸ Panel Report, *US – Softwood Lumber VII*, para. 7.562.

Canada has only sought to establish violations of the SCM Agreement and the GATT 1994 by the USDOC 'on these specific facts'.¹¹⁹

70. The Panel later noted that Article 14(d) grants latitude to investigating authorities to calculate the amount of benefit, so long as the methodology used to do so is "transparent and adequately explained" and is consistent with the general "guidelines" provided in Article 14(d):

"According to Article 14(d), the purchase of goods will not confer a benefit unless it is made 'for more than adequate remuneration'. The adequacy of remuneration must be determined in relation to 'prevailing market conditions' for the good in question, including 'price, quality, availability, marketability, transportation and other conditions of sale.' Article 14(d) of the SCM Agreement necessarily involves an analysis of the market generally in order to draw a conclusion concerning the conditions that are 'prevailing' in that market. At the same time, Article 14(d) does not prescribe any specific methodology to calculate the benefit to the recipient conferred by a government's purchase of goods. The *chapeau* of Article 14 provides an investigating authority with some latitude as to the methodology it chooses to calculate the amount of benefit, as long as such methodology is 'transparent and adequately explained' and is consistent with the general guidelines provided in Article 14(d)."¹²⁰

71. The Panel considered that all aspects of the methodology used by an investigating authority in determining the adequacy of remuneration must relate to the prevailing market conditions for the good in question:

"We consider that Canada has properly established that the reference to 'any method used' in the *chapeau* of Article 14, read with the guidelines in Article 14(d) of the SCM Agreement require that all aspects of the methodology applied by an investigating authority in determining the adequacy of remuneration must relate to the prevailing market conditions for the good in question.

We note that this reading of Article 14 of the SCM Agreement is in keeping with the Appellate Body's finding in *Japan – DRAMs (Korea)*, that the *chapeau* of Article 14 requires that any method used by an investigating authority shall be consistent with the guidelines contained in paragraphs (a)-(d) of Article 14. As Canada points out and we agree, the Appellate Body in that case also clarified that the determination of a benchmark is a 'component[] or element[] of the method[] used' by an investigating authority to calculate the amount of benefit conferred, and that the determination of benchmark 'in isolation' cannot be understood as being 'the complete 'method used' in calculating the amount of subsidy'. We therefore consider that all aspects of an investigating authority's benefit determination methodology must conform to the guideline in Article 14(d) of the SCM Agreement that the adequacy of remuneration must be assessed in relation to the prevailing market conditions for the good in question. In our view, any aspect of the benefit determination methodology that detracts the investigating authority from this guideline in a given set of facts can potentially give rise to a violation of Article 14(d) of the SCM Agreement."¹²¹

72. Ultimately, the Panel found that the USDOC's methodology of setting negative comparison results to zero was inconsistent with Article 14(d) of the SCM Agreement. The Panel considered that the benefit amount resulting from the application of the zeroing methodology included price differences due solely to the asymmetry between geographic conditions of the benchmark price as compared to those of private transactions. The Panel considered that the USDOC should have applied a methodology that addressed this asymmetry due to the practical reality that timber prices vary significantly depending on geographical factors:

¹¹⁹ Panel Report, *US – Softwood Lumber VII*, paras. 7.562-7.563. The Panel later reaffirmed the finding of the panel in *US – Anti-Dumping and Countervailing Duties (China)* that "there is no general obligation in Article 14(d) of the SCM Agreement for an investigating authority to aggregate all comparison results, positive as well as negative, but that doing so may be necessary in specific circumstances to satisfy the requirements of Article 14(d) of the SCM Agreement". (Ibid. para. 7.584.)

¹²⁰ Panel Report, *US – Softwood Lumber VII*, para. 7.638.

¹²¹ Panel Report, *US – Softwood Lumber VII*, paras. 7.567-7.568.

"[B]y setting-to-zero negative comparison results, the USDOC calculated a benefit amount that included price differences that arise solely due to the asymmetry between average geographic conditions of various private transactions based on which the benchmark price was calculated on the one hand, and the specific geographic conditions relating to the individual transactions that were priced less than the benchmark price on the other. In other words, this method would capture as benefit any difference between the examined transaction price and the average benchmark price, including those differences attributable to variation in prevailing market conditions. The USDOC ought to have adopted a methodology that addressed this asymmetry, which is inherent to comparisons of individual transactions to average benchmark, due to the practical reality that timber prices vary significantly depending on factors such as whether timber is located on a steep slope or a flat stretch of land, or the distance of a timber stand from the sawmill to which logs have to be transported. An aggregation of *all* comparison results without zeroing would have achieved a result that reflects average market conditions on either side of the comparison, and hence resolved the asymmetry that arises due to the comparison of an individual transaction to a benchmark derived by averaging several transactions."¹²²

73. The Panel also considered that setting negative comparison results to zero resulted in the comparison of dissimilar things – i.e. a benchmark comprising private transactions taking place in a variety of geographic conditions and individual government transactions taking place in specific geographical conditions:

"We note that the requirement in Article 14(d) that the adequacy of remuneration be determined in relation to the prevailing market conditions '*for the good or service in question*' also supports Canada's contention that by setting negative comparison results to zero, the USDOC in effect compared dissimilar things – i.e. a benchmark comprising private transactions taking place in a variety of geographic conditions and individual government transactions taking place in specific geographical conditions. By focusing on 'the good ... in question', i.e. the government-provided good, Article 14(d) instructs an investigating authority to be mindful not only of the prevailing market conditions under which private transactions from which the benchmark is derived take place, but also of the conditions under which the government-provided good was supplied to the investigated producer when determining the adequacy of remuneration. The following finding of the panel in *US – Anti-Dumping and Countervailing Duties (China)*, in which the panel notes that the facts concerning the situation in which the government provides the good in question are also material to the process of benefit determination, supports this understanding:

[W]e consider that the basic requirement of Article 14(d), as expressed by the phrase 'prevailing market conditions for the good ... in question ... (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)', is that the benchmark used must correspond to the particular good at issue, as it is actually sold, at the time of the transaction being analyzed (i.e., it must reflect the factual situation found to exist in respect of the government-provided good).

We therefore find that by setting the negative comparison results to zero in light of the specific facts of this case, the USDOC failed to assess the adequacy of remuneration in relation to the prevailing market conditions of the Crown timber provided to the investigated producer by New Brunswick."¹²³

74. The Panel further added that, in its application of the zeroing methodology to its determination of benefit, the USDOC used a benchmark that reflected an average price for a single species, while the purchase price reflected an average price for several species.¹²⁴ In the Panel's view, the average stumpage rate applied by British Columbia to each species meant that

¹²² Panel Report, *US – Softwood Lumber VII*, para. 7.573. See also *ibid.* paras. 7.584-7.585.

¹²³ Panel Report, *US – Softwood Lumber VII*, paras. 7.574-7.575.

¹²⁴ Panel Report, *US – Softwood Lumber VII*, para. 7.582.

the higher-valued species were under-priced and that the lower-valued species were over-priced. In this factual context, the decision by the USDOC to zero negative comparison results where the higher-valued species were priced above the benchmark would, in the Panel's view, add to the total amount of benefit and thus be inconsistent with Article 14(d) of the SCM Agreement. Specifically, the Panel stated the following:

"British Columbia's application of the same average stumpage rate to each species in the stand meant that the higher-valued species were under-priced, because the average government price also reflects the inclusion of lower-valued timber in the stand. Likewise, the lower-valued species would be comparatively overpriced, because the higher-valued species in the stand would drive the average stumpage price within the stand higher. This implies that the USDOC, when examining any given stumpage sale transaction, was likely to find a benefit from the sale of the higher-valued species within the examined stand, while it was likely to find that the lower-valued species were priced higher than the benchmark price. Pursuant to the methodology it followed, the USDOC would add to the total benefit amount the result obtained on comparing the notionally-assumed species-specific transaction price of the higher-valued species in the examined stand to the corresponding benchmark if the benchmark price was higher. However, the USDOC would set to zero the result obtained on comparing the notionally-assumed species-specific transaction price of the lower-valued species in that stand to the corresponding benchmark, if a negative comparison result was obtained. ... [T]he benefit amount calculated on this basis will not reflect whether the stand-as-a-whole was purchased for less than adequate remuneration. On the other hand, if the USDOC were to aggregate all comparison results instead of setting some of them to zero, its benefit determination would properly account for both the lower-valued and higher-valued species that were purchased for the same stumpage price as part of the same transaction.

We therefore conclude that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement. We find that in context of the factual background of this dispute, by setting negative comparison results to zero, the USDOC failed to assess the adequacy of remuneration in relation to the prevailing market condition of stumpage sold by British Columbia on a stand-as-a-whole basis."¹²⁵

1.6.3 Prior subsidization in the relevant market

75. In *Japan – DRAMs (Korea)*, the Panel determined that prior subsidization of the relevant sector did not necessarily negate the commercial (i.e., "market") nature of subsequent transactions by commercial actors within that sector:

"We begin by acknowledging that there may be circumstances in which the market is distorted to such an extent that the pricing in that market may not be used for the purpose of establishing benefit. Thus, the Appellate Body found in *US – Softwood Lumber IV* that 'in certain situations where government involvement in the market is substantial, the prices of private suppliers may be artificially suppressed because of the prices charged for the same goods by the government'. This is 'because the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular'. Furthermore, several panels have recognised that private participation in restructuring programmes might be influenced by government / public participation in those programmes. Thus, the panel in *EC – Countervailing Measures on DRAM Chips* found that 'the behaviour of ... market players [could be] so distorted by the government's intervention that they can no longer serve as the benchmark against which to measure the alleged government distortion'. Similarly, the panel in *Korea – Commercial Vessels* found (with express reference to the Appellate Body's findings in *US – Softwood Lumber IV*) that 'there could be circumstances in which a government influences the market to such an extent that it becomes distorted, so that private entities no longer operate pursuant to purely commercial principles'.

¹²⁵ Panel Report, *US – Softwood Lumber VII*, paras. 7.582-7.583.

Japan has referred to the *US – Softwood Lumber IV* case in support of the JIA's reliance on prior subsidization. However, none of the Appellate Body or panel findings referred to above concerned the role of prior subsidization in distorting markets. Instead, they were concerned with distortion caused by present, or contemporaneous, government involvement and intervention in markets. These cases therefore do not provide support for the JIA's determination.

In our view, prior subsidization of an object does not necessarily mean that the market price for that object is distorted. A buyer may be said to have paid a market price even though the object only exists because of prior subsidies. Indeed, this is the basic premise of consistent WTO rulings to the effect that the payment of fair market value for privatized entities does not confer a benefit. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body confirmed that '[p]rivatization at arm's length and for fair market value may result in extinguishing the benefit.' Implicit in this finding is the notion that a privatization might take place 'for fair market value'. The fact that a state-owned entity, which only exists because of prior subsidization, may be privatized, or sold, 'for fair market value' undermines Japan's argument that there can be no (fair) market price for an entity that existed, in the JIA's view, only because of prior subsidization."¹²⁶

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¹²⁶ Panel Report, *Japan - DRAMs (Korea)*, paras. 7.295-7.297.