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**UNITED STATES – COUNTERVAILING MEASURES ON  
SOFTWOOD LUMBER FROM CANADA**

REPORT OF THE PANEL

*BCI deleted, as indicated [[\*\*\*]]*

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<i>US – Countervailing Measures (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China</i> , <a href="#">WT/DS437/AB/RW</a> and Add.1, adopted 15 August 2019
<i>US – Countervailing Measures (China) (Article 21.5 – China)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China</i> , <a href="#">WT/DS437/RW</a> and Add.1, adopted 15 August 2019, as modified by Appellate Body Report WT/DS437/AB/RW
<i>US – Export Restraints</i>	Panel Report, <i>United States – Measures Treating Exports Restraints as Subsidies</i> , <a href="#">WT/DS194/R</a> and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , <a href="#">WT/DS108/AB/R</a> , adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , <a href="#">WT/DS285/AB/R</a> , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)

Short title	Full Case Title and Citation
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , <a href="#">WT/DS2/AB/R</a> , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , <a href="#">WT/DS177/AB/R</a> , <a href="#">WT/DS178/AB/R</a> , adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , <a href="#">WT/DS353/AB/R</a> , adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , <a href="#">WT/DS353/R</a> , adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Orange Juice (Brazil)</i>	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , <a href="#">WT/DS382/R</a> , adopted 17 June 2011, DSR 2011:VII, p. 3753
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , <a href="#">WT/DS257/AB/R</a> , adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , <a href="#">WT/DS277/AB/RW</a> , adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Supercalendered Paper</i>	Appellate Body Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , <a href="#">WT/DS505/AB/R</a> and Add.1, adopted 5 March 2020
<i>US – Supercalendered Paper</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , <a href="#">WT/DS505/R</a> and Add.1, adopted 5 March 2020, as upheld by Appellate Body Report WT/DS505/AB/R
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/AB/RW</a> and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , <a href="#">WT/DS464/AB/R</a> and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275

Short title	Full Case Title and Citation
<i>US – Washing Machines</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , <a href="#">WT/DS464/R</a> and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , <a href="#">WT/DS166/AB/R</a> , adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , <a href="#">WT/DS294/AB/R</a> , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

**EXHIBITS REFERRED TO IN THIS REPORT**

<b>Exhibit</b>	<b>Short Title</b>	<b>Description/Long Title</b>
CAN-8	Preliminary determination	Memorandum dated 24 April 2017 from the USDOC on Decision for the preliminary determination in the countervailing duty investigation of certain softwood lumber products from Canada
CAN-10	Final determination	Memorandum dated 1 November 2017 from the USDOC on Issues and Decision for the final determination in the countervailing duty investigation of certain softwood lumber products from Canada
CAN-13	Canada, Appendix II from the Constitution Act	Appendix II from the Consolidated Constitution Act of Canada (1 January 2013)
CAN-14	Kalt Report on Crown timber	J. P. Kalt, Prof., PH.D., "Economic analysis of remuneration for Canadian Crown timber: are in-jurisdiction benchmarks distorted by Crown stumpage?"
CAN-15	Asker Report	J. Asker, Prof., PH.D., "Economic analysis of factors affecting cross jurisdictional stumpage price comparisons"
CAN-16 (BCI)	Kalt Report on LEPs	J. P. Kalt, Prof., PH.D., "An analysis of certain economic issues relating to petitioner's claims about the operation of stumpage and log markets in British Columbia"
CAN-17	Bustard Report	B. Bustard, Vanlog Forestry Services, "The business of log exports from British Columbia and log export-permitting processes"
CAN-18 (BCI)	British Columbia initial questionnaire response	Response of the Government of British Columbia to the USDOC initial questionnaire dated 19 January 2017, Part I, stumpage (14 March 2017)
CAN-19 (BCI)	Hendricks Report	K. Hendricks, Dr, "An economic analysis of the Ontario timber market and an examination of private market prices in that competitive market"
CAN-20 (BCI)	Jendro and Hart Report	Jendro and Hart LLC, "Critique of petitioner's proposed cross-border subsidy methodology" (13 March 2017)
CAN-23	Athey Report	S. Athey, Prof., "British Columbia's market-based pricing system for timber" (March 2017)
CAN-29	Summary of BC harvest data	British Columbia, summary of BC harvest data by species (2015)
CAN-31 (BCI)	Larry Gardner affidavit	Affidavit dated 12 March 2017 of Larry Gardner, West Fraser Mills, Ltd.
CAN-33 (BCI)	[[***]] affidavit	Affidavit of [[***]]
CAN-34 (BCI)	Mark Feldinger affidavit	Affidavit dated 13 March 2017 of Mark Feldinger, Canfor Corporation
CAN-35 (BCI)	[[***]] affidavit	Affidavit of [[***]]
CAN-39	Forest Act	British Columbia, Forest Act (1996)
CAN-49 (BCI)	British Columbia initial questionnaire response on LEP	Response of the Government of Canada and the Government of British Columbia to the USDOC initial questionnaire dated 19 January 2017, Part I – log export permit processing narrative (13 March 2017) (Corrected)
CAN-51 (BCI)	Canfor initial questionnaire response	Response of Canfor to the USDOC initial questionnaire (13 March 2017)
CAN-52 (BCI)	West Fraser questionnaire response	Response of West Fraser to the USDOC questionnaire dated 19 January 2017 (14 March 2017)
CAN-67 (BCI)	Tolko questionnaire response	Response of Tolko to the USDOC questionnaire, section III (13 March 2017)
CAN-68 (BCI)	[[***]] affidavit	Affidavit of [[***]]
CAN-69	Federal Notice to Exporters No. 102	Government of Canada, Notice to exporters No. 102 (1 April 1998)
CAN-72 (BCI)	Overview of the BC export process	British Columbia, "Overview of BC log export process", questionnaire verification (June 2017)
CAN-80	Market memorandum	Memorandum from British Columbia on volume allocation and softwood harvest for 2015-2016
CAN-88	British Columbia verification of questionnaire response	USDOC, Verification of the questionnaire responses of the Government of British Columbia (14 July 2017)
CAN-90 (BCI)	Kalt response on LEPs	J. P. Kalt, Prof., PH.D., "response to petitioner claims of march 24, 2017 about the operation of stumpage and log markets in British Columbia"

<b>Exhibit</b>	<b>Short Title</b>	<b>Description/Long Title</b>
CAN-91	Time between advertising list date and federal surplus decision authorizing export in POI	British Columbia, time between advertising list date and federal surplus decision authorizing export in POI
CAN-92	Alberta case brief	Case brief of the Government of Alberta and the Alberta Softwood Lumber Trade Council (27 July 2017)
CAN-93	Brattle Report	Brattle group, "Assessment of an internal benchmark for Alberta crown timber" (10 March 2017)
CAN-94	First remand determination	USDOC, Remand Determination, in the matter of certain softwood lumber from Canada: final affirmative countervailing duty determination (12 January 2004)
CAN-96	Alberta, MNP cross-border analysis	MNP cross-border analysis of stumpage and log prices in Alberta and six other jurisdictions (10 March 2017)
CAN-97	Alberta initial questionnaire response	Response of the Government of Alberta to the USDOC 17 January 2017 initial questionnaire, Vol. IV, Stumpage (13 March 2017)
CAN-102	Alberta MNP damage assessment	MNP Timber Damage Assessment, table 2016 update (27 April 2016)
CAN-103 (BCI)	Alberta JMC survey	Joint Management Committee survey of 2015 timber values for the 2016 TDA table update
CAN-109	Alberta MNP TDA log transactions overview	MNP, Timber damage assessment log transactions overview (8 March 2017)
CAN-110 (BCI)	Alberta verification report	USDOC, Verification of the questionnaire responses of the Government of Alberta (17 July 2017)
CAN-112	Alberta Forest Act	Alberta, "Corrected Exhibit AB-S-7: Table 1 – FY 15/16 Harvest Volume by Land Ownership Type"
CAN-114	Alberta Timber Harvest Planning	Alberta, Forests Act (17 December 2014)
CAN-115	Alberta TMR	Alberta, "Alberta Forest Management Planning Standard"
CAN-137 (BCI)	Canfor case brief	Case brief of Canfor No. C-122-858 (27 July 2017)
CAN-139 (BCI)	West Fraser case brief	Case brief of West Fraser (27 July 2017)
CAN-141	MNP supplemental report	MNP, "Supplement #2 to MNP's March 10, 2017 cross border analysis of stumpage and log prices in Alberta and six other jurisdictions" (6 April 2017)
CAN-144 (BCI)	MNP Ontario survey	MNP, "A Survey of the Ontario Private Timber Market" (3 March 2017)
CAN-145	KPMG Report	KPMG, "Report on 2015-16 Ontario softwood timber costs and resources covering the period April 1, 2015 to March 31, 2016" (6 March 2017)
CAN-147	Ontario, the forests	Ontario, "The forests resources of Ontario, 2011"
CAN-149	Ontario, comparison between Acadian and Boreal forest regions	J. Golding, RPF, MFE, "A comparison between the Acadian Forest region in Nova Scotia and New Brunswick and the Boreal Forest region in Ontario" (March 2017)
CAN-152	Ontario, structure of the softwood lumber industry	Ontario, "Overview of the structure of the softwood lumber industry" (June 2017)
CAN-153	Ontario, diameter distribution of timber	M. Sharma, Dr, "Comparison of scaling methodology and applicability of adapting diameter distributions in provincially harvested timber from 2005 to 2015" (8 March 2017)
CAN-155	Ontario initial questionnaire response	Response of the Government of Ontario to the USDOC 19 January 2017 initial questionnaire (13 March 2017)
CAN-156	Ontario, notes on Maritimes forests	Canadian Forest Services, "Some notes on the forests of the Maritimes" (31 August 2014)
CAN-169	SFDA	Québec, Sustainable Forest Development Act 2015-16 (21 April 2015)
CAN-170	Québec initial questionnaire response	Response of the Government of Québec to the USDOC 19 January 2017 initial questionnaire, Vol. I, stumpage (13 March 2017)
CAN-171 (BCI)	Marshall Report	R. C. Marshall, PH.D., "Expert Report" (10 March 2017)
CAN-184	Québec verification report	USDOC, Verification of the questionnaire responses of the Government of Québec (14 July 2017)
CAN-193	Québec, sample BMMB auction tender package	Québec, Document of the call for tenders, sample BMMB auction tender package (26 October 2015)
CAN-206	Third administrative review on softwood lumber products	USDOC, Notice of preliminary results and extension of final result of countervailing duty administrative review: certain

<b>Exhibit</b>	<b>Short Title</b>	<b>Description/Long Title</b>
		softwood lumber products from Canada, United States Federal Register, Vol. 71, p. 33,932 (12 June 2006)
CAN-208	Treasury Board Note	Québec, Treasury Board Note establishing PCIP – CT212414 (2013-2016)
CAN-211 (BCI)	Québec auction data file	Québec, data for each auction block
CAN-213	Québec stumpage data file	Québec, unitary stumpage rates (1 January to 31 March 2015)
CAN-214 (BCI)	Québec operating permit 2015-2016	Québec, Softwood sawmills, operating permit size 2015-16
CAN-240 (BCI)	New Brunswick questionnaire response	Response of the Government of New Brunswick, Vol. II of III, stumpage questions (17 March 2017)
CAN-242 CAN-250 (BCI)	New Brunswick CLFA JDIL Forest Management Agreement	New Brunswick, Crown Lands and Forests Act (16 July 1980) New Brunswick, JDIL Forest Management Agreement (31 July 2014)
CAN-264 (BCI)	Irving final calculation	USDOC, J.D. Irving Limited final calculation (1 November 2017)
CAN-284	USDOC memorandum to the WDNR on delivered log price information	Memorandum dated 25 April 2015 from the USDOC to file Washington Department of Natural Resources delivered log price information
CAN-286 (BCI)	Leamer Report	E. Leamer, Prof., "Statistical and Economic Issues Associated with Petitioner's Proposed Use of a Cross-Border Log Methodology to Measure the 'Adequacy of Remuneration' for BC Timber" (13 March 2017)
CAN-287	Spelter Study	H. Spelter, "Conversion of Board Foot Scaled Logs to Cubic Meters in Washington State, 1970-1998" (June 2002)
CAN-295	British Columbia case brief	Case brief of the Government of British Columbia and the BC Lumber Trade Council, Vol. V (28 July 2017)
CAN-303 (BCI)	Miller Report	E. Miller, "Characteristics of Nova Scotia's Wood Fibre Market" (10 March 2017)
CAN-304	Nova Scotia tree identification guide	Alberta, "Nova Scotia Tree Identification Guide"
CAN-305	Nova Scotia forest inventory	P. Townsend, "Nova Scotia Inventory Based on Permanent Sample Plots Measured Between 1999 and 2003 Report for 2004"
CAN-306	Québec, description of softwood species	Québec, "Description of Each Species of Softwood"
CAN-307 (BCI)	Resolute new factual information declaration	Resolute declaration on new factual information (28 March 2017)
CAN-310	Mill specifications	Elmsdale Lumber Company Ltd, "Logs specifications" (1 January 2017)
CAN-311	Public version of joint case brief	Public version of the joint case brief of the Government of Canada, Vols. I and II (27 July 2017)
CAN-312	Deloitte Report	Deloitte, "Report of Nova Scotia private stumpage prices for the period April 1, 2015 through December 31, 2015" (10 March 2017)
CAN-313	Nova Scotia addendum questionnaire response	Response of the Government of Nova Scotia to the USDOC questionnaire addendum for the provincial governments (17 March 2017)
CAN-316 (BCI)	Tolko verification report	USDOC, Verification of the questionnaire responses of Tolko (14 July 2017)
CAN-318	Redacted version of Nova Scotia verification report	USDOC, Verification of the questionnaire responses of the Government of Nova Scotia (11 July 2017)
CAN-329	Attachment 60 to Asker Report	<i>Nova Scotia Woodlot Owners and Operators Association Legacy Newsletter</i> (Summer 2013) (attachment 60 to Asker Report)
CAN-330	Attachment 30 to Asker Report	Government of Nova Scotia, "Economic Impact Analysis of Timber Management & Supply Changes on Nova Scotia's Forest Industry" (attachment 30 to Asker Report) (May 2011)
CAN-331	Attachment 62 to Asker Report	P. Woodbridge, "Nova Scotia pulp & paper sector back from brink of disaster" (attachment 62 to Asker Report) (2015)
CAN-353 (BCI)	Irving submission of factual information	Irving submission of factual information to measure the adequacy of remuneration (27 March 2017)
CAN-358 (BCI)	TSG 206	Resolute, Timber supply guarantee granted pursuant to Section 338 of the Sustainable Forest Development Act

<b>Exhibit</b>	<b>Short Title</b>	<b>Description/Long Title</b>
CAN-380 (BCI)	USDOC calculation memo, Canfor	Memorandum dated 1 November 2017 from the USDOC on final determination calculations for Canfor
CAN-381 (BCI)	USDOC calculation memo, Tolko	Memorandum dated 1 November 2017 from the USDOC on final determination calculations for Tolko Marketing and Sales Ltd. and Tolko Industries Ltd. (collectively Tolko)
CAN-382 (BCI)	USDOC calculation memo, West Fraser	Memorandum dated 1 November 2017 from the USDOC on final determination calculations for West Fraser
CAN-383 (BCI)	Attachment IV to USDOC calculation memo, Canfor	USDOC, BC stumpage and log export restraint subsidy rate calculations (attachment IV to Canfor Calculation Memo)
CAN-384 (BCI)	USDOC initiation checklist	USDOC, Enforcement and compliance office of AD/CVD operations, countervailing duty investigation initiation checklist, certain softwood lumber products from Canada (C-122-858) (15 December 2016)
CAN-395	British Columbia initial questionnaire response	Response of the Government of British Columbia to the USDOC 19 January 2017 initial questionnaire, Part I, BC Hydro (14 March 2017)
CAN-397	Hydro and Power Authority Act	British Columbia, Hydro Power and Authority Act
CAN-398	Utilities Commission Act	British Columbia, Utilities Commission Act
CAN-402	BC Energy Plan	Tolko, "The BC energy plan: a vision for clean energy leadership"
CAN-403	Clean Energy Act	British Columbia, Clean Energy Act
CAN-404 (BCI)	BCUC application for BioPhase 1	British Columbia Utilities Commission, Application for BioPhase 1
CAN-405	Report on the RFP process	West Fraser, "Bioenergy Phase 2 call request for proposals: report on the request for proposals process" (10 February 2012)
CAN-407	Standing Offer programme rules	BC Hydro, Standing Offer programme, programme rules, version 2.3 (October 2013)
CAN-411 (BCI)	Fraser Lake EPA	BC Hydro and West Fraser Mills Ltd. electricity purchase agreement bioenergy phase 2 call, Fraser Lake
CAN-412 (BCI)	Chetwynd EPA	BC Hydro and West Fraser Mills Ltd. electricity purchase agreement bioenergy phase 2 call, Chetwynd
CAN-414 (BCI)	Armstrong EPA	BC Hydro and Tolko Industries Ltd. electricity purchase agreement, Armstrong
CAN-416 (BCI)	Kelowna Standing Offer programme EPA	BC Hydro electricity purchase agreement, Kelowna standing offer programme
CAN-417	Rosenzweig Report	M. Rosenzweig, Dr, "An analysis of certain economic issues relating to the coalition's claims about BC Hydro's electricity purchase agreements"
CAN-420 (BCI)	Tolko calculation memorandum	Attachment II to the memorandum from the USDOC on Tolko, grants and taxes
CAN-423	Hydro-Québec Act	Québec, Hydro-Québec Act (1 November 2016)
CAN-424 (BCI)	Québec questionnaire response	Response of the Government of Québec to the USDOC 19 January 2017 initial questionnaire, Vol. III, purchase of electricity under PAE 2011-11 (13 March 2017)
CAN-428	Act respecting the Régie de l'énergie	Québec, Act respecting the Régie de l'énergie (1 November 2016)
CAN-429	Québec Energy Strategy 2006-2015	Government of Québec, Québec Energy Strategy 2006-2015 (2006)
CAN-431	Order in Council D-1086-2011	Québec, Order in Council Decree No. 1086-2011 (26 October 2011)
CAN-432	Cost of biomass-generated electricity	Merrimack Energy Group Inc., "The competitive cost of biomass generated electricity" (7 May 2010)
CAN-438	Electricity Act	New Brunswick Electricity Act (21 June 2013)
CAN-439	LIREPP Regulation	New Brunswick Regulation No. 2013-65 (24 September 2013)
CAN-440 (BCI)	LIREPP	New Brunswick large industrial renewable energy purchase programme
CAN-448 (BCI)	LIREPP Agreement	Agreement between New Brunswick and Irving for the purchase and resale of eligible electricity, large industrial renewable energy purchase programme contract
CAN-450 (BCI)	Appendix to New Brunswick questionnaire response	Appendix to New Brunswick questionnaire response, allocation and grant

<b>Exhibit</b>	<b>Short Title</b>	<b>Description/Long Title</b>
CAN-451 (BCI)	Appendix to LIREPP questionnaire response	Appendix to Irving questionnaire response, LIREPP
CAN-452	New Brunswick LIREPP	Irving, New Brunswick large industrial renewable energy purchase programme
CAN-500	Decree 259-2015	Québec Decree No. 258-2005 allowing export of crown wood (25 March 2015)
CAN-511 (BCI)	Nova Scotia verification report	USDOC, Verification of the questionnaire responses of the Government of Nova Scotia (11 July 2017)
CAN-512 (BCI)	Nova Scotia verification exhibit NS-VE-6	Deloitte, Nova Scotia private softwood lumber stumpage survey (26 June 2016)
CAN-513 (BCI)	Joint case brief	Joint case brief of the Government of Canada, Vols. I and II (27 July 2017)
CAN-516 (BCI)	Nova Scotia, freedom of information response	Letter dated 6 November 2018 from Nova Scotia in reply to the request based on the Freedom of Information and Protection of Privacy Act, 2018-7611-DLF
CAN-525	Canada presentation at first meeting (26 February 2019)	Canada's presentation at the first substantive meeting of the panel, 26 February 2019
CAN-528 (BCI)	Canada presentation at first meeting (28 February 2019)	Canada PowerPoint presentation at the first substantive meeting of the Panel (28 February 2019)
CAN-551 (BCI)	Nova Scotia verification exhibit NS-VE-7	Nova Scotia, survey response of single largest purchaser
CAN-552 (BCI)	Nova Scotia verification exhibit NS-VE-8-C	Nova Scotia, supporting documentation for survey obs. 239
CAN-594	Québec comments on subsidy methodology	USDOC, Certain softwood lumber from Canada, comments of the Government of Québec on appropriate subsidy methodology and respondent selection (29 December 2016)
CAN-595	Québec comments on preliminary determination	USDOC, Certain softwood lumber from Canada, comments of the Government of Québec for the Preliminary Determination, (13 April 2017)
CAN-608	Attachment 6 to Kalt Report	D. Zhang and P. H. Pease, <i>Forest Economics</i> , (UBS Press, 2011) (Attachment 6 to Kalt Report)
CAN-616	Nova Scotia scaling manual	"Nova Scotia scaling manual", 2 <sup>nd</sup> edn (October 2007)
CAN-623 (BCI) USA-3	Harvest Agreement Ontario market memorandum	Harvest Agreement between Québec and Resolute (2014-2016) Memorandum dated 1 November 2017 from the USDOC on final determination on Ontario private stumpage market distortion
USA-10	Petition	Petitions for the imposition of antidumping duties and countervailing duties on imports of certain softwood lumber products from Canada (25 November 2016)
USA-16	GOC-CRA-ACCA-4	Exhibit GOC-CRA-ACCA-4 (14 March 2017)
USA-19	Petitioner's comments on Canada initial questionnaire response	Petitioners' comments on Canada's initial questionnaire responses, exhibits 3, 4, 5, 8, 11, 12, 13, 19, and 32 (27 March 2017)
USA-26 (BCI)	Nova Scotia verification exhibit NS-VE-4	Nova Scotia verification exhibit NS-VE-4
USA-32 (BCI)	Nova Scotia first supplemental questionnaire response	First supplemental questionnaire response of the Government of Nova Scotia (3 April 2017), exhibit NS-SUPP1, Statement of work provided by Deloitte to Nova Scotia, in June 2016
USA-51 (BCI)	Nova Scotia verification exhibit VE-9-C	Government of Nova Scotia verification exhibits: exhibit NS-VE-8A, exhibit NS-VE-8B, exhibit NS-VE-8C, exhibit NS-VE-8D, exhibit NS-VE-8E, exhibit NS-VE-8F, exhibit NS-VE-9A, exhibit NS-VE-9B, exhibit NS-VE-9C, and exhibit NS-VE-10
USA-63	Initial stumpage questionnaire	USDOC, initial stumpage questionnaire (19 January 2017)
USA-64	Addendum initial stumpage questionnaire	USDOC, Addendum to the initial stumpage questionnaire (31 January 2017)

<b>Exhibit</b>	<b>Short Title</b>	<b>Description/Long Title</b>
USA-75	Québec questionnaire response	Response of the Government of Québec, Exhibit QC-STUMP-22, Excerpt from SFDA Regulations, chapter A-18.1, r.7, section 89 of the regulation respecting standards of forest management for forests in the domain of the State
USA-78	Definition of "group" from Oxford English Dictionary Online	Definition of "group" from Oxford English Dictionary Online
USA-84	Exhibit BC-S-124 of British Columbia initial questionnaire response	Initial questionnaire response of the Government of British Columbia (14 March 2017), exhibit BC-S-124
USA-92 (BCI)	Québec verification exhibit VE-QC-29	Government of Québec verification exhibit VE-QC-29

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
AAC	annual allowable cut
ACCA	accelerated capital cost allowance
AWS	annual work schedules
BC	British Columbia
BC Hydro	British Columbia Hydro and Power Authority
BCI	Business Confidential Information
BCTS	British Columbia Timber Sales
BCUC	British Columbia Utilities Commission
BMMB	Timber Marketing Bureau, <i>Le Bureau de mise en marché des bois</i>
CLFA	Crown Lands and Forests Act
DBH	diameter at breast height
DERD	Department of Energy and Resource Development
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EIPA	Export and Import Permits Act
EPA	electricity purchase agreement
FMA	Forest Management Agreement
FMU	Forest Management Unit
FRIAA	Forest Resource Improvement Association of Alberta
GATT 1994	General Agreement on Tariffs and Trade 1994
GBC	Government of British Columbia
GOC	Government of Canada
HBS	Harvest Billing System
Hydro-Québec	<i>Commission hydro-électrique du Québec</i>
JDIL	J.D. Irving, Ltd.
JMC	Joint Management Committee
KPMG	KPMG LLP
LEP	log export-permitting
LIREPP	large industrial renewable energy purchase programme
MBF	thousand board feet
MFFP	Ministry of Forests, Wildlife, and Parks
MFLNRO	Ministry of Forests, Lands, and Natural Resource Operations
MNP	MNP LLP
MPB	mountain pine beetle
MPS	Market Pricing System
NB Power	New Brunswick Power Corporation
NS	Nova Scotia
NSDNR	Nova Scotia Department of Natural Resources
PCIP	Partial Cut Investment programme
PNW	Pacific North-West
POI	period of investigation
PPA	power purchase agreement
Resolute	Resolute FP Canada Inc.
RFP	request for proposal
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SFDA	Sustainable Forest Development Act
SPF	spruce-pine-fir
TDA	Timber Damage Assessment
TMR	Timber Management Regulation
TSG	Timber Supply Guarantee
USDOC	United States Department of Commerce
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WDNR	Washington Department of Natural Resources
WTO	World Trade Organization

## 1 INTRODUCTION

### 1.1 Complaint by Canada

1.1. On 28 November 2017, Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to the measures and claims set out below.<sup>1</sup>

1.2. Consultations were held on 17 January 2018, but failed to resolve the dispute.

### 1.2 Panel establishment and composition

1.3. On 15 March 2018, Canada requested the establishment of a panel pursuant to Article 6 of the DSU and Article 30 of the SCM Agreement with standard terms of reference.<sup>2</sup> At its meeting on 9 April 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Canada in document WT/DS533/2, in accordance with Article 6 of the DSU.<sup>3</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Canada in document WT/DS533/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>4</sup>

1.5. On 27 June 2018, Canada requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 6 July 2018, the Director-General accordingly composed the Panel as follows:

Chairperson: Ms Enie Neri de Ross

Members: Mr Gustav Brink  
Mr Alberto Trejos

1.6. Brazil, China, the European Union, Japan, Kazakhstan, the Republic of Korea, the Russian Federation, Turkey, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

### 1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures<sup>5</sup>, Additional Working Procedures on Business Confidential Information (BCI), Additional Working Procedures on Open Panel Meetings, and the partial timetable on 23 August 2018. The Panel revised the timetable on 27 March 2019 and 21 November 2019.

1.8. The Panel held a first substantive meeting with the parties on 26, 27, and 28 February 2019. A session with the third parties took place on 28 February 2019. The Panel held a second substantive meeting with the parties on 16, 17, and 18 October 2019. On 18 December 2019, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 12 May 2020. The Panel issued its Final Report to the parties on 30 June 2020.

1.9. In its letter of 5 March 2019 to the Panel, the United States objected to Canada designating as BCI certain statements and exhibits that form part of Canada's submissions in these proceedings. In its letter to the Panel dated 11 March 2019, as amended by another letter dated 2 April 2019,

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<sup>1</sup> Request for consultations by Canada, WT/DS533/1 (Canada's consultations request).

<sup>2</sup> Request for the establishment of a Panel by Canada, WT/DS533/2 (Canada's panel request).

<sup>3</sup> DSB, Minutes of meeting held on 9 April 2018, WT/DSB/M/411.

<sup>4</sup> Constitution note of the Panel, WT/DS533/3.

<sup>5</sup> See the Panel's Working Procedures in Annex A-1.

Canada responded to the United States' objections, proposing to maintain its designation as BCI for certain statements, while withdrawing it for others. The Panel addressed the United States' objections regarding BCI designation of the relevant information by Canada by issuing a ruling on 2 May 2019.

## 2 FACTUAL ASPECTS

### 2.1 The measures at issue

2.1. This dispute concerns certain US countervailing measures concerning softwood lumber products from Canada. In the request for the establishment of a panel, Canada identified the following measures as being the measures at issue:

- a. Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances, 82 United States Federal Register 51,814 (8 November 2017);
- b. Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination (1 November 2017);
- c. Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 United States Federal Register 347 (3 January 2018); and
- d. the notice of initiation, initiation checklist, questionnaires, verification reports, preliminary determination, decision memorandum for the preliminary determination, calculations memoranda, market memoranda, as well as other determinations, memoranda, reports, and measures related to the certain softwood lumber products from Canada countervailing duty investigation.<sup>6</sup>

2.2. Canada also challenged an alleged US measure pursuant to which the United States has treated stumpage in certain Maritime provinces as an in-country benchmark that reflected prevailing market conditions for standing timber sold in provincial markets in Alberta, Ontario, and Québec.<sup>7</sup> According to Canada's panel request, this alleged measure is evidenced, *inter alia*, by the following:

- a. Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada, 69 United States Federal Register 75,917 (20 December 2004) as amended by 70 United States Federal Register 9,046 (24 February 2005);
- b. Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber Products from Canada (13 December 2004);
- c. Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada, 70 United States Federal Register 73,448 (12 December 2005);
- d. Second Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum: Final Results of Administrative Review (5 December 2005);
- e. Notice of Preliminary Results and Extension of Final Result of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada, 71 United States Federal Register 33,931 (12 June 2006);

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<sup>6</sup> Canada's Panel request, p. 1.

<sup>7</sup> The United States disagrees with Canada as regards the existence of such a measure. (United States' first written submission, para. 765).

- f. Certain Softwood Lumber Products from Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination, 82 United States Federal Register 19,657 (28 April 2017);
- g. Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada (24 April 2017);
- h. Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances, 82 United States Federal Register 51,814 (8 November 2017);
- i. Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination (1 November 2017);
- j. Certain Uncoated Groundwood Paper from Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination, 83 United States Federal Register 2,133 (16 January 2018);
- k. Decision Memorandum for the Affirmative Preliminary Determination in the Countervailing Duty Investigation of Certain Uncoated Groundwood Paper from Canada (8 January 2018); and
- l. the orders, questionnaires, verification reports, calculations memoranda, issues and decision memoranda, as well as other determinations, memoranda, reports, and measures related to the above administrative reviews and investigations concerning softwood lumber products from Canada.

### **3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

3.1. Canada requests that the Panel find that the United States Department of Commerce (USDOC) acted inconsistently with the United States' obligations under the SCM Agreement and the GATT 1994.<sup>8,9</sup> Specifically, Canada contends that the USDOC acted inconsistently with:

- a. Article 14(d) of the SCM Agreement by improperly rejecting in-market benchmarks from British Columbia, Alberta, Ontario, Québec, and New Brunswick to determine the adequacy of remuneration for Crown timber provided to the respondent companies by each province<sup>10</sup>;

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<sup>8</sup> In the United States' comments on the draft descriptive part of the Interim Report, the United States argues that Canada did not request a finding under Article 1.1(b) in relation to British Columbia Hydro and Power Authority (BC Hydro)'s purchases of electricity (para. 3.1(h) of the draft descriptive part of the Interim Report), and New Brunswick's large industrial renewable energy purchase programme (LIREPP) (para. 3.1(i) of the draft descriptive part of the Interim Report). The United States argues that Canada did not request these findings in the relevant sections of its first written submission, in its opening statement during the first panel meeting, nor in its second written submission. (United States' comments on the draft descriptive part of the Report, paras. 11 and 13). We consider that Canada has requested a finding under Article 1.1(b) in relation to BC Hydro's purchases of electricity and New Brunswick's LIREPP. Canada presented facts and arguments to substantiate a request for these findings in its first written submission, in accordance with para. 3(1) of the Working Procedures, in particular, in section VI.A of its first written submission. Furthermore, we note that the United States responded to Canada's request for a finding under Article 1.1(b) in relation to BC Hydro's purchases of electricity and New Brunswick's LIREPP in its first written submission, in sections VI.A and VI.B respectively.

<sup>9</sup> In Canada's comments on the draft descriptive part of the Interim Report, Canada requested that we include certain additional provisions of the SCM Agreement and the GATT 1994 to its request for findings in paragraph 3.1 of the draft descriptive part. (Canada's comments on the draft descriptive part of the Report, para. 3.1). We note in this respect that para. 3(1) of the Working Procedures provides:

Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

We reject Canada's request as it did not put forth arguments in its first written submission under the provisions that it has requested the Panel to add to Canada's request for findings.

<sup>10</sup> Canada's first written submission, p. 21.

- b. Article 14(d) of the SCM Agreement by using the Washington State log price benchmark for determining the adequacy of remuneration for Crown timber provided by British Columbia<sup>11</sup>;
- c. Articles 14(d) and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by using the Nova Scotia survey benchmark for determining the adequacy of remuneration for Crown timber provided by Alberta, Ontario, and Québec<sup>12</sup>;
- d. Article 14(d) of the SCM Agreement by using Irving's purchases of Nova Scotia private timber as a benchmark for determining the adequacy of remuneration for Crown timber provided by New Brunswick<sup>13</sup>;
- e. Article 14(d) of the SCM Agreement by failing to consider the full remuneration paid by producers in Alberta, Ontario, Québec, and New Brunswick<sup>14</sup>;
- f. Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because it improperly "set to zero" the results of certain comparisons used to calculate the benefit for the government provision of Crown timber<sup>15</sup>;
- g. Article 1.1(a)(1)(iv) because it improperly treated the log export-permitting (LEP) process for British Columbia logs as a financial contribution<sup>16</sup>;
- h. Articles 11.2 and 11.3 of the SCM Agreement by improperly initiating an investigation into the British Columbia LEP process<sup>17</sup>;
- i. Articles 1.1(a)(1), 1.1(b), 19.3, and 19.4 of the SCM Agreement in treating certain reimbursements provided by Québec and New Brunswick relating to licence management and silviculture as a financial contribution or, alternatively, even if the reimbursements were found to constitute a financial contribution, Article 1.1(b) of the SCM Agreement in that the reimbursements did not confer a benefit<sup>18</sup>;
- j. Articles 1.1(b) and 14(d) of the SCM Agreement because it improperly assessed the adequacy of remuneration for British Columbia Hydro and Power Authority (BC Hydro)'s purchase of electricity<sup>19</sup>;
- k. Articles 1.1(b) and 14(d) of the SCM Agreement because it improperly assessed the adequacy of remuneration for *Commission hydro-électrique du Québec* (Hydro-Québec)'s purchase of electricity<sup>20</sup>;
- l. Articles 1.1(a)(1)(iii), 1.1(b), and 14(d) of the SCM Agreement because it incorrectly analysed benefit for New Brunswick's large industrial renewable energy purchase programme (LIREPP)<sup>21</sup>;
- m. Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by failing to ascertain the precise amount of subsidies allegedly conferred by provincial electricity programmes that were attributable to softwood lumber products<sup>22</sup>;

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<sup>11</sup> Canada's first written submission, p. 248.

<sup>12</sup> Canada's first written submission, p. 312.

<sup>13</sup> Canada's first written submission, p. 247.

<sup>14</sup> Canada's first written submission, p. 359.

<sup>15</sup> Canada's first written submission, p. 380.

<sup>16</sup> Canada's first written submission, p. 391.

<sup>17</sup> Canada's first written submission, para. 969.

<sup>18</sup> Canada's first written submission, p. 403; response to Panel question No. 134, para. 385.

<sup>19</sup> Canada's first written submission, p. 424.

<sup>20</sup> Canada's first written submission, p. 438.

<sup>21</sup> Canada's first written submission, p. 446.

<sup>22</sup> Canada's first written submission, p. 454.

- n. Articles 2.1(a) and (b) of the SCM Agreement by incorrectly concluding that the accelerated capital cost allowance (ACCA) for Class 29 assets was *de jure* specific<sup>23</sup>;
- o. Articles 1.1(b) and 14(d) of the SCM Agreement by improperly making use of standing timber in the Maritime provinces as an in-market benchmark in the application of the "Maritimes Stumpage Benchmark" measure<sup>24</sup>; and
- p. Articles 21.1, 21.2, 32.1, and 32.5 of the SCM Agreement.<sup>25</sup>

3.2. Canada further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures into conformity with its WTO obligations.

3.3. The United States requests that the Panel reject Canada's claims in this dispute in their entirety.

#### **4 ARGUMENTS OF THE PARTIES**

4.1. The arguments of the parties are reflected in their integrated executive summaries, provided to the Panel in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

#### **5 ARGUMENTS OF THE THIRD PARTIES**

5.1. The arguments of Brazil, the European Union, and Japan are reflected in their integrated executive summaries, provided in accordance with paragraph 25 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, and C-3). China, Kazakhstan, the Republic of Korea, the Russian Federation, Turkey, and Viet Nam did not submit written or oral arguments to the Panel.

#### **6 INTERIM REVIEW**

6.1. On 29 May 2020, Canada and the United States each submitted written requests for the review of precise aspects of the Interim Report. Neither party requested an interim review meeting. On 12 June 2020, both parties submitted comments on each other's requests for review. On 15 June 2020, the United States filed an additional submission related to the interim review. Canada responded to the United States' additional submission on 19 June 2020. The Panel's discussion and disposition of the parties' submissions related to the interim review are set out in Annex A-4.

#### **7 FINDINGS**

##### **7.1 General principles regarding treaty interpretation, standard of review, and burden of proof**

###### **7.1.1 Treaty interpretation**

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) are such customary rules.<sup>26</sup>

###### **7.1.2 Standard of review**

7.2. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

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<sup>23</sup> Canada's first written submission, p. 464.

<sup>24</sup> Canada's first written submission, p. 489.

<sup>25</sup> Canada's first written submission, para. 1209.i.

<sup>26</sup> Appellate Body Reports, *US – Gasoline*, DSR 1996:I, pp. 15-16; *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 10, section D.

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered Agreements.

7.3. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.<sup>27</sup>

7.4. The Appellate Body has also stated that a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".<sup>28</sup>

7.5. A panel must limit its examination to the evidence that was before the authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.<sup>29</sup> In that regard, a panel may be called upon to respond to allegations by a complainant concerning the significance of record evidence that the investigating authority allegedly ignored, or on which it placed insufficient weight, or from which it drew incorrect inferences, or that there was no record evidence that could have possibly substantiated its conclusion.<sup>30</sup> The fact that an investigating authority has not cited every piece of record evidence which negates – or substantiates – these kinds of allegations does not mean that a panel is prevented from considering such evidence to test the veracity of such allegations. A panel's review of the record evidence in order to establish the veracity of such allegations, and thus determine whether the complainant has demonstrated sufficiently that the investigating authority's conclusions were not reasoned and adequate, does not amount to a *de novo* review of the record evidence.<sup>31</sup>

7.6. Likewise, a panel's examination of whether an investigating authority's conclusions were reasoned and adequate is not necessarily limited to the pieces of evidence *expressly* relied upon by the authority in its establishment and evaluation of the facts in arriving at a particular conclusion.<sup>32</sup> Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss every piece of supporting record evidence for each fact in the final determination.<sup>33</sup> However, since a panel's review cannot be *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's finding that the authority's conclusion was reasoned and adequate.<sup>34</sup>

7.7. We also note that not every error made or questionable inference drawn by an investigating authority in its treatment of a given piece of evidence will necessarily rise to the level of a violation of an obligation of the WTO Agreements. Rather, a panel's evaluation of whether an investigating authority's explanation is "reasoned and adequate" requires an assessment of the totality of evidence relied upon by an authority to justify its reasoning on a given point.<sup>35</sup>

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<sup>27</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>28</sup> Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; and *US – Lamb*, paras. 106-107.

<sup>29</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

<sup>30</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99.

<sup>31</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99.

<sup>32</sup> Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.

<sup>33</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.

<sup>34</sup> Appellate Body Report, *US – Lamb*, paras. 153-161. See also Appellate Body Reports, *US – Steel Safeguards*, para. 326; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; *Argentina – Poultry Anti-Dumping Duties*, para. 7.48.

<sup>35</sup> See e.g. Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 133-134. See also Panel Report, *EC – Fasteners (China)*, para. 7.359.

### 7.1.3 Burden of proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.<sup>36</sup> Therefore, Canada bears the burden of demonstrating that the challenged measures are inconsistent with the WTO Agreements. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.<sup>37</sup> It is generally for each party asserting a fact to provide proof thereof.<sup>38</sup>

## 7.2 Whether Article 14(d) required the USDOC to consider using, as a starting point in its benefit assessment, stumpage benchmarks from within certain "regional markets" in Canada

### 7.2.1 Introduction

7.9. In the underlying investigation, the USDOC used stumpage prices in Nova Scotia as a benchmark to determine the adequacy of remuneration for Crown stumpage in Alberta, Ontario, Québec, and New Brunswick, and a benchmark in Washington State in the United States to determine the adequacy of remuneration for Crown stumpage in British Columbia. In the process of selecting stumpage benchmarks, the USDOC considered using certain prices from within each of Alberta, Ontario, Québec, New Brunswick, and British Columbia as stumpage benchmarks for each of those regions respectively. Having considered using those prices as benchmarks, the USDOC ultimately rejected them on the basis that they were distorted as a result of the government's share in the stumpage market taken together with certain other factors.<sup>39</sup>

7.10. In this dispute, Canada challenges the USDOC's rejection of those prices from each of Alberta, Ontario, Québec, New Brunswick, and the British Columbia interior as benchmarks in determining the adequacy of remuneration for Crown stumpage provided in each of those regions. Canada also challenges the USDOC's use of stumpage prices in Nova Scotia, instead, as a benchmark to assess benefit from provision of Crown stumpage in Alberta, Ontario, and Québec; and of log prices in Washington State as a benchmark to assess benefit from provision of Crown stumpage in British Columbia. Canada claims that, given the facts of the underlying investigation, the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in rejecting "in-market", and selecting "out-of-market", benchmarks for determining adequacy of remuneration for Crown stumpage provided in the regions in question.<sup>40</sup> For Canada, the USDOC, in light of the record evidence, should have selected "in-market" benchmarks from within the relevant "regional markets" in each of the five Canadian regions, in order to comply with the requirements of Article 14(d). Canada's claims thus pertain to the appropriate stumpage benchmark that the USDOC was required to use for determining the adequacy of remuneration for Crown stumpage. These claims are based on Canada's argument that Article 14(d) placed the USDOC under an obligation to consider using, as a starting point in its benefit assessment, stumpage benchmarks from within Canada's "regional markets".<sup>41</sup>

7.11. The United States rejects Canada's argument, asserting that Article 14(d) placed the USDOC under no such obligation. For the United States, as long as the USDOC used as a benchmark a market-determined price for the good in question in the country of provision, which the United States asserts the USDOC did in the underlying investigation, the authority had met the requirements of Article 14(d).<sup>42</sup> The United States posits that each of Canada's claims under Article 14(d) concerning the USDOC's rejection of prices from within the alleged "regional markets" in question as benchmarks to assess benefit from the provision of Crown stumpage in those regions must

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<sup>36</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 337.

<sup>37</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>38</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.

<sup>39</sup> United States' first written submission, paras. 200, 245, 285, 323, and 357.

<sup>40</sup> Canada's first written submission, para. 34.

<sup>41</sup> Canada's first written submission, paras. 50-54 and 300.

<sup>42</sup> United States' response to Panel question No. 154, para. 6.

necessarily fail because the USDOC was under no obligation in the first place to have considered using such benchmarks.<sup>43</sup>

7.12. In order to address Canada's claims regarding the USDOC's rejection of certain prices from each of the five regions in question as stumpage benchmarks for those regions, the Panel must therefore, as a threshold matter, examine whether, as Canada argues, Article 14(d) required the USDOC to have considered using as a starting point in its benefit assessment benchmarks from within those regions. Should we conclude that the USDOC was, in light of the facts of the underlying investigation, required to do so, we will proceed to evaluate Canada's claims under Article 14(d) regarding the USDOC's rejection of benchmarks from within the regions in question. On the contrary, if we conclude that the USDOC was not so required, we will have no basis to evaluate Canada's claims in question and will reject them.

7.13. For the reasons discussed in our evaluation below, we conclude that, in light of the facts of the underlying investigation, Article 14(d) did require the USDOC to have considered using, as a starting point, benchmarks for Ontario, Québec, and Alberta from within each of those regions, and for British Columbia, from the British Columbia interior.

7.14. As regards New Brunswick, we have no basis to examine whether the USDOC was required to consider using, as a starting point in its benefit analysis, a stumpage benchmark for New Brunswick from within that region because Canada has not properly made out a claim that the USDOC improperly found that the benchmark price in Nova Scotia relates to prevailing market conditions in New Brunswick.<sup>44</sup>

### **7.2.2 Provision at issue**

7.15. The *chapeau* and Article 14(d) of the SCM Agreement provide that:

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:

...

[T]he provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made 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).

### **7.2.3 Evaluation**

7.16. As noted earlier, the USDOC used stumpage prices in Nova Scotia as a benchmark to determine the adequacy of remuneration for Crown stumpage in Alberta, Ontario, Québec, and New Brunswick. Further, it relied on a benchmark in Washington State in the United States to determine the adequacy of remuneration for Crown stumpage in British Columbia. Canada challenges the USDOC's choice of stumpage benchmarks, arguing that Article 14(d) required the USDOC to select an "in-market" or regional benchmark for each of the five regions in question.<sup>45</sup> In particular, Canada argues that the USDOC was required to use a benchmark for Alberta, Ontario, Québec, and New Brunswick from within each of those regions, and in the case of British Columbia, from the British Columbia interior.<sup>46</sup> Instead, the USDOC rejected those "in-market" benchmarks

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<sup>43</sup> United States' response to Panel question No. 154, para. 2.

<sup>44</sup> See fn 118 below.

<sup>45</sup> Canada's argument is based on its assertion that the USDOC improperly rejected the "in-market" or regional benchmark for each of the five regions in question. (Canada's first written submission, para. 34).

<sup>46</sup> Canada's second written submission, paras. 15 and 21.

and relied on an "out-of-market"<sup>47</sup> benchmark to assess the adequacy of remuneration for Crown stumpage in Alberta, Ontario, Québec, and New Brunswick, and an out-of-country benchmark to do the same for British Columbia. Canada argues that in doing so, the USDOC acted inconsistently with Article 14(d) of the SCM Agreement.<sup>48</sup>

7.17. For Canada, the USDOC was required to have selected regional, "in-market" benchmarks to determine the adequacy of remuneration for Crown timber provided under the relevant provincial stumpage programmes, as these provinces have discrete, regional stumpage markets. These regional markets are defined by differences in, among others, forest type (tree species, climate, terrain)<sup>49</sup>, the structure and operations of the industry in each region, and government management.<sup>50</sup> Canada posits that the regional nature of the markets in question is driven by the fact that Crown timber is an immovable good.<sup>51</sup> Canada contends that the USDOC was therefore required to choose benchmarks that related to "prevailing market conditions", in the sense of Article 14(d), within each of those regional markets.<sup>52</sup> Canada asserts that Alberta, Ontario, Québec, New Brunswick, and the British Columbia interior, each constituted their own "regional market".

7.18. Canada points to an Appellate Body finding that an investigating authority may rely on out-of-country benchmarks only in "very limited" circumstances.<sup>53</sup> Canada contends that, similarly, the legal and evidentiary thresholds that must be met for an investigating authority investigating "regional markets" to reject "in-market" prices are also high.<sup>54</sup> An investigating authority may reject "in-market" prices only upon establishing that government intervention in the market distorts "in-market" prices.<sup>55</sup> In other words, Canada accepts that an investigating authority may ultimately apply "out-of-market", or even out-of-country, benchmarks but only after first determining that the "in-market" prices are distorted by government intervention.<sup>56</sup>

7.19. The United States, in response, contends that Canada incorrectly argues that Article 14(d) required the USDOC to select benchmark prices that reflected the prevailing market conditions in Canadian "regional markets". According to the United States, Article 14(d) makes no mention of "regional markets". Article 14(d) does not require that an investigating authority use prices from the province or region of provision as a benchmark in determining the adequacy of remuneration. Rather, Article 14(d) requires that the investigating authority select a benchmark that relates to the prevailing market conditions for the good in question "in the country of provision", which is precisely what the USDOC did in selecting the Nova Scotia benchmark.<sup>57</sup> In the United States' view, even if the term "market" within the phrase "prevailing market conditions" in Article 14(d) is interpreted as relating to a particular geographical location, that location is the country of provision and not, as Canada suggests, a particular "region". Neither the text nor the context of Article 14(d) supports Canada's emphasis on the "regional" aspects of a market.<sup>58</sup> For the United States, therefore, there was no obligation on the USDOC to consider the use of what Canada refers to as "in-market" benchmarks; rather, the USDOC was entitled to select a benchmark from within Canada, i.e. "the country of provision", even if that benchmark was not based on prices from the alleged "regional markets" at issue.

7.20. The main issue before us is whether Article 14(d), given the facts of the underlying investigation, required the USDOC to consider using, as a starting point in its benefit assessment, benchmark prices from within the five regions<sup>59</sup> in question, before it could turn to stumpage

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<sup>47</sup> The "out-of-market" benchmark that the USDOC relied on for Alberta, Ontario, Québec, and New Brunswick was based on stumpage prices in Nova Scotia, which was within Canada.

<sup>48</sup> Canada's first written submission, para. 34.

<sup>49</sup> Canada asserts that forest density, terrain, and climate affect the cost of harvesting timber, which, in turn, affects the value of standing timber to forestry companies. (Canada's first written submission, paras. 28-29).

<sup>50</sup> Canada's first written submission, para. 25.

<sup>51</sup> Canada's second written submission, para. 21.

<sup>52</sup> Canada's first written submission, para. 33.

<sup>53</sup> Canada's first written submission, para. 51 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 102).

<sup>54</sup> Canada's first written submission, paras. 51-52.

<sup>55</sup> Canada's first written submission, paras. 51-54.

<sup>56</sup> Canada's first written submission, paras. 50-54 and 300.

<sup>57</sup> United States' first written submission, paras. 81-82 and 85. (emphasis added)

<sup>58</sup> United States' first written submission, paras. 86 and 88.

<sup>59</sup> Alberta, Québec, Ontario, New Brunswick, and the British Columbia interior.

benchmarks from outside those regions. We note that the text of Article 14(d) does not expressly mention "regional markets". Article 14(d) provides, in relevant part, that:

[T]he 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 adequacy of remuneration shall be determined in relation to prevailing market conditions for the good in question in the country of provision (including price, quality, availability, marketability, transportation and other conditions of sale).

7.21. 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.

7.22. 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.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

7.23. 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.

7.24. In response to a question from the Panel, the United States suggests that it suffices for purposes of Article 14(d) to pick a benchmark from *anywhere* in the country of provision as long as that benchmark is a private, market-determined price for a good that is the same as the government-provided good.<sup>63</sup> For the United States, if the benchmark good is the same as the good in question and the benchmark price is a market-determined price in the country of provision, that benchmark price *will* reflect the same prevailing market conditions as those encountered by the government-provided good.<sup>64</sup> We disagree. 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 stumps, sold in different parts of the country of provision, will have the same quality, availability,

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<sup>60</sup> Article 14(d) requires that the adequacy of remuneration for the government-provided good be determined in relation to the prevailing market conditions for that good. It follows that any market-determined benchmark price used for purposes of assessing the adequacy of remuneration must also *relate to* the prevailing market conditions for the government-provided good.

<sup>61</sup> The underlying reasoning comports with the panel's observation in *US – Anti-Dumping and Countervailing Duties (China)* that "any benchmark identified as representing the 'prevailing market conditions' for the good provided by a government must reflect the price for that same good as it would be or is sold by private sources at that time and on comparable terms and conditions." (Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.53). At the same time, like the panel in *US – Carbon Steel (India)*, we do not consider that "such market benchmarks need mirror the contractual terms on which the government provider sells its good". We further agree with the panel that the terms "prevailing market conditions" and "conditions of sale" in the second sentence of Article 14(d) relate not to the specific contractual terms on which the government provides goods but to "the general conditions of the relevant market, in the context of which market operators engage in sales transactions". (Panel Report, *US – Carbon Steel (India)*, para. 7.60 (emphasis added)).

<sup>62</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.56.

<sup>63</sup> United States' response to Panel question No. 154, paras. 6 and 11-12.

<sup>64</sup> United States' response to Panel question No. 154, para. 6.

marketability, transportation-related costs, and conditions of sale – all prevailing market conditions as set out under Article 14(d).<sup>65</sup>

7.25. The United States further cites to the Appellate Body's finding that where the investigating authority selects as a benchmark a private, market-determined price from within the country of provision, that benchmark will *necessarily* relate to the prevailing market conditions for the government-provided good in the country of provision.<sup>66</sup> For the United States, this suggests that an investigating authority may use as a benchmark, a private, market-determined price for a good that is the same or similar as the government-provided good from *anywhere* within the country of provision. We consider that Article 14(d) permits an investigating authority to do so in certain, but not *all*, situations, depending on the facts and circumstances of the case before it. Further, the Appellate Body's observations that the United States refers to were not based on the facts of this dispute – in that case there was no suggestion that the prevailing market conditions for the relevant good changed from one region to another within the country of provision.

7.26. 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.

7.27. 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.<sup>67</sup> 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. The investigating authority may do so, in certain cases, by taking the market-determined price for the same or similar good from anywhere in the country of provision and making appropriate adjustments to that price so that it relates to the prevailing market conditions for the government-provided good.<sup>68</sup> We consider, however, that market-determined prices that *result from the prevailing market conditions*

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<sup>65</sup> Indeed, the USDOC itself did not select a country-wide benchmark, that is, a benchmark from *anywhere* in the country of provision, for determining the adequacy of remuneration for provision of stumpage in each of the provinces in question. The USDOC concluded that private stumpage prices in Nova Scotia were not an appropriate benchmark for the provision of stumpage in British Columbia, even though the USDOC had found that the Nova Scotia prices were in-country, market-determined prices for stumpage. In this regard, the United States argues, in response to a question from the Panel, that the USDOC had found that British Columbia stumpage was distinct from stumpage provided in the other provinces in Canada.

(United States' response to Panel question No. 154, paras. 9 and 14). We note that, although the USDOC did find differences related to species and diameter between stumpage in Nova Scotia and in British Columbia, it never determined that the good in question sold in British Columbia was not stumpage. In particular, the USDOC found that "the standing timber in British Columbia is not comparable to the standing timber in Nova Scotia", and not that the good in question in British Columbia was not standing timber (or stumpage). (Preliminary determination, (Exhibit CAN-8), p. 46). Therefore, based on the logic of the United States' own argument, as long as the timber sold in British Columbia was stumpage and the Nova Scotia benchmark was an in-country market-determined price for the same or similar good, the Nova Scotia benchmark should have sufficed as a benchmark for British Columbia stumpage. Yet, the USDOC concluded that the private stumpage prices in Nova Scotia were not an appropriate benchmark for the provision of stumpage in British Columbia. Therefore, we note that the United States' argument is at odds with the USDOC's own finding.

<sup>66</sup> United States' first written submission, paras. 72 and 74 (referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.46).

<sup>67</sup> In other words, this is a case where, even though goods that are the same or similar to the government-provided good are sold in the country of provision, the record shows that the prevailing market conditions for the government-provided good are different from the prevailing market conditions for the same or similar goods.

<sup>68</sup> We note that, in the underlying investigation, the USDOC found that the benchmark price for stumpage in Nova Scotia "reasonably reflected" the prevailing market conditions for stumpage in Alberta, Ontario, New Brunswick, and Québec, and that adjustments to the Nova Scotia benchmark were "not warranted to address comparability issues". (Final determination, (Exhibit CAN-10), p. 125).

for the government-provided good itself would more accurately reflect the prevailing market conditions for that good.<sup>69</sup> For, as noted in paragraph 7.23, such 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<sup>70</sup>, 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.

7.28. We therefore consider that making adjustments to prices for goods that are the same or similar to the government-provided good, but that result from prevailing market conditions different to those for the government-provided good, even when those prices are market-determined and "in-country", is not the preferred way of arriving at an appropriate benchmark. 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.<sup>71</sup> In particular, the Appellate Body observed that:

[I]t 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.<sup>72</sup>

7.29. The Appellate Body therefore observed that before resorting to the use of external benchmarks, an investigating authority needs to consider as the *starting point*, when determining adequacy of remuneration for the government-provided good, the price at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision.<sup>73</sup> The Appellate Body found that prices in the market of the country of provision are the primary, but not the exclusive, benchmark for calculating benefit. 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

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<sup>69</sup> We note that the dissenting opinion of one member of the panel in *Canada – Feed-In Tariff Program* addresses this issue, as set out below, and we agree with this general approach:

In the present disputes, the complainants have not advanced country-specific price benchmarks, but rather benchmarks based on prices established in regional intra-national markets operating in Canada, and also the United States. The complainants appear to have done so because there are no national electricity wholesale markets in Canada. In other words, the "prevailing market conditions" in the country of purchase (Canada) are such that there are no country-wide electricity markets. In my view Article 14(d) does not suggest that the prevailing market conditions can only be those of a national market. Market conditions in a regional market of a country are, relevantly, market conditions "in the country of purchase". In this light, the complainants' approach is not inconsistent with the guidelines stipulated in Article 14(d) of the SCM Agreement.

(Panel Report, *Canada – Feed-In Tariff Program*, para. 9.9 (emphasis original))

<sup>70</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 108.

<sup>71</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

<sup>72</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 108. (emphasis added)

<sup>73</sup> Appellate Body Reports, *US – Softwood Lumber IV*, para. 90; *US – Carbon Steel (India)*, para. 4.154; and Panel Report, *US – Coated Paper (Indonesia)*, para. 7.33.

private prices in that country are distorted because of the government's predominant role in providing those goods in the market.<sup>74</sup>

7.30. We consider, in a similar vein, the preferred approach for selecting a benchmark in cases where the record shows 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. We find that in such cases, for reasons set out in paragraph 7.23, an authority is required to consider, as a starting point in its benefit analysis, using as a benchmark the prices resulting from the prevailing market conditions for the government-provided good. 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.

7.31. It follows that, where 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.<sup>75</sup> 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.

7.32. 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"<sup>76</sup> 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.

7.33. We further consider that the obligation in Article 19.4 of the SCM Agreement supports the reasoning above. That provision requires that no countervailing duty be levied on any imported product in excess of the amount of subsidy found to exist. As Canada submits, the Appellate Body has found that Article 19.4 of the SCM Agreement requires an investigating authority to "ascertain as accurately as possible the amount of subsidization bestowed on the investigated products".<sup>77, 78</sup>

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<sup>74</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

<sup>75</sup> This obligation flows from the *chapeau* of Article 14(d), which requires that an investigating authority's "application to each particular case" of any method it uses to calculate the benefit conferred to the recipient be "transparent" and "adequately explained".

<sup>76</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.187.

<sup>77</sup> Appellate Body Report, *US – Washing Machines*, para. 5.268.

<sup>78</sup> We note that in its first written submission, the United States has acknowledged in the context of another argument that Canada's view that "[t]he SCM Agreement requires that an investigating authority

Considering that the amount of subsidy is determined based on the amount of benefit conferred, which in turn depends on the choice of benchmark, it follows that the investigating authority will need to at least start its benefit assessment with considering the use of a benchmark that best reflects the prevailing market conditions for the government-provided good. A price that results from the prevailing market conditions for the government-provided good, for reasons discussed above, would constitute such a benchmark.

7.34. Whether the USDOC was required, in the underlying investigation, to have first considered selecting a stumpage benchmark for Alberta, Ontario, Québec, and New Brunswick from within each of those regions, and in the case of British Columbia, from the British Columbia interior, will hinge on whether there was evidence on the record of the investigation pertaining to differences in prevailing market conditions for Crown stumpage provided in these regions and whether the USDOC provided a reasoned and adequate explanation, in light of that evidence, as to whether each of these regions had their own distinct prevailing market conditions. We will accordingly evaluate whether there was evidence on the record before the USDOC pertaining to distinct prevailing market conditions in the regions in question, and if so, whether the USDOC provided a reasoned and adequate explanation in light of that evidence regarding whether each of these regions did have distinct prevailing market conditions. If we consider that the USDOC did not provide a reasoned and adequate explanation for why any relevant evidence on the record did not show that the regions in question had distinct prevailing market conditions, we will find that the USDOC was under an obligation to have considered using, as a starting point in its benefit analysis, a benchmark price from within each of those regions.

7.35. The United States contends that, in arguing that the benchmark selection should have been limited to regional jurisdictions, Canada has not established that such regional subdivisions even exist in the country. The United States notes that on the one hand, Canada argues that the conditions in one province cannot be compared to the conditions in another province because the government pricing mechanism in each province creates province-specific conditions. On the other hand, Canada argues that the relevant market conditions "vary significantly" across even the smallest distances e.g. "even at the level of the individual mills located within the same states, owned by the same company, and within an hour and a half haul of each other", or even on a tree-by-tree basis. According to the United States, Canada's proposition implies that there may be no appropriate basis upon which to delineate between conditions in one region and another.<sup>79</sup>

7.36. In response, Canada argues that during the underlying investigation the Canadian interested parties "demonstrated, with reference to extensive evidence, that regional markets *do* exist, and that these markets are shaped by their differing prevailing conditions".<sup>80</sup> Canada asserts that the Canadian parties documented differences in prevailing market conditions between Nova Scotia and the other provinces in question, and those between eastern Washington and the British Columbia interior. Canada further asserts that it has discussed in detail, during these proceedings, the differences in prevailing market conditions among the regions in question.<sup>81</sup> These differences include regional supply and demand, quality (i.e. species mix, diameter, etc.), transportation differences, harvesting costs, and other conditions of purchase and sale.<sup>82</sup> For Canada, "regional markets" are largely coextensive with provincial boundaries due to geography and the fact that provinces are responsible under the Canadian Constitution for establishing the legal and regulatory framework for forestry, thus shaping the area in which the forces of supply and demand for standing timber interact.<sup>83</sup> Further, Canada posits that it has explained that the regional nature of Canada's standing timber markets is a function of the fact that Crown timber is an immovable good<sup>84</sup>, and the inherently local nature of standing timber.<sup>85</sup>

7.37. We note that the record of the underlying investigation indicates that the Canadian respondents had placed before the USDOC vast amounts of evidence purporting to show that distinct

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accurately determine the amount of a subsidy" is "unobjectionable". (United States' first written submission, para. 495).

<sup>79</sup> United States' opening statement at the first meeting of the Panel (26 February 2019), para. 16 (referring to Canada's first written submission, para. 616).

<sup>80</sup> Canada's response to Panel question No. 157, para. 44. (emphasis original)

<sup>81</sup> Canada's response to Panel question No. 157, para. 44.

<sup>82</sup> Canada's response to Panel question No. 157, para. 46.

<sup>83</sup> Canada's response to Panel question No. 157, para. 45.

<sup>84</sup> Canada's response to Panel question No. 157, para. 45.

<sup>85</sup> Canada's response to Panel question No. 157, para. 49.

market conditions prevailed in the regions in question. Investigating authorities are required to conduct the necessary analysis to arrive at the appropriate benchmark, and the role of the investigating authority in this context will vary depending on the circumstances of the case, the nature, quantity, and quality of information supplied by petitioners and respondents.<sup>86</sup>

7.38. We note that the evidence placed on the record of the underlying investigation by the Canadian respondents, on its face, pertains to differences in quality (such as species mix and diameter), transportation and hauling distances, climate, growing seasons, and provincial legislation, among others, in respect of stumpage in each of the regions in question.<sup>87, 88</sup> For instance, the evidence suggests that the predominant species mix in Alberta is distinct from that in the other regions<sup>89</sup>, as is the primarily sub-Arctic climate<sup>90</sup> in the region, resulting in a short growing season<sup>91</sup> as well as slow tree growth.<sup>92</sup> The evidence suggests that this impacts the tree size<sup>93</sup>, and thus the value of timber in that region, considering that smaller trees are more costly to harvest.<sup>94</sup> Further, as Canada asserts, the record evidence addresses the "inherently local nature of standing timber" based on the fact that it is an immovable good.<sup>95</sup> We note that the evidence that Canada identifies indicates that stumpage markets are inherently local and often differentiated by substantial quality and locational differences across local areas.<sup>96</sup> The evidence suggests that the local nature of stumpage renders inter-regional comparisons of timber prices too complex to be meaningful. This is because timber prices are a function of many dynamics, such as: the physical characteristics of the trees, the stands that they grow in and the land, the location of the forest relative to the mill and market for forest products like lumber or pulp, and the climate and geographic influences on forest growth and ecology (e.g. presence of certain wood-eating insects), among others.<sup>97</sup> We note that the evidence suggests that consequently, inter-regional comparisons of timber pricing require "so many empirical adjustments and assumptions, that any resulting conclusions have little real meaning".<sup>98</sup>

7.39. Canada has further pointed to the evidence on the record in support of the view that the British Columbia coast (coast) and the British Columbia interior (interior) regions had distinct prevailing market conditions.<sup>99</sup> Canada asserts that the coast is separated from the interior through mountain ranges that create differences in the climate, ecology, and transportation conditions between the two regions.<sup>100</sup> In its questionnaire response, British Columbia stated that road access, building, and maintenance are generally easier in the interior than on the coast.<sup>101</sup> While the record evidence indicates that road transport is easier in the interior, we note that the evidence also

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<sup>86</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.153.

<sup>87</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), pp. 5, 11-12, 14, 20-22, 24-26, and 34; Alberta initial questionnaire response, (Exhibit CAN-97), pp. ABIV-26-ABIV-30; Ontario, comparison between Acadian and Boreal forest regions, (Exhibit CAN-149), pp. 4-5; Ontario, notes on Maritimes forests, (Exhibit CAN-156), pp. 4-5; Ontario initial questionnaire response, (Exhibit CAN-155), pp. ON-10-ON-11; Ontario, diameter distribution of timber, (Exhibit CAN-153), p. 3; Ontario, the forests, (Exhibit CAN-147), p. 118; Ontario, structure of the softwood lumber industry, (Exhibit CAN-152), pp. 13-14; Hendricks Report, (Exhibit CAN-19 (BCI)), pp. 8 and 19; Québec initial questionnaire response, (Exhibit CAN-170), pp. QC-S-14, QC-S-20-QC-S-21, and QC-S-23; Québec, description of softwood species, (Exhibit CAN-306), p. 1; Kalt Report on Crown timber, (Exhibit CAN-14), pp. 9 and 50-54; and Canada, Appendix II from the Constitution Act, (Exhibit CAN-13), paras. 92(5) and 92A.

<sup>88</sup> In considering the evidence in question before the USDOC, "on its face", as noted here, we do not draw any firm conclusions regarding whether that evidence definitively demonstrates differences in prevailing market conditions among the regions in question. Rather, we note that the evidence suggests differences in prevailing market conditions among those regions.

<sup>89</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), pp. 14 and 34.

<sup>90</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), p. 11.

<sup>91</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), p. 12.

<sup>92</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), p. 20; Alberta initial questionnaire response, (Exhibit CAN-97), pp. ABIV-28 and ABIV-89.

<sup>93</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), pp. 20-22; Alberta initial questionnaire response, (Exhibit CAN-97), pp. ABIV-31-ABIV-32.

<sup>94</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), pp. 24 and 37.

<sup>95</sup> Canada's response to Panel question No. 157, paras. 45 and 49.

<sup>96</sup> Kalt Report on Crown timber, (Exhibit CAN-14), p. 51.

<sup>97</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), p. 3; Asker Report, (Exhibit CAN-15), pp. 9-14.

<sup>98</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), p. 3.

<sup>99</sup> Canada's first written submission, paras. 65-75.

<sup>100</sup> Canada's first written submission, para. 67 (referring to British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), pp. BC-I-46-BC-I-56).

<sup>101</sup> British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), pp. BC-I-47-BC-I-48.

indicates that truck haul distances and the resulting hauling costs limit how far logs can be transported in the interior.<sup>102</sup> The evidence also suggests that as a result, the mills operating in the interior must be located relatively near to their timber supply, unlike the coast where waterborne transportation imposes no such constraint on the location of the mills.<sup>103</sup> Canada also points to the record evidence concerning differences between the quality of timber produced in the interior and in the coast. According to British Columbia's questionnaire response, the timber in the interior is generally smaller and the volume per hectare lower than that on the coast, due to lower rainfall and colder winters.<sup>104</sup> Canada also argues that wild fires affect forests to a much greater degree in the interior than on the coast, and that the quality of certain varieties of timber in the interior has been heavily impacted by beetle epidemics.<sup>105</sup> We note that the record evidence identified by Canada suggests that given these differences in forests, mill design, and transportation costs, there is "substantial economic separation between markets and activities on the coast and in the interior for logs and timber".<sup>106</sup>

7.40. We consider, in that context, that the copious amounts of evidence placed before the USDOC in the underlying investigation, purporting to show the existence of regionally distinct prevailing market conditions, would have given an objective and unbiased authority pause, and prompted it to investigate whether the prevailing market conditions for stumpage were indeed distinct across the regions in question. This is particularly so given the "inherently local nature" of standing timber and that the quality, price, marketability, transportation, availability, among other prevailing market conditions for standing timber, are so rooted to the unique climatic, geographical, and ecological characteristics of the region it grows in, as the evidence that Canada points to underscores.<sup>107</sup>

7.41. In the underlying investigation, the USDOC did address at least some of the evidence pertaining to prevailing market conditions in the different Canadian regions in question and found that the benchmark price for stumpage in Nova Scotia reasonably reflected the prevailing market conditions for stumpage in Alberta, Ontario, and Québec, and that the adjustments to the Nova Scotia benchmark were "not warranted to address comparability issues".<sup>108</sup> However, for reasons set out later in this Report<sup>109</sup>, we have concluded that the USDOC erroneously found that the benchmark price for stumpage in Nova Scotia "reasonably reflected" the prevailing market conditions for stumpage in Alberta, Ontario, and Québec. Further, as regards British Columbia, the USDOC did find that the prevailing market conditions for the government-provided good in that province differed from the prevailing market conditions in Nova Scotia.<sup>110</sup> The USDOC did not, however, make any finding as to whether the British Columbia interior had its own distinct prevailing market conditions, despite respondents submitting evidence in this regard.

7.42. Nothing in the USDOC's determination therefore reasonably and adequately addresses whether each of the British Columbia interior, Alberta, Ontario, and Québec had their own distinct prevailing market conditions despite the ample evidence before the USDOC that was directly pertinent to that question. As noted earlier, we consider that the Canadian respondents had placed enough evidence on the record of the underlying investigation pertaining to differences in prevailing market conditions among the regions in question to have led an unbiased and objective investigating authority to examine the existence of those differences. An objective and unbiased authority would have assessed that evidence and adequately explained why it considered that the evidence either demonstrated, or did not so demonstrate, the existence of regionally distinct prevailing market conditions.

7.43. If the USDOC considered that the record did not show that each of the British Columbia interior, Alberta, Ontario, and Québec had their own distinct prevailing market conditions, it would need to have provided a reasoned explanation in that regard. For reasons discussed in

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<sup>102</sup> Bustard Report, (Exhibit CAN-17), p. 10.

<sup>103</sup> Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), p. 14.

<sup>104</sup> British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), pp. BC-I-51 and BC-I-54; Bustard Report, (Exhibit CAN-17), p. 10.

<sup>105</sup> British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), p. BC-I-49; Canada's first written submission, para. 70.

<sup>106</sup> Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), p. 19.

<sup>107</sup> Kalt Report on Crown timber, (Exhibit CAN-14), p. 51; Alberta, MNP cross-border analysis, (Exhibit CAN-96), p. 3; and Asker Report, (Exhibit CAN-15), pp. 9-14.

<sup>108</sup> Final determination, (Exhibit CAN-10), p. 125; United States' first written submission, para. 115.

<sup>109</sup> See, below, paras. 7.397-7.399.

<sup>110</sup> Final determination, (Exhibit CAN-10), p. 63; Preliminary determination, (Exhibit CAN-8), pp. 46-47.

paragraph 7.31, unless the USDOC gave a reasoned and adequate explanation for why the record evidence did not demonstrate the existence of distinct prevailing market conditions for stumpage in each of the British Columbia interior, Alberta, Ontario, and Québec, Article 14(d) placed the USDOC under an obligation to have considered using, as a starting point in its benefit analysis, benchmarks from within each of those regions. We consider that the USDOC failed to provide that reasoned and adequate explanation, and therefore it was required to have considered using as a starting point those benchmarks before it could turn to using external benchmarks in its benefit determination.

7.44. We further note that a sizeable volume of evidence pertaining to differences in prevailing market conditions across the regions in question that the Canadian interested parties adduced before the USDOC was solicited by the USDOC itself. The USDOC had *itself* conducted its investigation on a region-specific basis, seeking region-specific benchmark data, among other region-specific information, from the Canadian interested parties. The USDOC, in its questionnaires to the Canadian interested parties in the underlying investigation, had *itself* asked them to provide data on stumpage and log prices from the *regions in question*.<sup>111</sup> The USDOC also sought information on the structure of the softwood lumber industry including the production, marketing, and selling practices within certain of the five provinces.<sup>112</sup> Further, the USDOC requested information pertaining to provincial legislation governing stumpage<sup>113</sup>, information on terrain, accessibility, size, density, quality, species, climatic conditions, and the proximity of timber tracts to mills and of mills to distribution centres pertaining to harvest zones in each region<sup>114</sup>, and species and diameter of standing timber for each region<sup>115</sup>, among others. In light of the fact that the USDOC itself solicited a significant volume of evidence pertaining to differences in prevailing market conditions across the regions in question, we find it perplexing that the USDOC failed to adequately explain the finding based on that evidence. We also find it perplexing that the USDOC applied its price distortion analysis on a region-specific basis, and yet did not consider it necessary to complete its benchmarking exercise on this basis.<sup>116</sup>

7.45. As regards New Brunswick, the USDOC found that the Nova Scotia benchmark reasonably reflected the prevailing market conditions for stumpage in New Brunswick and that adjustments to the Nova Scotia benchmark were "not warranted to address comparability issues".<sup>117</sup> If that finding were proper, it would imply that New Brunswick did not have its own distinct prevailing market conditions, and that therefore the USDOC was not under any obligation to have considered using, even as a starting point in its benefit analysis, a benchmark price from within New Brunswick. We consider, however, that Canada has not properly made out a claim that the USDOC incorrectly found that the Nova Scotia benchmark reflected the prevailing market conditions in New Brunswick.<sup>118</sup>

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<sup>111</sup> Ontario initial questionnaire response, (Exhibit CAN-155), p. ON-150; Québec initial questionnaire response, (Exhibit CAN-170), pp. QC-S-135-QC-S-136; Alberta initial questionnaire response, (Exhibit CAN-97), pp. ABIV-127 and ABIV-130; New Brunswick questionnaire response, (Exhibit CAN-240 (BCI)), p. NBII-1; and British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), pp. BC-I-241-242.

<sup>112</sup> Ontario initial questionnaire response, (Exhibit CAN-155), p. ON-7; Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-11; Alberta initial questionnaire response, (Exhibit CAN-97), p. ABIV-7; and British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), p. BC-I-18.

<sup>113</sup> Initial stumpage questionnaire, (Exhibit USA-63), pp. 8-13, 23, 41, and 54; Addendum initial stumpage questionnaire, (Exhibit USA-64), p. 2.

<sup>114</sup> Initial stumpage questionnaire, (Exhibit USA-63), pp. 8-9, 24, 41, and 54.

<sup>115</sup> Initial stumpage questionnaire, (Exhibit USA-63), pp. 8-9, 33, 41, and 54.

<sup>116</sup> We note, for instance, that in assessing whether certain prices in each of the regions in question in Canada were distorted, the USDOC determined the government's market share for stumpage for each of those regions separately, suggesting that it was treating each of those regions as separate markets for purposes of its price distortion analysis. (Final determination, (Exhibit CAN-10), pp. 51, 80, 92, and 99; Preliminary determination, (Exhibit CAN-8), p. 20).

<sup>117</sup> Final determination, (Exhibit CAN-10), pp. 115 and 125.

<sup>118</sup> We note that Canada's panel request sets out a claim that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by failing "to make necessary adjustments to stumpage" to reflect prevailing market conditions in assessing adequacy of remuneration when it compared "New Brunswick stumpage", among others, to a Nova Scotia stumpage benchmark. (Canada's panel request, para. I.A.2). Further, in its comments to the draft descriptive part of this Report, Canada requests the Panel to find that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by using Irving's purchases of Nova Scotia private timber as a benchmark for determining the adequacy of remuneration for Crown timber provided by New Brunswick. However, we note that, contrary to para. 3(1) of our Working Procedures, Canada did not present the relevant facts and arguments to substantiate that claim, "before the first substantive meeting of the Panel with the parties". (Working Procedures of the Panel, *United States – Countervailing*

Accordingly, we have no basis to conclude that the USDOC was under an obligation to have considered, as a starting point, using a benchmark price from within New Brunswick.

#### **7.2.4 Conclusion**

7.46. As noted above, no reasoned and adequate basis exists in the USDOC's determination for us to conclude that the British Columbia interior, Alberta, Québec, and Ontario did not each have their own distinct prevailing market conditions. In the absence of a reasoned and adequate explanation in that respect, we consider that the USDOC was under an obligation to have considered using market-determined benchmarks from within each of those regions as a starting point in its benefit analysis. Based on that consideration, we will next proceed to evaluate whether the USDOC acted inconsistently with Article 14(d) in rejecting benchmarks from within the British Columbia interior, Alberta, Québec, and Ontario. As regards New Brunswick, for reasons noted in the preceding paragraph, we do not have the legal basis to find that the USDOC was under such an obligation, and therefore will not evaluate Canada's claim pertaining to the USDOC's rejection of the proposed benchmark from within that region.

### **7.3 Canada's claims that the USDOC improperly rejected "in-market" prices as a stumpage benchmark in certain provinces**

7.47. Canada claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting certain "in-market" prices in Ontario, Québec, Alberta, New Brunswick, and British Columbia as a benchmark for determining the adequacy of remuneration for Crown stumpage (stumpage benchmark) in each of those provinces.

#### **7.3.1 Legal standard**

7.48. As discussed above<sup>119</sup>, we have already concluded that the USDOC (a) was required to have considered using market-determined benchmarks from within the British Columbia interior, Alberta, Québec, and Ontario as an initial step in its benefit analysis; and (b) was permitted to reject those prices only where it found that those prices were distorted as a result of government intervention.<sup>120</sup> We will next evaluate whether the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in rejecting benchmarks from within the British Columbia interior, Alberta, Québec, and Ontario. As regards New Brunswick, as noted earlier, we have no basis to find that the USDOC was under an obligation to first consider using a benchmark from within that region before it could use an external benchmark.<sup>121</sup> We will therefore not evaluate Canada's claim pertaining to the USDOC's rejection of the proposed benchmark from within New Brunswick.

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*Measures on Softwood Lumber from Canada*, para. 3(1)). In its first written submission, Canada asserts that "[i]n New Brunswick, Commerce improperly used Irving's private purchases of Nova Scotia standing timber as a benchmark". (Canada's first written submission, para. 599). However, Canada presents no relevant facts or arguments to substantiate that assertion in its first written submission. We further note that the United States contends in its first written submission that "Canada does not dispute that the stumpage market in Nova Scotia reflects prevailing market conditions in New Brunswick". (United States' first written submission, fn 138 (referring to Canada's first written submission, para. 600)). Canada did not respond to that assertion from the United States with any relevant facts and arguments except in response to a question from the Panel at the second substantive meeting. (Canada's response to Panel question No. 186, paras. 97-100). We consider that Canada provided its arguments in regard to the claim in question too late in the proceedings to be consistent with para. 3(1) of our Working Procedures, and we therefore reject that claim. This approach is consistent with the Appellate Body's finding in *EC – Fasteners (China)* "that assertions made ... only in response to questioning by the Panel, [cannot] comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law". (Appellate Body Report, *EC – Fasteners (China)*, para. 574). We note that Rule 4 of the working procedures of the panel in that case is equivalent to paragraph 3.1 of the Panel's working procedures in this case.

<sup>119</sup> See, above, para. 7.46.

<sup>120</sup> We note that the Appellate Body has found that the concept of "price distortion" is not equivalent to *any* impact on prices as 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. (Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – *China*), para. 5.146). See para. 7.145 below for more detailed discussion.

<sup>121</sup> See, above, para. 7.45.

7.49. In assessing whether the USDOC improperly rejected the prices in question as a stumpage benchmark, we must apply a standard that is consistent with Article 11 of the DSU. This provision requires that a panel objectively assess the matter before it, including the facts of the case and the applicability of and conformity with the relevant agreements. The Appellate Body has found that the applicable standard of review in a subsidy determination requires that a panel objectively assess whether the investigating authority provided a "reasoned and adequate" explanation as to how the record evidence supports its factual findings, and how those findings support its overall determination.<sup>122</sup> The panel must also conduct an "in-depth" and "critical and searching" assessment of whether the record evidence and the explanations support the authority's conclusions.<sup>123</sup> Further, the panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. In particular, the panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in light of other plausible alternative explanations.<sup>124</sup>

7.50. In cases where an investigating authority bases its overall conclusion on its assessment of the *totality* of multiple pieces of circumstantial evidence, a panel may find it appropriate, or necessary, to examine the sufficiency of the evidence supporting an investigating authority's conclusion by considering each individual piece of evidence. In addition, the panel must examine how the totality of the evidence supports the overall conclusion reached. In particular, panels must consider, in the context of the totality of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation.<sup>125</sup>

7.51. The Appellate Body has further found that the standard of review to be applied in a given case is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute.<sup>126</sup> In this regard, we note that the *chapeau* of Article 14(d), which is the substantive provision at issue in Canada's claims at hand, requires that an investigating authority's application to each particular case of any method it uses to calculate the benefit conferred to the recipient must be "transparent" and "adequately explained".

7.52. In evaluating the USDOC's findings that Canada challenges, we are also guided by the Appellate Body's finding that the reasoning of the investigating authority must be coherent and internally consistent, and the conclusions reached and the inferences drawn by the authority must be based on positive evidence.<sup>127</sup> We further note that the USDOC stated in its determination that it had accorded less weight in its analysis to certain "purchased commissioned reports" than to other evidence that had been "prepared in the ordinary course of business" because those reports had been produced for the express purpose of submission in the underlying investigation and therefore ran the "risk of litigation-inspired fabrication or exaggeration".<sup>128</sup> We consider that the USDOC's treatment of the reports in question placed on the record of the underlying investigation by the Canadian interested parties undermines Canada's rights under Article 12.1 of the SCM Agreement, which requires, in relevant part, that "[i]nterested members and all interested parties in a countervailing duty investigation shall be given ... ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question". In our view, the USDOC was required to have reviewed the evidence set out in the reports in question. It was not open to the USDOC to have accorded less weight in its analysis to those reports simply because they had been produced for the express purpose of submission in the underlying investigation.<sup>129</sup>

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<sup>122</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186.

<sup>123</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>124</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>125</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 94.

<sup>126</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 95 (referring to Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMs*, para. 184; *US – Cotton Yarn*, paras. 75-78; and *US – Lamb*, para. 105).

<sup>127</sup> Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; *US – Corrosion-Resistant Steel Sunset Review*, para. 199.

<sup>128</sup> Final determination, (Exhibit CAN-10), p. 103.

<sup>129</sup> We consider that this approach is generally consistent with the Appellate Body's approach in *US – Washing Machines*. The Appellate Body in that case explained that the fact that the evidence submitted by a respondent in the Washers countervailing duty investigation was created *ad hoc* for the purposes of the

### **7.3.2 Whether the USDOC improperly rejected certain private market prices in Ontario as an appropriate stumpage benchmark**

7.53. In the underlying investigation, the Canadian respondents had proposed that the USDOC use certain prices as a benchmark in determining the adequacy of remuneration for the provision of Crown stumpage in Ontario.<sup>130</sup> In particular, they had proposed that the USDOC use as a benchmark prices of private standing timber, and alternatively prices of logs, in Ontario. The record shows that while the USDOC did consider using these prices in Ontario as a stumpage benchmark, it ultimately rejected them. Canada claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in improperly rejecting, as a stumpage benchmark, private standing timber and log prices in Ontario.

#### **7.3.2.1 Factual aspects**

7.54. The Ontario Government had placed on the record of the underlying investigation certain data that it proposed for use as a benchmark to determine the adequacy of remuneration for the Crown's provision of stumpage in the province. In particular, Ontario submitted results of a survey conducted by MNP LLP (MNP), a Canadian accounting firm, reporting prices of private market standing timber in the province.<sup>131</sup> In connection with the MNP Ontario survey data, Ontario submitted the Hendricks Report, which analysed that price data and concluded that the data resulted from a competitive process.<sup>132</sup> Further, Ontario submitted the results of a KPMG LLP (KPMG) survey of log prices in Ontario from private and Crown lands. In addition, Resolute FP Canada Inc. (Resolute), the only respondent company with operations in Ontario, submitted its actual purchases of logs sourced from private Ontario land.

7.55. The USDOC rejected each of the above data sets as a possible stumpage benchmark. At the outset, it found that Crown-origin standing timber constituted 96.5% of the total volume of softwood timber harvested in Ontario. The USDOC then proceeded to examine whether such government predominance in the province's timber market had distorted private transactions.<sup>133</sup> It concluded that private timber prices in Ontario are distorted as a result of the government's involvement in the market and that it could not use those prices as a stumpage benchmark for Ontario.<sup>134</sup> The USDOC declined to use the proposed private stumpage prices as a benchmark mainly for the following reasons<sup>135</sup>:

- a. the Crown stumpage rate, is for the most part, set administratively, and does not account for market conditions<sup>136</sup>;
- b. tenure-holders could harvest Crown-origin standing timber in a year beyond volume targets set out in their annual work schedules (AWS).<sup>137</sup> The tenure-holders' flexibility in this regard and, the ability of Ontario sawmills to trade Crown timber among themselves, expands the market for Crown timber, which in turn depresses demand, and therefore prices, in the private market;

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investigation, among others, does not suffice to relieve the USDOC of its duty to review that evidence. (Appellate Body Report, *US – Washing Machines*, paras. 5.281-5.283).

<sup>130</sup> Ontario initial questionnaire response, (Exhibit CAN-155), p. ON-150.

<sup>131</sup> MNP Ontario survey, (Exhibit CAN-144 (BCI)).

<sup>132</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), pp. 39-42.

<sup>133</sup> Final determination, (Exhibit CAN-10), p. 92.

<sup>134</sup> Final determination, (Exhibit CAN-10), p. 94.

<sup>135</sup> Final determination, (Exhibit CAN-10), pp. 92-94.

<sup>136</sup> The USDOC considered that Ontario's Crown stumpage charge consists of (a) an administratively-set minimum charge; (b) a residual value charge assessed on the difference between the price of a basket of softwood lumber end-products and the cost of producing and delivering those products; (c) a forest renewal charge; and (d) a forestry futures charge levied every year to cover the cost of renewing harvested areas and protecting Crown timber land. During the POI, the residual value charge was not levied on Crown-origin timber. The USDOC found that of the three remaining stumpage components that Ontario charged during the POI, only the forest renewal charge took into account market conditions. The minimum charge was adjusted annually for inflation. (Final determination, (Exhibit CAN-10), p. 93).

<sup>137</sup> The only effective harvest limit that tenure-holders faced was their allocated harvest area over a ten-year period. (Final determination, (Exhibit CAN-10), p. 93).

- c. most of the private standing timber is sold to a small number of consumers, who are dominant consumers of both Crown and private timber. The USDOC considered that this demonstrated that the private market in Ontario is not "as independent and free of influence from the Crown timber market as the Hendricks report suggests"<sup>138</sup>; and
- d. the small number of respondents reporting private timber purchases in the MNP Ontario survey makes the survey results unrepresentative and further indicates diminished demand for private timber in Ontario.

7.56. Further, the USDOC declined using private log prices in Ontario as a stumpage benchmark because it considered that log prices are not market-determined prices for the "good in question", stumpage, and that the Nova Scotia private stumpage prices were more appropriate in this regard.<sup>139</sup>

### **7.3.2.2 Evaluation**

7.57. Canada argues that the USDOC rejected Ontario's private prices as a stumpage benchmark based on flawed reasoning, which did not take into consideration all record evidence. At the core of Canada's arguments is its assertion that the USDOC concluded that private prices in Ontario were distorted based on speculative considerations, without engaging with the record evidence.<sup>140</sup> The United States contends in response that the evidence evaluated by the USDOC demonstrates that the case at hand is one "where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight".<sup>141</sup>

7.58. The main issue before us is whether the USDOC properly engaged with the record evidence in determining that the private stumpage prices in question in Ontario were distorted. In evaluating that issue, we must address the following preliminary questions:

- a. In light of the government's predominant share in the stumpage market, was the USDOC required to assess, and engage with the evidence on the record in analysing whether private stumpage prices in Ontario could be used as a benchmark?
- b. If so, what evidentiary weight was the USDOC required to accord to that record evidence in its benchmark analysis, given the large government share in the market?
- c. If the USDOC did accord less weight to the record evidence in light of the government's market share, was it required to explicitly say so in its determination?

7.59. In assessing the above issues, we must apply a standard that is consistent with Article 11 of the DSU, and Article 14(d) of the SCM Agreement, which is the substantive provision at issue pertaining to the claim at hand. As noted earlier, the *chapeau* of Article 14(d) requires that an investigating authority adequately explain its application, to each particular case, of any method it uses to calculate the benefit conferred upon the recipient.

7.60. We consider that we must apply the above standard in reviewing an investigating authority's finding of price distortion even in cases where the authority determines that the government is the predominant provider of the good in question. In applying that standard to such cases, we consider that the investigating authority cannot, based solely on evidence of the government's predominant share in the market, conclude that the private prices for the good are distorted. The investigating authority must evaluate the remaining evidence on the record before it can reach any conclusion. This reasoning accords with the findings of the Appellate Body and past panels that the link between government predominance and price distortion is evidentiary. When the government is the predominant provider of goods, it is *likely* that private prices are distorted. However, the distortion of private prices may not be presumed. The investigating authority must

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<sup>138</sup> Final determination, (Exhibit CAN-10), p. 94.

<sup>139</sup> Final determination, (Exhibit CAN-10), pp. 95-96.

<sup>140</sup> Canada's second written submission, paras. 124-125.

<sup>141</sup> United States' first written submission, para. 301 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446).

still evaluate the evidence on the record to ascertain whether private prices are actually distorted as a result of government intervention in the market.<sup>142</sup>

7.61. We note, in this regard, that the United States concurs that "there is no market share threshold above which an investigating authority may conclude *per se* that price distortion exists"; the United States considers, however, referring to the Appellate Body's finding in *US – Anti-Dumping and Countervailing Duties (China)*, that the more predominant a government's role is in the market, the more likely it is that the government's role results in the distortion of private prices.<sup>143</sup> The United States, further asserts, citing to the Appellate Body's finding, that evidence evaluated by the USDOC in the underlying investigation demonstrates that the case at hand is one "where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight".<sup>144</sup> We concur with the Appellate Body's observation. In certain cases, the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight. However, the weight to be given to evidence necessarily depends on the substance of the evidence, and an investigating authority may only ascertain the substance of evidence after properly evaluating it. In all cases, the evidence must be properly evaluated. Placing less weight on evidence *after properly evaluating it* is different from placing less weight on evidence *without first properly evaluating it*. This reasoning accords with the Appellate Body's observation that, even in cases where the government is the predominant supplier of the goods in question, the investigating authority cannot, based on the government's predominance, refuse to consider evidence relating to factors other than government market share.<sup>145</sup>

7.62. An investigating authority, having considered all the evidence on the record, may find that in light of the government's predominant share, any other evidence on the record is either irrelevant or insufficient to override the price distortion, which the government's predominance in the market has likely caused. However, the investigating authority cannot decide upon the relevance of the remaining evidence or what weight to accord that evidence without first properly evaluating that evidence. If upon such evaluation, the investigating authority finds that the evidence indicates that private prices are in fact undistorted, the authority may not accord less weight to that evidence simply because of the government's predominant role. Further, should the investigating authority decide that, having considered the government's predominant share and having properly evaluated

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<sup>142</sup> In *US – Carbon Steel (India)*, the Appellate Body observed that:

The Appellate Body has emphasized that, although a government's predominant role as a supplier in the market makes it "likely" that private prices will be distorted, the distortion of in-country private prices must be established "on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation". In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body emphasized that "an investigating authority cannot, based simply on a finding that the government is the predominant supplier of the relevant goods, refuse to consider evidence relating to factors other than government market share." It clarified that its reasoning in *US – Softwood Lumber IV* excluded the application of a *per se* rule, according to which an investigating authority could properly conclude in every case, and regardless of any other evidence, that the fact that the government is the predominant supplier means that private prices are distorted. The Appellate Body has therefore cautioned against equating the concepts of price distortion and government predominance, and has highlighted that the link between the two concepts is an evidentiary one. Thus, there does not exist "a threshold above which the fact that the government is the predominant supplier in the market alone becomes sufficient to establish price distortion, but clearly, the more predominant a government's role in the market is, the more *likely* this role will result in the distortion of private prices."

(Appellate Body Report, *US – Carbon Steel (India)*, para. 4.156 (fns omitted)); see also, Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.51 and 4.52; and *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.137-5.146.

<sup>143</sup> United States' response to Panel question No. 46, para. 146 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444).

<sup>144</sup> United States' first written submission, para. 301 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446).

<sup>145</sup> We note that although the Appellate Body did consider, as the United States submits, that there may be cases where the government's role as a provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight, it nonetheless emphasized that "price distortion must be established on a case-by-case basis and that an investigating authority cannot, based simply on a finding that the government is the predominant supplier of the relevant goods, refuse to consider evidence relating to factors other than government market share". (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446).

evidence other than the evidence pertaining to the government's market share, it will accord less weight to such other evidence, that decision should be clearly set out in its determination.

7.63. The relevance of record evidence other than government market share, and the weight that an investigating authority may properly accord to that evidence, will depend on the facts of each case.

7.64. In light of these considerations, we will proceed to examine whether the USDOC adequately evaluated the record evidence in finding that the private stumpage prices in Ontario were distorted and provided a reasoned and adequate explanation for that finding. In the case of Ontario, the USDOC did not explicitly state in its determination that it had accorded less weight to any record evidence because of the government's predominant market share. However, even if it had made that express statement, we will need to examine whether the USDOC had properly evaluated that evidence before arriving at that decision.

7.65. As noted above, the USDOC made several intermediate findings, other than that the government held a predominant market share, that led it to conclude overall that Ontario private stumpage prices were distorted. As the United States asserts, the USDOC concluded that private stumpage prices in Ontario were distorted based not solely on the share of Ontario's ownership or control of the stumpage market, but also on other evidence on the record. In particular, the USDOC reached its conclusion considering (a) the method of setting the price for Crown stumpage; (b) the flexible amounts of annual timber supply available to Crown timber tenure-holders; (c) the ability of sawmills to trade Crown timber; and (d) the fact that the most dominant purchasers of Crown timber were also the most dominant purchasers of private-origin timber.<sup>146</sup> In evaluating whether the USDOC properly concluded that Ontario private stumpage prices were distorted, we will examine each of the USDOC's intermediate findings and the evidentiary basis for each.<sup>147</sup>

7.66. We will also examine whether the USDOC improperly declined using private log prices in Ontario as a stumpage benchmark.

### **7.3.2.2.1 Administratively-set Crown stumpage prices**

7.67. The United States submits that the USDOC concluded that private stumpage prices in Ontario were distorted considering, among others, the method by which the Crown stumpage price was set.<sup>148</sup> The United States emphasizes that more than 96% of the harvest volume in Ontario is subject to the Crown's administrative pricing mechanism.<sup>149</sup> We will therefore first examine the USDOC's finding that the Crown stumpage rate is, for the most part, set administratively, and does not account for market conditions.

7.68. The USDOC found that during the period of investigation (POI), the Crown stumpage rate consisted of three components: a minimum charge, which was administratively set by the Ontario Government and intended to provide a secure level of revenue for the government, regardless of market conditions; as well as a forest renewal charge; and forestry futures charge, which are levied annually to cover the cost of renewing harvested areas and protecting Crown timber land. The USDOC observed that of the three components, only the forest renewal charge took into account market conditions.<sup>150</sup> Canada does not contest that the two components of the Crown stumpage price, other than the forest renewal charge, were administratively set, but argues that the manner

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<sup>146</sup> United States' first written submission, para. 298.

<sup>147</sup> The Appellate Body has found that:

A key aspect of how a panel must review a determination relates to the evidentiary basis for both the intermediate factual findings made by a national authority, as well as for its overall conclusions. In its Report in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body considered how a panel is to review the evidentiary basis for findings when the overall conclusions are based on the authority's assessment of the totality of multiple pieces of circumstantial evidence. The Appellate Body observed that, even where the investigating authority draws its conclusion from the *totality* of the evidence, it will often be appropriate, or necessary, for a panel "to examine the sufficiency of the evidence supporting an investigating authority's conclusion ... by looking at each individual piece of evidence".

(Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 94 (emphasis original))

<sup>148</sup> United States' first written submission, para. 298.

<sup>149</sup> United States' second written submission, para. 255.

<sup>150</sup> Final determination, (Exhibit CAN-10), pp. 92-93.

in which Crown stumpage prices are determined is irrelevant to a distortion analysis. For Canada, the government price, simply because it is administratively set, cannot distort all other prices in the market.<sup>151</sup>

7.69. We agree with Canada that simply because the government price is administratively set, does not necessarily mean that all the other prices in the market are distorted. In our view, the fact that the administratively-set price governs an overwhelming majority of the market, as the United States asserts, does raise the *likelihood* that the administratively-set price may influence prices in the private market.<sup>152</sup> However, whether the administratively-set price is actually transmitted to the private market will depend on the facts and circumstances of each case. In the present case, as the United States submits<sup>153</sup>, the USDOC did not base its conclusion of price distortion in Ontario's private market solely on the existence of administratively-set prices in the Crown market, but also took into consideration other relevant factors. We must, therefore, consider whether the USDOC's finding relating to Ontario's price setting mechanism, together with its other findings, cumulatively demonstrate price distortion.

### **7.3.2.2.2 Flexible supply of Crown timber**

7.70. We will next examine the USDOC's finding that Ontario's Crown timber tenure-holders had flexible amounts of annual timber supply available to them that depressed private timber prices.

7.71. Canada argues that in concluding that Ontario tenure-holders' ability to harvest timber from Crown lands at levels above their AWS objectives could depress prices for private timber, the USDOC considered only what *could*, but not what *did*, happen. Canada asserts that the Hendricks Report showed that in 2014-2015, Ontario's cumulative planned harvest across Forest Management Units (FMUs) was 30,576,223 m<sup>3</sup>, whereas the actual harvest was 13,631,124 m<sup>3</sup>. All Crown timber that could economically be harvested was harvested, and the sawmills could not have used the unharvested Crown areas instead of private standing timber.<sup>154</sup> Further, sawmills consumed all timber that could be economically consumed, as confirmed by the excess capacity of Ontario sawmills during the POI.<sup>155</sup> Canada contends that the USDOC also asserted without factual support that the ability of Ontario mills to transfer Crown timber between one another depresses demand for private timber. For Canada, the sale of softwood logs among mills indicates a robust market for harvested logs and KPMG found that a significant proportion (25%) of Ontario softwood logs destined for sawmills, including logs from private timber stands, are purchased from third parties at arm's-length. Therefore, Canada contends that the USDOC's conclusion that Crown timber supply depresses the price of private timber because mills can always purchase additional supply at an administered price, is inconsistent with the facts.<sup>156</sup>

7.72. The United States argues, in response, that the USDOC analysed the flexible supply of Crown timber available to Ontario tenure-holders in the context of the Crown's majority share of the market in the POI. In that context, the additional supply of Crown timber available to Crown tenure-holders reduced the tenure-holders' demand for, and prices of, private timber, therefore distorting those prices. The ability of mills in Ontario to transfer Crown timber – in the form of logs – amongst themselves had the same effect.<sup>157</sup>

7.73. We note that the parties do not dispute that tenure-holders in Ontario could harvest timber from Crown lands at levels above their AWS objectives, and therefore additional Crown timber was at least, in principle, available to them. What they disagree over is how the additionally available Crown timber affected prices for private timber. We consider that flexible supply of Crown timber *could* but would not *necessarily* lower demand for, and depress prices of, private timber. Whether that additional supply of Crown timber would lower private timber prices would depend to a large extent on whether that additional supply was economically harvestable, in the sense of being

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<sup>151</sup> Canada's second written submission, para. 124(a).

<sup>152</sup> We note, in this regard, that the Appellate Body has observed that the evidence of direct impact of the government intervention on prices such as administrative price-fixing, among others, may be probative and make the finding of price distortion very likely, such that other evidence may be of lesser importance. (Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.154).

<sup>153</sup> United States' second written submission, para. 256.

<sup>154</sup> Canada's first written submission, paras. 337-338.

<sup>155</sup> Canada's first written submission, para. 333.

<sup>156</sup> Canada's first written submission, paras. 339-340.

<sup>157</sup> United States' first written submission, paras. 307-308.

profitable. In our view, if the record evidence indicates that the additional supply of Crown timber may not have been profitable to harvest, tenure-holders may not have relied on that additional supply as an alternative to private timber. In that case, the availability of additional Crown timber may not have affected tenure-holders' demand for, and prices of private timber. In this regard, the Hendricks Report, available on the record of the underlying investigation, reasoned that the additional supply of timber could not have depressed private stumpage prices, as the excess capacity of Ontario sawmills during the POI indicated that sawmills consumed all timber that could be economically consumed.<sup>158</sup> According to the Hendricks Report, had profitable stands of either Ontario Crown or private softwood timber been available for lumber production, the sawmills would have harvested them.<sup>159</sup> The Hendricks Report therefore suggested that the sawmills did not harvest the additional Crown timber because that supply was not economical or profitable to harvest.<sup>160</sup> The Hendricks Report also noted that in 2014-2015, Ontario's cumulative planned harvest across FMUs at 30,576,223 m<sup>3</sup> was much higher than its actual harvest at 13,631,124 m<sup>3</sup>. According to the report, this indicated that Ontario harvesters could have harvested a lot more timber than they actually did and that they did not harvest more timber because that would require them to harvest stands that were not economical at the time.<sup>161</sup> In its determination, the USDOC, however, did not engage with that reasoning and evidence. Nor did the USDOC address the reasoning in the Hendricks Report that the supply of timber from Crown stands does not affect the potential revenues from private stands, and *vice versa*. According to the report, private stumpage prices are driven by the price of the end-product, which is lumber, and the share of softwood lumber exports from Ontario was too small to have affected the US price of softwood lumber.<sup>162</sup>

7.74. We consider that the reasoning and evidence cited in the Hendricks Report regarding the effect of flexible Crown timber supply on prices of private timber is, on its face, relevant to the USDOC's finding in that regard.<sup>163</sup> An objective and unbiased authority confronted with evidence or reasoning that appears relevant to its line of examination, would not, despite any predominance of government market share, accord less weight to that evidence without first scrutinizing the evidence.<sup>164</sup> An objective and unbiased investigating authority would have engaged with that reasoning and evidence, and further examined whether tenure-holders could indeed have profitably harvested the additional Crown timber available to them before concluding that the additional supply depressed private timber prices. This view comports with the Appellate Body's observation that "independently 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" in order to ensure that its finding is supported, and not diminished or contradicted by evidence and explanation on the record.<sup>165</sup> The USDOC, however, did not do so in reaching the finding at issue.

7.75. We consider, in particular, that the USDOC did not adequately explain, in light of record evidence, *how* the additional supply of Crown timber available to Ontario tenure-holders because of their flexible AWS objectives *actually* depressed the demand for, and prices of, private-origin timber. In our view, whether the additional supply of Crown timber depressed private timber prices would

<sup>158</sup> The Hendricks Report stated that sawmills in Ontario had been operating below capacity and, pointing to industry data, asserted that the capacity utilization rate for the larger sawmills had not exceeded 65% over the last three years. (Hendricks Report, (Exhibit CAN-19 (BCI)), paras. 13, 62, and 77).

<sup>159</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), paras. 16, 65, and 77.

<sup>160</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), paras. 65, 72, and 77.

<sup>161</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), para. 72.

<sup>162</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), paras. 55-56.

<sup>163</sup> We address in paragraphs 7.93-7.101 below the United States' arguments that the USDOC decided to accord the Hendricks Report limited weight due to certain assumptions in the report, and because the report allegedly ignored certain key facts about the Ontario stumpage market. For reasons discussed in that part, we conclude that the United States has not established how the Hendricks Report was flawed.

We further agree with Canada that even if the USDOC was correct in discrediting

Dr Hendricks' economic analysis, it was not entitled to reject the underlying evidence, and still had to engage with and analyse it, in order to ensure that its finding of price distortion was not contradicted by the record evidence. As Canada asserts, Dr Hendricks' analysis pertaining to Ontario sawmills' excess capacity was based on certain sources that were appended to the Hendricks Report, that is, the "Profile 2015: softwood sawmills in United States and Canada by forest economic advisors". (Canada's comments on the United States' response to the Panel question No. 165, para. 58 (referring to Hendricks Report, (Exhibit CAN-19 (BCI)), p. 128)).

<sup>164</sup> We agree with the panel in *US – Countervailing Measures (China)* (Article 21.5 – China), that "when information which appears on its face relevant to [the] analysis under Article 14(d) is before the investigating authority, it must consider this information and, if it concludes it is not probative or relevant to its analysis, explain that conclusion". (Panel Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 7.220).

<sup>165</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.155.

depend on, among others, the Ontario sawmills' total consumption needs for softwood timber and whether that supply of Crown timber satisfied that need, in addition to how profitable it was to harvest that supply of Crown timber relative to private timber. For instance, if the supply of Crown timber in question fully met the sawmills' total need and was equally or more profitable to harvest than private timber, that supply may have lowered the demand for private timber. However, if the supply of Crown timber did not satisfy the sawmills' total need or was less profitable to harvest than private timber, that supply would have been unlikely to affect the demand for private timber. However, the USDOC analysed neither the consumption needs of Ontario sawmills nor the profitability of harvesting Crown relative to private timber. The USDOC failed to do so, despite the evidence of excess capacity of Ontario sawmills during the POI set out in the Hendricks Report.<sup>166</sup> That evidence may have prompted an unbiased and objective investigating authority to at least examine whether, as Canada argues, "had there been additional stands of Crown or private timber, that could have been profitably harvested, they would have been".<sup>167</sup>

7.76. We also agree with Canada that the USDOC did not engage with the record evidence in finding that the ability of Ontario mills to transfer Crown timber between one another depresses demand for private timber. The USDOC did not address the finding in the KPMG report that a significant proportion (25%) of Ontario softwood logs destined for sawmills, including logs from private timber stands, are purchased from third-parties at arm's-length, and not from other sawmills.

7.77. Moreover, we consider that the USDOC also did not adequately explain *how* the additional supply of Crown timber available to Ontario tenure-holders because of their ability to sell logs among themselves, depressed the demand for, and prices of, private timber. Once again, we consider that whether that additional supply of Crown timber depressed private timber prices would depend on, among others, the Ontario sawmills' total consumption needs for softwood timber, whether the inter-mill transfer of logs together with the supply of Crown standing timber satisfied that need, as well as whether it made more economic sense for tenure-holders to purchase those logs relative to harvesting private timber. The USDOC, however, did not make that assessment.

7.78. The USDOC also did not support with any concrete evidence its finding that because tenure-holders could rely on Crown standing timber for their supply, "private woodlot owners" or owners of private timber stands, "would be forced to price their standing timber at or below the Crown-stumpage price, or risk not selling their standing timber".<sup>168</sup> In particular, the USDOC did not compare the record evidence of actual Crown and private timber prices to assess whether the latter were actually "at or below the Crown-stumpage price". Canada asserts that private market transactions in Ontario can and do occur at stumpage prices above Crown stumpage prices. According to Canada, the survey of private timber sales found that sales were made regularly at prices both above and below the average Crown rates.<sup>169</sup> Canada asserts that the record evidence shows that private timber was purchased for prices in excess of Crown stumpage prices for spruce-pine-fir (SPF) timber during the POI.<sup>170</sup> We consider that the USDOC did not engage with that pricing data to explain whether that data did indeed show that private timber had been purchased for prices in excess of Crown stumpage prices for SPF timber during the POI, and if that were the case, why it considered that the flexible supply of Crown timber had depressed prices of private timber despite that data. The USDOC also did not engage with the finding in the Hendricks Report that most landowners of private timber stands are located close to primary and secondary roads, which would raise the average value of private timber stands relative to Crown timber; and that private timber owners were under no obligation to sell their timber at a given point in time and could wait to sell in the future when prices were more favourable.<sup>171</sup>

7.79. We note that the United States asserts that although Ontario "submitted survey prices for standing timber purchased on private lands, along with a study suggesting that these prices may serve as a tier-one benchmark price", the USDOC found that the "private prices in Ontario would

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<sup>166</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), paras. 62 and 65.

<sup>167</sup> Canada's first written submission, para. 333.

<sup>168</sup> Preliminary determination, (Exhibit CAN-8), p. 31.

<sup>169</sup> Canada's first written submission, fn 617 (referring to MNP Ontario survey, (Exhibit CAN-144 (BCI)), appendix 4; and KPMG Report, (Exhibit CAN-145), schedule 1).

<sup>170</sup> Canada's second written submission, para. 122 (referring to MNP Ontario survey, (Exhibit CAN-144 (BCI)), p. 6).

<sup>171</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), paras. 60 and 63.

largely track the prices the [government] charges for stumpage on Crown lands".<sup>172</sup> We consider, however, that the USDOC concluded that private stumpage prices in Ontario "would" track government stumpage prices without citing to any pricing data on the record or providing any explanation of that data to show how private prices did in fact track government stumpage prices. An objective and unbiased authority would have made that examination before reaching the conclusion that the USDOC did.

7.80. The USDOC's finding that the flexible supply of Crown timber depressed the demand for, and price of, private-origin timber is therefore, at best, speculative, not founded on record evidence or a reasoned explanation. Moreover, as noted above, the USDOC made that finding disregarding relevant evidence on the record.<sup>173</sup> We, therefore, consider that the USDOC improperly found that any flexible supply of Crown timber available to sawmills expands the market for Crown timber, which in turn depresses demand for, and therefore prices of, timber in the private market. As that finding was flawed, it cannot, by itself, or by interacting with any of the USDOC's other findings pertaining to Ontario's timber market, demonstrate price distortion.

### 7.3.2.2.3 Market concentration

#### 7.3.2.2.3.1 Whether the USDOC explained how market concentration interacts with other factors to effect price distortion

7.81. We will next examine the USDOC's finding pertaining to market concentration among a small number of tenure-holding companies. The USDOC found that "the five largest tenure-holding corporations accounted for approximately 92.6 percent of the allocated Crown-origin standing timber volume in [fiscal year] FY 2015-2016", and "the five largest tenure-holding corporations accounted for 86.11 percent of the Crown-origin standing timber harvested during FY 2015-2016".<sup>174</sup> The USDOC considered that "[t]he concentration of the Crown harvest among a small number of companies gives these companies substantial market power over sellers of non-Crown-origin standing timber".<sup>175</sup> Further, the USDOC found that "the universe of firms consuming timber from private sources in Ontario is heavily concentrated and is dominated by tenure holders".<sup>176</sup> In particular, the USDOC considered that most of the private standing timber is sold to a small number of consumers who are dominant consumers of both Crown and private timber, which demonstrated that the private market in Ontario was "not as independent and free of influence from the Crown timber market as the Hendricks Report suggests".<sup>177</sup>

7.82. Canada argues that the USDOC improperly concluded that market concentration created inadequate competition in Ontario's standing timber market. For Canada, the level of competition among private companies, including the level of market concentration, cannot be relied on, in and of itself, to establish that the government has distorted the private market. Canada submits that the level of competition is a prevailing market condition, as is any level of market concentration.<sup>178</sup> The United States rejects Canada's argument, submitting that the level of concentration of firms in the market may be a relevant consideration depending on the various circumstances of a case. The United States asserts that in the case at hand, the USDOC had found that the same firms dominated both the Crown and private timber markets. Further, the USDOC found that Ontario's data showed that only a small number of firms consumed from sources other than Crown land during the POI.<sup>179</sup> The United States submits that of the 15 largest harvesters of timber from Crown and other sources

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<sup>172</sup> United States' first written submission, para. 295 (referring to Preliminary determination, (Exhibit CAN-8), p. 31).

<sup>173</sup> We agree with the Appellate Body's observation in *US – Carbon Steel (India)* that "the obligation under Article 14 to calculate the amount of subsidy in terms of the benefit to the recipient encompasses a requirement to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts, and to base a determination on positive evidence on the record". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.190).

<sup>174</sup> Preliminary determination, (Exhibit CAN-8), p. 31.

<sup>175</sup> Preliminary determination, (Exhibit CAN-8), p. 31.

<sup>176</sup> Final determination, (Exhibit CAN-10), p. 94.

<sup>177</sup> Final determination, (Exhibit CAN-10), p. 94.

<sup>178</sup> Canada's first written submission, para. 342; opening statement at the first meeting of the Panel (28 February 2019), para. 132.

<sup>179</sup> United States' first written submission, para. 310 (referring to Final determination, (Exhibit CAN-10), p. 94).

during the POI, including those harvesters that were dual-source firms<sup>180</sup>, only a few firms dominated the purchase of all timber consumed from other, non-Crown sources.<sup>181</sup> Moreover, those dual-source firms consumed much more timber from Crown sources than from other, non-Crown sources and the USDOC reasonably found, on the basis of that data, that "dual source firms are the most important customers of private timberland owners and private timber sellers must compete against the much larger Crown timber market when selling timber to their largest customers in Ontario".<sup>182</sup>

7.83. We agree with Canada that an objective and unbiased investigating authority would not find price distortion based solely on the level of competition among private companies, including the level of market concentration. In this case, however, as noted earlier, the USDOC did not reject private prices in Ontario based solely on a finding of market concentration. The USDOC had found that the Crown held the majority share of the stumpage market in the POI and that most of the private-origin standing timber is sold to a small number of consumers who are dominant consumers of *both* Crown and private-origin timber which, according to the USDOC, demonstrated that the private market in Ontario was "not as independent and free of influence from the Crown timber market as the Hendricks Report suggests".<sup>183</sup> Further, the USDOC had found that the "ability of the majority of tenure-holders in Ontario to purchase significant amounts of standing timber in excess of their allocated volume reduces the need of those tenure-holders to source from non-Crown sources, such as the private market", and "private woodlot owners would be forced to price their standing timber at or below the Crown stumpage price".<sup>184</sup>

7.84. We consider, however, that the USDOC did not explain in its determination how market concentration, *in interaction* with any of the above considerations including government predominance in the stumpage market, resulted in prices of private timber in Ontario being distorted, or in the USDOC's words, not being "free of influence from the Crown timber market".<sup>185</sup> Even if the same group of Crown tenure-holders dominate the purchase of both Crown and private-origin timber and rely primarily on the Crown market for their timber supply, those facts do not *necessarily* imply distortion of private market prices. For instance, where Crown timber does not fully meet the consumption needs of Crown tenure-holders, even if those tenure-holders are the dominant buyers of both Crown and private timber, their "market power" over sellers of private timber is diminished to the extent that they need to rely on private timber for their consumption needs. The same would hold true regardless of the Crown's predominant share in the timber market and the fact that the Crown stumpage rate is mainly administratively set. If the Crown tenure-holders must rely on private timber to fulfil their consumption needs, their demand for that timber will not necessarily be diminished for any of the following reasons: their dominance in both the Crown and private timber markets, their primary reliance on Crown timber as a source of supply, the Crown's predominant share in the timber market or the fact that the Crown stumpage rate is administratively set. The question arises whether tenure-holders' dominance in both Crown and private timber markets, taken together with certain other factors, such as evidence of additional harvestable Crown standing timber available to those tenure-holders may indicate price distortion.<sup>186</sup>

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<sup>180</sup> "Dual-source firms" were firms that consumed timber from both Crown and "other sources" (private land, patent land, native land, and out of province sources) during the POI. (Ontario market memorandum, (Exhibit USA-3), p. 1).

<sup>181</sup> United States' first written submission, para. 310 (referring to Ontario market memorandum, (Exhibit USA-3), p. 2).

<sup>182</sup> United States' first written submission, para. 310 (referring to Ontario market memorandum, (Exhibit USA-3), p. 2).

<sup>183</sup> Final determination, (Exhibit CAN-10), p. 94.

<sup>184</sup> United States' first written submission, para. 291 (referring to Preliminary determination, (Exhibit CAN-8), p. 31).

<sup>185</sup> We note that the USDOC found that: "[t]he fact that a majority of private origin standing timber is sold to a small number of customers, who are dominant consumers of both private and Crown timber, demonstrates that the private market in Ontario is not as independent and free of influence from the Crown timber market as the Hendricks Report suggests". (Final determination, (Exhibit CAN-10), p. 94).

<sup>186</sup> The Appellate Body found that:

In addition to such review of how the investigating authority treated individual pieces of evidence, the Appellate Body underlined that a panel must also, with due regard to the approach taken by that authority, examine how the totality of the evidence supports the overall conclusion reached. In this connection, the Appellate Body emphasized that panels have "the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of

7.85. We consider however that, as noted earlier, the USDOC did not, in light of the record evidence, reasonably and adequately explain how any additional supply of Crown timber available to Crown tenure-holders, either because of their flexible AWS objectives or their ability to sell timber among themselves, depressed demand for private timber. For instance, if the additional supply of Crown timber was not economical to harvest, Crown tenure-holders would not have relied on it and the fact that it was available to Crown tenure-holders could not possibly have, either by itself, or together with the fact of dominance of certain consumers in both markets, enhanced the market power of those tenure-holders in private markets. Therefore, the USDOC's finding of additional supply of Crown timber even when considered together with its finding of market concentration does not, in light of the record evidence, establish price distortion.

7.86. Canada further asserts that a past panel found that any decision to reject in-country prices must be supported by a reasoned and adequate explanation of how the alleged government intervention distorts the price as well as direct evidence of an effect on price. Canada contends that in the case at hand the USDOC provided no indication that the alleged private market concentration distorted or had any effect on the private prices of stumpage.<sup>187</sup> The United States contends, in response, that Canada's argument regarding "direct evidence of an effect on price" has no basis in the text of Article 14(d) of the SCM Agreement or in the facts of this dispute.<sup>188</sup>

7.87. We note that in making the argument set out in the preceding paragraph, Canada relies on the panel's finding in *US – Countervailing Measures (China)* (Article 21.5 – China). In that case, the panel had observed, in relevant part, that:

Evidence of widespread government intervention in the economy, without evidence of a direct impact on the price of the good in question *or* an adequate explanation of how the price of the good in question is distorted as a result, will not suffice to justify a determination that there are no "market-determined" prices for the good in question which can be used for purposes of determining the adequacy of remuneration for government-provided goods.<sup>189</sup>

7.88. We consider that the panel in the above dispute took the view that in order to demonstrate that government intervention has resulted in price distortion, an investigating authority must rely on evidence of a direct impact on the price of the good in question *or* a reasoned and adequate explanation of how government intervention distorts the price of the good in question. Therefore, in order to show that government intervention has resulted in price distortion, it is not necessary that an investigating authority must always show a direct effect of government intervention on prices, when it has provided a reasoned and adequate explanation of how government intervention distorts prices, in light of the record evidence. Further, the Appellate Body also understood the panel in the above dispute to have recognized that in the absence of evidence of a direct impact on the price of the good in question, an adequate explanation of how government intervention distorts the price of the good in question would suffice for purposes of the inquiry.<sup>190</sup> The Appellate Body further clarified that:

[B]y requiring in the alternative either "evidence of a direct impact on the price of the good in question" *or* "an adequate explanation of how the price of the good in question is distorted as a result", the Panel's statement is in line with our conclusion that, while there may be different ways to demonstrate the existence of price distortion, the investigating authority must choose a method capable of establishing how in-country prices are actually distorted as a result of government intervention.<sup>191</sup>

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evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."

(Appellate Body Report, *US – Softwood Lumber VI* (Article 21.5 – Canada), para. 94 (emphasis original))

<sup>187</sup> Canada's first written submission, para. 343 (referring to Panel Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 7.205).

<sup>188</sup> United States' response to Panel question No. 46, para. 143.

<sup>189</sup> Panel Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 7.205. (emphasis added)

<sup>190</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.145.

<sup>191</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.159. (emphasis original; fns omitted)

The Appellate Body also considered that in the absence of evidence of a direct impact of the government intervention on prices, the investigating authority may be required to provide a more detailed analysis and explanation. It emphasized nevertheless that "investigating authorities should provide a reasoned and adequate explanation of the basis for their price distortion findings in each case, independently of whether their finding is based on evidence of direct or indirect impact of the government intervention on in-country prices".<sup>192</sup>

7.89. We agree with the Appellate Body's and panel's observations and consider that investigating authorities have discretion to choose the specific method or type of analysis for purposes of determining the existence of price distortion. As regards the issue at hand, in the absence of evidence of a direct impact of government intervention on prices, the USDOC was required to have provided a more *detailed* explanation of how market concentration resulted in prices of private timber in Ontario being distorted as a result of government predominance in the stumpage market than would have been required if the USDOC had relied on evidence of a direct impact of government intervention on prices. As set out in paragraph 7.84 above, it is not apparent from the USDOC's determination that it provided such detailed explanation.

#### **7.3.2.2.3.2 Whether the USDOC was required to consider evidence relating to market concentration in the Hendricks Report**

7.90. Canada contends that the record evidence contradicts the USDOC's assertion that "there is inadequate competition on the basis of market concentration" in Ontario's standing timber market.<sup>193</sup> Canada asserts that the record shows that private timber owners had multiple buyers. The Hendricks Report explained that competitive timber markets can occur with as few as two mills located in sufficient proximity to sellers of timber.<sup>194</sup>

7.91. In our view, the evidence pertaining to competitiveness in the Hendricks Report was, on its face, directly relevant to the USDOC's finding that market concentration indicated that the private market in Ontario was not "free of influence from the Crown timber market", and an objective and impartial investigating authority would therefore have taken it into consideration. The United States, however, argues that the USDOC decided to accord the Hendricks Report limited weight due to certain assumptions in the report that were inconsistent with the record evidence and because it ignored several key facts regarding the Ontario stumpage market, including that the market contained "one dominant price setter", the Ontario Government.<sup>195</sup>

7.92. Canada disagrees with the United States' assertion that certain assumptions in the Hendricks Report were inconsistent with the record evidence and that the report ignored the fact that the Ontario Government was the "dominant price setter" in the Ontario timber market. Canada contends that contrary to the United States and the USDOC's assertion that the Hendricks Report "ignores the fact that there is one dominant price setter, [Ontario], in the Ontario timber market"<sup>196</sup>, the Hendricks Report does address this issue. Canada asserts that the entire premise of the Hendricks Report is that, despite the large role of the Crown in Ontario, the conditions of competition were such that market forces set private prices for stumpage in Ontario during the POI, without distortion.<sup>197</sup> Canada further argues that the USDOC's conclusion that the Hendricks Report ignores the fact that the Ontario Government is the "dominant price setter" in the Ontario timber market is incorrect because "Dr. Hendricks explicitly acknowledged that Ontario Crown stumpage rates are administratively set".<sup>198</sup> The United States contends, in response, that acknowledging that Crown stumpage rates are administratively set does not undermine the USDOC's conclusion that the report ignores the dominance of the Ontario Government in the stumpage market.<sup>199</sup>

7.93. As regards the USDOC's consideration of the Hendricks Report, we will first examine the USDOC's observation that the report ignores the fact that the Ontario Government is the "dominant price setter" in the Ontario timber market. We note that Dr Hendricks, in his report, recognized that

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<sup>192</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.159.

<sup>193</sup> Canada's first written submission, para. 344.

<sup>194</sup> Canada's first written submission, para. 344.

<sup>195</sup> United States' first written submission, paras. 303-305.

<sup>196</sup> Final determination, (Exhibit CAN-10), p. 94.

<sup>197</sup> Canada's opening statement at the first meeting of the Panel (26 February 2019), para. 122.

<sup>198</sup> Canada's responses to the Panel question Nos. 1-153, annex A, p. A-10.

<sup>199</sup> United States' second written submission, para. 85.

the coalition of US lumber producers, the petitioner in the underlying investigation, had made the following claim, in relevant part, regarding prices in the Ontario timber market:

[W]here a substantial amount of any market is supplied by a government entity at an administered price ... prices in any non-administered sector will be depressed by the administered price.<sup>200</sup>

Dr Hendricks then noted that he had been asked to assess, among others, that claim of the petitioner. In that context, he indicated that he would apply certain economic principles to assess whether the government's supply of timber and stumpage programme reduced the demand of lumber producers for private timber. He further noted that the absence of any effect would imply that transaction prices in the private timber market were not distorted by the "supply of Crown timber at administered prices".<sup>201</sup> We infer from these statements and references in the Hendricks Report, first, that Dr Hendricks acknowledged, as Canada asserts<sup>202</sup>, that Ontario Crown stumpage prices are administratively set. Second, we agree with Canada<sup>203</sup> that these statements imply that Dr Hendricks had recognized that his mandate was to examine whether the private timber market in Ontario was distorted in light of the petitioner's claim that "a substantial amount" of the Ontario timber market is supplied by a government entity at an administered price. Nowhere in his report did Dr Hendricks dispute that the Ontario Government supplied "a substantial amount" of the Ontario timber market at an administered price. Further, as Canada asserts, Dr Hendricks also noted that the private timber harvest represented approximately 8% of the total Crown harvest during the POI.<sup>204</sup> Therefore, we can infer from the above considerations that Dr Hendricks conducted his assessment based on the premise that the Ontario Government supplies a substantial amount of the Ontario timber market at an administered price. We, therefore, consider that the United States has not established how the Hendricks Report ignored the fact that the Ontario Government was the "dominant price setter" in the Ontario timber market.

7.94. We will next examine the USDOC's observation that certain assumptions in the Hendricks Report did not accord with the underlying MNP Ontario survey data. We note that the Hendricks Report had concluded that private timber prices resulted from a competitive process based on, among others, the evidence that private stumpage prices are driven by prices for end-products manufactured from timber, and that private landowners had multiple potential buyers. The USDOC found that the Hendricks Report assumed that stumpage prices in southern Ontario would be higher than prices in northern Ontario because the distance between the timber stands and sawmills is greater in the north than in the south. According to the USDOC, the MNP Ontario survey, on which the Hendricks Report relied, however, showed that SPF stumpage prices in 2015-2016 in southern Ontario were lower than those in northern Ontario. The USDOC concluded that this underlying data ran contrary to the "theory of a competitive market for private origin timber in Ontario in the Hendricks report".<sup>205</sup>

7.95. Canada contends that the USDOC incorrectly found that the Hendricks Report assumed that stumpage prices in southern Ontario are higher than prices in northern Ontario. Canada also denies that Dr Hendricks' analysis relied on that assumption. Canada asserts that, in any event, Dr Hendricks noted that "for SPF delivered to sawmills, the volume-weighted average prices in the two regions are not significantly different from each other in either period".<sup>206</sup> The United States responds that the Hendricks Report does suggest that Dr Hendricks made the assumption that stumpage prices in southern Ontario would be higher than prices in northern Ontario. The United States asserts that the report discusses data that, it suggests, demonstrates that "stands in the northern regions are often located further away from mills, have smaller trees due to higher latitudes, and are costly to harvest, thus making some portion of the available supply uneconomical at current prices", in contrast to the southern regions where harvesting is more economical at current prices.<sup>207</sup> The United States adds that Canada has argued throughout this proceeding that smaller

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<sup>200</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), para. 9.

<sup>201</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), para. 10.

<sup>202</sup> Canada's responses to the Panel question Nos. 1-153, annex A, p. A-10.

<sup>203</sup> Canada's response to Panel question No. 43, para. 177.

<sup>204</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), para. 81.

<sup>205</sup> Final determination, (Exhibit CAN-10), p. 94.

<sup>206</sup> Canada's second written submission, para. 121 and fn 174 (quoting Hendricks Report, (Exhibit CAN-19 (BCI)), para. 98).

<sup>207</sup> United States' second written submission, para. 87 (referring to Hendricks Report, (Exhibit CAN-19 (BCI)), pp. 13-14); response to Panel question No. 162, para. 55.

trees, high harvesting costs, and high transportation costs have a downward effect on price, such that trees with these characteristics in Ontario (i.e. trees in the northern regions) would command a lower price for stumpage than trees without those characteristics (i.e. trees in the southern regions).<sup>208</sup>

7.96. We note first that the United States has not shown that Dr Hendricks, implicitly or explicitly, stated anywhere in his report that because the stands in southern Ontario were located closer to mills than in northern Ontario, stumpage prices in southern Ontario would be higher than prices in northern Ontario. In response to our question asking the United States where the Hendricks Report set out that assumption, the United States points to certain statements in the MNP Ontario survey.<sup>209</sup> In particular, the United States asserts that the MNP Ontario survey notes that "SPF stumpage prices are lower in the South region than the North region, which was not expected" and that "[s]urvey respondents familiar with SPF markets in Ontario indicated that they expected stumpage prices in the South region to be higher than the North region based on an assumption that timber in southern Ontario is in closer proximity to markets, would typically attract lower costs associated with access and stump-to-mill transportation, and would result in a higher average stumpage prices".<sup>210</sup> For the United States, the Hendricks Report relies on this same assumption.

7.97. We agree with Canada, however, that the statement that the United States refers us to in the MNP Ontario survey that private stumpage prices in the south should be higher than in the north due to the shorter distance between timber stands and mills in the south, is based on comments from the MNP Ontario survey respondents but does not constitute an assumption made by Dr Hendricks himself.<sup>211</sup> As Canada asserts, the United States fails to identify where Dr Hendricks himself made the assumption in question in his report. On the contrary, as Canada avers, Dr Hendricks noted in his report that "for SPF delivered to sawmills, the volume-weighted average prices in the [north and south] regions are not significantly different from each other in either period".<sup>212</sup>

7.98. Canada further asserts that the USDOC looked at the wrong table pertaining to stumpage prices in the MNP Ontario survey.<sup>213</sup> According to Canada, exhibit 6 of the MNP Ontario survey, which the USDOC relied upon in its finding, shows that prices were lower in the south because that table reports transaction prices for SPF delivered to sawmills *and* to pulp mills, and because SPF prices delivered to *pulp mills* were much lower in the south than in the north.<sup>214</sup> Canada posits that exhibit 4 of the MNP Ontario survey, which relates to prices of SPF delivered to *sawmills*, in contrast, shows that the weighted average stumpage price was indeed higher in the south in 2014-2015, although it was slightly lower in 2015-2016.<sup>215</sup> The United States asserts that the USDOC did not err in relying on exhibit 6 of the MNP Ontario survey to support its observations regarding stumpage prices in northern as compared with southern Ontario, as that table summarizes total SPF stumpage prices for standing timber on private land in Ontario, and establishes that SPF weighted average stumpage prices were lower in southern Ontario than northern Ontario.<sup>216</sup> Further, exhibit 4 of the MNP survey shows that the sawmill SPF weighted average stumpage prices for the 2015-2016 period also were lower in southern Ontario than northern Ontario. Therefore, for the United States, regardless of the table relied upon, the MNP Ontario survey provides evidentiary support for the USDOC's conclusions regarding price differences for private stumpage between northern and southern Ontario.<sup>217</sup>

7.99. In our view, whether the USDOC should have relied on exhibit 6 or exhibit 4 in drawing conclusions regarding price differences for private stumpage between northern and southern Ontario, is immaterial to the question at hand, which is whether the Hendricks Report made an

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<sup>208</sup> United States' second written submission, para. 87.

<sup>209</sup> United States' response to Panel question No. 162, para. 57.

<sup>210</sup> United States' response to Panel question No. 162, para. 57 (quoting MNP Ontario survey, (Exhibit CAN-144 (BCI)), p. 5). (emphasis original)

<sup>211</sup> Canada's comments on the United States' response to Panel question No. 162, para. 47.

<sup>212</sup> Canada's comments on the United States' response to Panel question No. 162, para. 47 (referring to Hendricks Report, (Exhibit CAN-19 (BCI)), para. 98).

<sup>213</sup> Canada's second written submission, para. 120.

<sup>214</sup> Canada's second written submission, para. 121 (referring to MNP Ontario survey, (Exhibit CAN-144 (BCI)), p. 7, exhibit 6).

<sup>215</sup> Canada's second written submission, para. 121 (referring to MNP Ontario survey, (Exhibit CAN-144 (BCI)), p. 7, exhibit 4).

<sup>216</sup> United States' response to Panel question No. 163, para. 58.

<sup>217</sup> United States' response to Panel question No. 163, para. 59.

assumption that stumpage prices in southern Ontario would be higher than prices in northern Ontario because the distance between the timber stands and sawmills is greater in the north than in the south. As noted above, the United States has failed to establish that the Hendricks Report did in fact make that assumption.

7.100. We further note that Dr Hendricks in his report had explained that the price of a private softwood timber stand is determined on the basis of its "residual value", which is equal to *the revenue derived from the end-products produced from the stand less the costs of harvesting the trees on the private timber stand (excluding stumpage), of hauling the logs from the forest to the sawmill, of processing the logs into end-products, and of delivering the end-products from the sawmill to their markets*.<sup>218</sup> Even if Dr Hendricks suggested that the costs of harvesting private timber stands and of hauling logs from the forest to the sawmill in southern Ontario were lower than those in northern Ontario, he said nothing about *the remaining costs* that would cumulatively determine the prices of the timber stands in question, i.e. costs of processing the logs into end-products (i.e. lumber), and of delivering the end-products to their markets. When the Hendricks Report itself set out these costs as determinants of the stumpage price, the report cannot be understood to have assumed that solely because one of the costs was lower in the south, the price of timber in the south would necessarily be higher. In any event, we recall that, as Canada asserts, Dr Hendricks indicated that for SPF delivered to sawmills, "the volume-weighted average prices in the two regions are not significantly different from each other" in either of the periods assessed, that is, 2014-2015 or 2015-2016. It is possible, at least in principle, that if costs of accessing and harvesting timber, being lower in the south, put an upward pressure on stumpage prices in the south, the remaining costs that Dr Hendricks had referred to, may have put a downward pressure, so that the final prices in the north and the south were, as in Dr Hendricks' words, not significantly different from each other.

7.101. We therefore consider that the United States has not established how the Hendricks Report was flawed. As noted earlier, an objective and unbiased investigating authority would not reject evidence without first evaluating it. In the underlying investigation, however, the record shows that the USDOC did reject the Hendricks Report without properly evaluating it.

7.102. The United States asserts, as noted earlier, that the evidence evaluated by the USDOC in the case of Ontario demonstrates that this is a case where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight.<sup>219</sup> As regards the Hendricks Report, we take the view that considering that the USDOC did not properly evaluate that report in the first place, the USDOC could not reasonably have accorded the report less weight prior to such proper evaluation. Furthermore, as noted earlier, it is not evident from the USDOC's determination that the USDOC had decided to accord "less weight" to the Hendricks Report based on the Ontario Government's predominant share in the stumpage market. We agree with Canada that the United States' assertion that the USDOC was correct to attach less weight to Ontario's record evidence because of the predominance of the Ontario Government in the stumpage market, amounts to *ex post* rationalization.<sup>220</sup>

7.103. For the reasons stated above, we consider that the USDOC did not reasonably and adequately explain, in light of the record evidence, how market concentration, either by itself or in conjunction with other factors, effects distortion of private stumpage prices in Ontario.

#### **7.3.2.2.4 Representativeness of MNP Ontario survey**

7.104. We will next examine the USDOC's finding that the MNP Ontario survey results were unrepresentative. The USDOC found, in particular, that the small number of respondents reporting private timber purchases in the MNP Ontario survey makes the survey results unrepresentative and further indicates diminished demand for private timber in Ontario. Canada argues that the USDOC erred in concluding that the MNP Ontario survey results were unrepresentative and indicated diminished demand for private timber in Ontario. Canada asserts that the USDOC itself acknowledged that "the [Nova Scotia] Survey, in terms of the number of respondents and the absolute volume of SPF timber reported by the survey respondents, is on *par* with the private-origin

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<sup>218</sup> Hendricks Report, (Exhibit CAN-19 (BCI)), paras. 54-57.

<sup>219</sup> United States' first written submission, para. 301.

<sup>220</sup> Canada's opening statement at the first meeting of the Panel (26 February 2019), para. 117.

standing timber harvest data contained in the MNP Ontario Survey".<sup>221</sup> For Canada, the lower number of respondents to the MNP Ontario survey compared with previous surveys of Ontario's private timber market suggests "a consolidation of loggers in the marketplace" rather than a reduction in demand for private timber in the province.<sup>222</sup>

7.105. We note that the USDOC rejected the MNP Ontario survey for purposes of arriving at a stumpage benchmark on the basis that the "small number of survey respondents" calls into question the representativeness of the survey, among other things. We consider that the USDOC's rejection of the MNP Ontario survey on that basis is at odds with its acceptance of the Nova Scotia survey for purposes of arriving at a stumpage benchmark given that the USDOC considered that the latter survey was *at par* with the MNP Ontario survey in terms of the number of respondents and the absolute volume of timber they reported.<sup>223</sup> In our view, the USDOC therefore provided no reasonable basis for finding that the MNP Ontario survey was inadequately representative.<sup>224</sup>

7.106. Further, the USDOC also did not explain why the number of respondents to the survey necessarily suggested diminished demand when the survey indicated that the lower number of respondents, in comparison to previous surveys of the Ontario private market suggests a reduction in the number of industry participants because of a "consolidation of [loggers] in the marketplace".<sup>225</sup> The MNP Ontario survey indicated that the loggers responding to the survey in 2016 were less than half the number of loggers that responded to the survey in 2006, but purchased almost an equal amount of private timber as compared to loggers responding to the survey in 2006.<sup>226</sup> Considering that the USDOC failed to engage with that explanation, we take the view that the USDOC did not, in light of the record evidence, provide a reasoned and adequate explanation for its finding that the MNP Ontario survey indicates diminished demand for private timber in Ontario.

### 7.3.2.2.5 Log prices in Ontario

7.107. Finally, we turn to examine the USDOC's decision to decline using private log prices in Ontario as a stumpage benchmark.

7.108. Canada argues that the USDOC improperly rejected as a stumpage benchmark the KPMG survey data on arm's-length, third-party private log transaction data in Ontario, sourced from both Crown and private land. That data pertains to a good that is similar to standing timber in Ontario and therefore reflects actual market conditions for both standing timber and logs in Ontario.<sup>227</sup> Further, the USDOC acknowledged in previous investigations that "in-market" stumpage prices can

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<sup>221</sup> Canada's first written submission, para. 330 (referring to Final determination, (Exhibit CAN-10), p. 121). (emphasis original)

<sup>222</sup> Canada's first written submission, para. 347.

<sup>223</sup> Canada's first written submission, para. 330 (referring to Final determination, (Exhibit CAN-10), p. 121). (emphasis original)

<sup>224</sup> We note that the United States argues that Canada draws a false equivalence between the MNP Ontario survey and the Nova Scotia survey. The United States asserts that the MNP survey was based on data from 8 (or in some instances 15) sawmills whereas the Nova Scotia survey was based on data from 21 registered buyers. (United States' second written submission, para. 95). We consider, however, that the USDOC itself drew equivalence between the MNP Ontario survey and the Nova Scotia survey, in finding that "the [Nova Scotia] Survey, in terms of the number of respondents and the absolute volume of SPF timber reported by the survey respondents, is *on par* with the private-origin standing timber harvest data contained in the MNP Ontario Survey". The United States further asserts that "the MNP survey covered 65% of 3.5% of Ontario's softwood sawable stumpage market: that is approximately 2.275% of the Ontario softwood sawable market". In contrast, the Nova Scotia survey "included approximately 36% of private softwood sawable volume purchased in Nova Scotia" during the survey period i.e. approximately 36 per cent of [[\*\*\*]] percent, that is over [[\*\*\*]] percent of the Nova Scotia private softwood sawable stumpage market". (United States' second written submission, para. 96 (emphasis added)). We note first that the USDOC did not itself provide this reasoning and the United States' argument is therefore *ex post* rationalization. In any event, we consider that the MNP Ontario survey's coverage of the total *private* timber transacted in the province, standing at approximately 65%, was higher than the Nova Scotia survey's coverage of 36% *private* softwood sawable volume purchased in Nova Scotia. We therefore reject the United States' arguments.

<sup>225</sup> MNP Ontario survey, (Exhibit CAN-144 (BCI)), p. 4.

<sup>226</sup> In particular, the survey explained that "[i]n 2016, there were 35 loggers responding to the survey compared to 83 in 2006. The 35 loggers responding in 2016 accounted for 749,041 m<sup>3</sup> of private timber purchases, whereas the 83 loggers responding in 2006 accounted for 805,530 m<sup>3</sup> of purchased timber. This points to a nearly equal volume of private timber purchased by fewer than half the number of loggers in 2016, indicating a consolidation of buyers in the marketplace". (MNP Ontario survey, (Exhibit CAN-144 (BCI)), p. 4).

<sup>227</sup> Canada's first written submission, para. 348.

be derived by deducting harvesting costs from log prices.<sup>228</sup> In response, the United States contends that the log prices proposed as a benchmark by the Canadian respondents are not prices for the good in question – that is, standing timber – but rather are prices for logs. The log price benchmark is not a market-determined price for the good in question and, given that the USDOC had identified a stumpage benchmark for the good in question in Nova Scotia, which was within Canada, using an alternative approach is not required.<sup>229</sup>

7.109. We note that the USDOC considered that the KPMG survey data that the Ontario Government proposed as a benchmark, set out prices for logs, rather than prices for stumpage, which was the good in question. The USDOC therefore considered that log prices did not constitute a "tier-one benchmark"<sup>230</sup> under the US regulatory hierarchy. The USDOC dismissed as being unnecessary, the examination of non-tier-one benchmark data such as the log prices in Ontario when it had already found a tier-one benchmark in Nova Scotia stumpage prices.<sup>231</sup> We consider, however, that Article 14(d) of the SCM Agreement required the USDOC to determine the adequacy of remuneration for Crown stumpage in Ontario "in relation to *prevailing market conditions for the good in question*". Therefore, Article 14(d) required not only that the selected benchmark relate to Crown *stumpage* in Ontario, which is the good in question, but also to the *prevailing market conditions* for that Crown *stumpage*.

7.110. We further note that in the underlying investigation the USDOC, in its questionnaire to the respondents, had itself asked the respondents to provide data on private log prices in Ontario.<sup>232</sup>

7.111. In our view, an objective and unbiased investigating authority, in light of the above considerations and facts of the underlying investigation, would not have dismissed log prices in Ontario as a possible stumpage benchmark without explaining whether, and if so why, the Nova Scotia stumpage prices related more closely to the prevailing market conditions for stumpage in Ontario than the log prices in question. Such an explanation is pertinent for several reasons. First, the USDOC had itself asked the respondents to submit data on log prices in Ontario. This indicated that the USDOC regarded log prices as a potential benchmark. Further, the Appellate Body has found that Article VI:3 of the GATT 1994 requires investigating authorities, before imposing countervailing duties, to ascertain the precise amount of a subsidy attributed to the imported products under investigation.<sup>233</sup> Considering that the amount of subsidy is determined based on the amount of benefit conferred, which in turn depends on the choice of benchmark, it follows that the investigating authority will need to consider using, at least as an initial step in its benefit analysis, a benchmark that best reflects the prevailing market conditions for the government-provided good. The USDOC dismissed the log prices on the basis that they did not reflect the price for the good in question, which was stumpage, but did not explain why the stumpage prices that could have been derived from the log prices may not have better reflected the prevailing market conditions for stumpage in Ontario than the stumpage prices in Nova Scotia. In this regard, we note that the United States recognizes that "the use of a log-derived benchmark for stumpage may be permissible in certain contexts"<sup>234</sup>, and has acknowledged in previous investigations that stumpage prices can be derived simply by deducting certain costs from log prices.<sup>235</sup> Moreover, even in the underlying investigation,

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<sup>228</sup> Canada's first written submission, paras. 353-354.

<sup>229</sup> United States' first written submission, para. 313.

<sup>230</sup> As noted earlier, US law sets out potential benchmarks in hierarchical order of preference (a) a market-determined price for the good in question using actual transactions in the country under investigation (tier-one); (b) world market prices that would be available to the purchasers in the country under investigation (tier-two); or (c) assessment of whether the government price is consistent with market principles (tier-three). The USDOC explained that the preferred benchmark in the hierarchy, the tier-one benchmark price, is an observed market price from actual transactions, such as prices from private parties or, in certain circumstances, government-run auctions, within the country under investigation. (Preliminary determination, (Exhibit CAN-8), pp. 26-27).

<sup>231</sup> Final determination, (Exhibit CAN-10), p. 95.

<sup>232</sup> Ontario initial questionnaire response, (Exhibit CAN-155), pp. ON-149-ON-150.

<sup>233</sup> The Appellate Body further observed that "[a] parallel can be drawn between the obligation of an investigating authority under Article VI:3 of the GATT 1994 to determine the precise amount of the subsidy, on the one hand, and the analogous obligations that an investigating authority has under Articles 19.3 and 19.4 of the SCM Agreement, on the other hand, to determine and levy countervailing duties in amounts that are appropriate in each case and that do not exceed the amount of the subsidy found to exist". (Appellate Body Report, *Anti-Dumping and Countervailing Duties (China)*, para. 601). See also, Appellate Body Report, *US – Washing Machines*, para. 5.268.

<sup>234</sup> United States' first written submission, para. 338.

<sup>235</sup> First remand determination, (Exhibit CAN-94), p. 11.

the USDOC found that an appropriate stumpage benchmark for British Columbia could be derived from Washington State log prices because the timber species and growing conditions in the respective jurisdictions were allegedly "similar".<sup>236</sup>

7.112. Therefore, we consider that faced with a choice between log prices in Ontario and standing timber prices in Nova Scotia as potential stumpage benchmarks, an objective and unbiased authority would have explained why log prices in Ontario, provided they are market-determined, could not be used to derive a benchmark that would more accurately reflect the prevailing conditions for stumpage in the Ontario market than would stumpage prices in Nova Scotia. The United States has not identified where the USDOC provided that explanation in its determination.<sup>237</sup> We, therefore, consider that the USDOC did not provide a reasoned and adequate explanation for rejecting as a stumpage benchmark the log prices that it had itself requested the respondents to provide.

### **7.3.2.3 Conclusion**

7.113. For the reasons set out above, we consider that the USDOC's findings pertaining to Ontario's stumpage market did not either individually, or collectively, demonstrate price distortion in that market. Further, the USDOC did not provide a reasoned and adequate basis for rejecting, as a stumpage benchmark, log prices in Ontario. We, therefore, conclude that the USDOC acted inconsistently with Article 14(d) in rejecting Ontario's private stumpage and log prices as a stumpage benchmark.

### **7.3.3 Whether the USDOC improperly rejected BCTS auction prices in British Columbia as an appropriate stumpage benchmark**

7.114. Canada claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting British Columbia's proposed "in-market" stumpage benchmark. The proposed benchmark was the prices paid by log producers in British Columbia for rights to harvest certain Crown timber allocated via auctions.<sup>238</sup> Aside from allocating Crown timber via long-term licences for stumpage rates, British Columbia also allocated a certain portion of Crown timber via auctions. A total of 17% of Crown timber harvested in British Columbia during the POI was allocated through auctions in the POI.<sup>239</sup> In Canada's view, the price at which timber was allocated to log producers in these auctions represented the market value of timber that the USDOC ought to have treated as the benchmark for assessing the adequacy of the stumpage rates for timber sold via long-term licences.

#### **7.3.3.1 Factual aspects**

7.115. British Columbia uses results from auctions conducted by British Columbia Timber Sales (BCTS) to determine stumpage prices for non-BCTS Crown timber through its Market Pricing System (MPS).<sup>240</sup> The prices paid for the right to harvest from these auctions provide the basis for the MPS, which determines the stumpage rates for the remaining Crown stands not sold through auction. Stumpage prices in British Columbia for all Crown-origin standing timber are thus determined through either (a) BCTS auctions, or (b) British Columbia's MPS.<sup>241</sup> The MPS uses auction data from the BCTS to determine what the winning bid would have been if a timber stand had been sold through auction.<sup>242</sup> The value of the stand is determined by subsequently adjusting the estimated winning

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<sup>236</sup> Final determination, (Exhibit CAN-10), p. 63.

<sup>237</sup> We asked the United States to indicate where in its determination the USDOC explained why log prices in Ontario, provided they were market-determined, could not be used to derive a benchmark which would more accurately reflect the prevailing market conditions for stumpage in Ontario than stumpage prices in Nova Scotia. We agree with Canada that in its response, the United States, rather than pointing to that explanation referred to in our question, simply reiterates the USDOC's conclusion that it preferred to use a stumpage price rather than a log price, based upon the USDOC's regulatory hierarchy. (United States' response to Panel question No. 164, paras. 60-63; Canada's comments on the United States' response to Panel question No. 164, paras. 51-52).

<sup>238</sup> British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), p. BC-I-6.

<sup>239</sup> Canada's responses to Panel question No. 79, para. 236, and No. 202, para. 122.

<sup>240</sup> Canada's first written submission, para. 61.

<sup>241</sup> Final determination, (Exhibit CAN-10), p. 54.

<sup>242</sup> Canada's first written submission, para. 98.

bid to account for the non-BCTS bidders' obligations, including costs associated with forest management, development, road construction and maintenance, and silviculture.<sup>243</sup>

7.116. The USDOC concluded that prices in British Columbia, including the stumpage prices from BCTS auctions, were not market-determined and thus were not appropriate to use as a stumpage benchmark for determining the adequacy of remuneration for non-BCTS Crown-origin standing timber in the province.<sup>244</sup> The USDOC reached that conclusion considering (a) the provincial government's predominant share in the market<sup>245</sup>; (b) its findings of certain flaws in the BCTS auction system; and (c) the impact on the stumpage market of export restrictions on logs in British Columbia.<sup>246</sup>

7.117. The USDOC found the BCTS auction system to be flawed in two ways. First, a small number of companies dominate the BCTS auction market, thereby inhibiting competition. The five companies that dominate the direct allocation and harvest of standing timber from Crown lands account for a large percentage of the auctioned volume.<sup>247</sup> The same five companies also account for 65.23% of the Crown harvest while the ten largest companies account for 71.55%.<sup>248</sup> Second, the USDOC determined that British Columbia had imposed a three-sale limit on auction bidders with the aim of encouraging competition in the auction market. This limitation, however, introduces an "artificial barrier to participation" in the BCTS auctions because to the extent that some companies have already exhausted the three-sale quota, "any given auction will find fewer bidders that could otherwise participate". The USDOC found that "for this reason alone" it could not accept the BCTS auction prices as the benchmark stumpage price for non-BCTS Crown-origin timber.<sup>249</sup>

7.118. The USDOC also found that the dominant companies, in any event, circumvented the three-sale limit by accessing additional auctioned timber through third-party proxies or straw purchasers, and therefore maintained their dominance in the auctions.<sup>250</sup> According to the USDOC, these companies, in order to access the timber won by a third party at auction, pay a cutting rights fee to the third party. The USDOC reasoned that the companies therefore incur an additional cost that they would not incur if bidding for the timber directly, and that this cost would likely be factored into the auction in the form of lower bids, as the bidder would expect the companies to discount their purchase price accordingly. The price paid by the BCTS auction winner therefore does not reflect the full value of the timber.<sup>251</sup>

7.119. Finally, the USDOC found that the log export regulations in British Columbia reduced log prices and, therefore, stumpage prices in the province.<sup>252</sup>

### 7.3.3.2 Evaluation

7.120. Canada claims that the USDOC's rejection of the BCTS auction prices as a stumpage benchmark was inconsistent with Article 14(d) of the SCM Agreement. Canada contends that each of the grounds on which the USDOC's overall conclusion about the validity of BCTS auction prices as a benchmark was based was not supported by a reasoned or adequate explanation, nor adequately supported by record evidence.<sup>253</sup> We begin examining Canada's claim by evaluating each of the

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<sup>243</sup> Canada's first written submission, para. 101.

<sup>244</sup> We note that the USDOC used the terms *non-market-determined* and *price distortion* interchangeably in the underlying determinations.

<sup>245</sup> More than 90% of the total standing timber harvested in British Columbia during the POI was harvested from provincial Crown land. (Preliminary determination, (Exhibit CAN-8), p. 20).

<sup>246</sup> Preliminary determination, (Exhibit CAN-8), p. 36; Final determination, (Exhibit CAN-10), pp. 55-58.

<sup>247</sup> Preliminary determination, (Exhibit CAN-8), p. 38; Final determination, (Exhibit CAN-10), p. 57 and fn 341. We note that the five dominant firms referred to by the USDOC consumed auctioned timber, not only by purchasing the timber directly in the auctions, but also by purchasing timber from independent bidders. Canada's claim concerns the USDOC's finding that the fact that a handful of firms consumed a majority of auctioned timber – purchased both directly and indirectly – and also held a majority of directly allocated timber caused distortion of BCTS auction prices.

<sup>248</sup> Preliminary determination, (Exhibit CAN-8), p. 37.

<sup>249</sup> Final determination, (Exhibit CAN-10), p. 57.

<sup>250</sup> Final determination, (Exhibit CAN-10), p. 57.

<sup>251</sup> Final determination, (Exhibit CAN-10), p. 58.

<sup>252</sup> Final determination, (Exhibit CAN-10), p. 58.

<sup>253</sup> At para. 375 of its first written submission, the United States noted:

following three grounds based on which the USDOC rejected the BCTS auction prices as a valid benchmark (a) the nature of British Columbia's timber market; (b) the three-sale limit; and (c) the export regulations operating in British Columbia. We will reach an overall conclusion in respect of Canada's claim based on our assessment of the adequacy of the USDOC's analysis with respect to each of these grounds.

#### **7.3.3.2.1 Nature of the British Columbia timber market**

7.121. Canada claims that the USDOC's rejection of the BCTS auction prices as a benchmark on grounds of market concentration in British Columbia's timber market was inconsistent with Article 14(d) of the SCM Agreement. Canada argues that the level of competition among private enterprises is a prevailing market condition and cannot be a basis for a determination that the BCTS auction prices were not valid as a benchmark.<sup>254</sup> The United States asserts that the USDOC did not analyse the impact of market concentration on BCTS auction prices in isolation, but in light of the government's predominance as a seller in the British Columbia timber market.<sup>255</sup> We consider that the USDOC examined the impact of market concentration on the BCTS auction prices after having found the government to be a predominant supplier of timber in British Columbia, and therefore did not examine market concentration in isolation. We note in particular that the USDOC assessed whether the BCTS auction prices were distorted in light of the fact that the same few firms that held the majority of *government-supplied* long-term tenures, which was the largest source of timber in British Columbia, were also the predominant consumers of auctioned timber.<sup>256</sup> We therefore reject Canada's concern that the USDOC improperly treated the level of competition in the British Columbia timber market as a standalone basis for rejecting BCTS auction prices as a valid benchmark.<sup>257</sup> Rather, we consider that the USDOC's rejection of the BCTS auction prices was based on an assessment of government predominance combined with market concentration in British Columbia and not government predominance alone, as the United States itself has acknowledged elsewhere in its submissions.<sup>258</sup>

7.122. We also note Canada's argument that the potential for circular price comparison does not arise in context of the factual situation in British Columbia despite the existence of government predominance, as the government operates a competitive auction for a significant and representative portion of the harvest, and uses those auction prices to establish prices for non-auctioned harvest.<sup>259</sup> Canada also contends that because government predominance does not give rise to a potential for circular comparison in the context of the factual situation in British Columbia, market concentration also becomes irrelevant to the USDOC's analysis, as market concentration was relevant only to the extent that government predominance was relevant.<sup>260</sup> We disagree with Canada. We consider that these arguments by Canada do not adequately address the possibility that government predominance *taken together* with market concentration in British Columbia could have distorted BCTS auction prices, even if neither of the two factors *on its own* would suffice to establish that the auction prices were distorted. Hence, we proceed to examine the parties' arguments concerning whether the USDOC properly assessed how the level of market concentration in

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

<sup>254</sup> Canada's first written submission, paras. 163 and 167.

<sup>255</sup> United States' first written submission, para. 377; responses to Panel question No. 48, para. 151, and No. 82, para. 254 ("[t]he USDOC did not undertake to conduct a market concentration analysis *carte blanche*, but rather as a conditional exercise contingent upon having found the market to be predominantly supplied by the government").

<sup>256</sup> Preliminary determination, (Exhibit CAN-8), p. 38.

<sup>257</sup> For reasons discussed further below, however, we consider that the USDOC did not properly explain how the interaction of government predominance and market concentration had the effect of distorting the BCTS auction prices.

<sup>258</sup> United States' response to Panel question No. 82, para. 255 ("the USDOC sought to analyze whether the BCTS auction prices were competitive and open and independent, such that they could provide a benchmark market price for BC stumpage that was not distorted by the government's ownership of the vast majority of harvestable forest land.")

<sup>259</sup> Canada's response to Panel question No. 212, para. 158.

<sup>260</sup> Canada's comments on the United States' response to Panel question No. 212, para. 199.

British Columbia's timber market, seen in light of government's predominance as a supplier, affected the BCTS auctions in a manner that would distort auction prices.<sup>261</sup>

7.123. Canada argues that the USDOC did not provide a reasoned and adequate explanation as to how the level of market concentration rendered the BCTS auction prices unfit as a benchmark.<sup>262</sup> The United States disagrees. The United States contends that the USDOC properly established that because the five firms that consumed the majority of logs produced from auctioned timber were also the same five firms that held the majority of the timber allocated through long-term licences, the BCTS auction prices "[were] effectively limited by what those [five firms] pay for timber harvested from their tenures".<sup>263</sup> On such grounds, the USDOC determined BCTS auction prices were not market determined.<sup>264</sup>

7.124. The premise underlying the USDOC's finding that the level of market concentration undermined the validity of the BCTS auction prices as a benchmark is that the domination of the five firms in long-term tenure allocations had the effect of causing auction participants to bid lower. We do not consider that this premise was supported adequately by record evidence. The USDOC's reliance on this premise is evident in the following observations in the preliminary determination:

[W]e preliminarily find that the prices for standing timber auctioned under the BCTS are effectively limited by Crown stumpage prices paid by tenure-holding companies. The largest tenure-holding companies purchase the predominant amount of standing timber bought in the auctions by logging companies. The prices that loggers bid at auctions are limited by the price they receive from tenure-holding companies. The volume of Crown-origin standing timber allocated to tenure-holding companies exceeds the actual volume of Crown-origin standing timber harvested by tenure-holding companies, which supports a finding that the willingness of tenure-holding sawmills to pay for standing timber from the BCTS auction will be limited by their costs for obtaining standing timber from their own tenures. This information leads us to preliminarily conclude that BCTS standing timber prices are effectively limited by the prices that large tenure-holders paid for Crown stumpage under their own tenures. Therefore, these prices cannot serve as benchmarks to measure the adequacy of remuneration for Crown-origin standing timber, because they do not reflect market-determined prices from competitively run government auctions.<sup>265</sup>

7.125. In the preliminary determination, the USDOC noted that firms holding the majority of long-term licences could limit auction prices because of two factors (a) the firms were also the predominant consumers of auctioned timber; and (b) the firms were abundantly supplied with timber from their own tenure holdings, as indicated by the fact that a significant portion of the timber they held through long-term licences was not harvested.<sup>266</sup> We note that the second of these factors was explicitly found not to exist in the final determination. In the final determination, the USDOC found that no "supply 'overhang' exists in British Columbia" and that the portion of tenure that was left unharvested represented timber killed by beetle.<sup>267</sup> We consider that the abnegation of the second factor in the final determination weakened the premise based on which the USDOC rejected the validity of the BCTS auction prices as a benchmark.

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<sup>261</sup> We also note that the United States argues that British Columbia also had the ability to influence auction prices because "the provincial government designed the BCTS auction system to generate prices for the remainder of the government-held stumpage supply". (United States' comments on Canada's response to Panel question No. 212, para. 136 (emphasis original)). In respect of this argument, we consider that the ability of the British Columbia government to influence auction prices by virtue of its ability to design the auctions was not examined by the USDOC in the determination as a factor that distorted the auction prices. Further, the fact that the government designed the auctions does not *ipso facto* establish that the auctions were designed in a manner so as to yield distorted auction prices. Hence, we reject this argument by the United States.

<sup>262</sup> Canada's first written submission, para. 181.

<sup>263</sup> United States' first written submission, paras. 378-379.

<sup>264</sup> United States' first written submission, para. 381.

<sup>265</sup> Preliminary determination, (Exhibit CAN-8), p. 39.

<sup>266</sup> The USDOC found that "holders of Forest License and Tree Farm License (the two license types that accounted for the majority of timber allocated and harvested in British Columbia) harvested only 72.7 percent and 75.1 percent, respectively, of their allocations". (Final determination, (Exhibit CAN-10), p. 56).

<sup>267</sup> Final determination, (Exhibit CAN-10), p. 56.

7.126. Notwithstanding the USDOC's rejection of the second factor mentioned above in the final determination, the USDOC considered that the fact that the five largest long-term tenure-holding firms were the largest consumers of auctioned timber meant that auction prices were limited, or suppressed, by what the five firms were willing to pay. Supporting this finding of the USDOC, the United States submits that the dominance of the same firms in long-term tenure allocations as well as the auction market shows that auction prices were suppressed.<sup>268</sup> We consider this particular argument of the United States to be unpersuasive because it is unclear why the five long-term tenure-holding firms that the United States refers to would necessarily be in a position of influence over other entities that purchase BCTS auction timber, considering that the former would depend on the latter to satisfy their demand for timber in absence of a supply overhang. The status of those firms as the dominant consumers of auctioned timber as well as timber allocated via long-term licences does not imply that they will have the ability to limit auction prices unless they are adequately supplied with timber from their long-term tenures, which, as stated above, was not the case during the POI. We note that record evidence clearly indicates that the investigated exporters had to rely on sources of logs other than their long-term tenures to satisfy their demand for logs.<sup>269</sup>

7.127. In addition, we underscore that the USDOC found that BCTS auction prices were suppressed not because the participants in the auctions themselves held long-term tenures, but because the entities to which the auction participants sold the logs derived from auctioned timber held long-term tenures.<sup>270</sup> The USDOC itself acknowledged that most of the bidders were logging companies and not long-term tenure-holding sawmills.<sup>271</sup> This implies that the five firms that according to the USDOC cast downward pressure on auction prices by virtue of holding long-term tenures were one step removed from the actual bidding transaction in a majority of cases. Such firms were the bidders' customers, and not the bidders themselves. Hence, their influence on bidding could at best have been indirect. We consider that this further weakens the United States' argument that auction prices were suppressed because certain sawmills held the majority of long-term tenures – particularly as the USDOC did not discuss this aspect in its determination.

7.128. Further, data that the USDOC presented specifies that the five "dominant" firms purchased 64.8% of cruise-based<sup>272</sup> timber and 43.6% of scale-based timber<sup>273</sup> that was allocated through the BCTS auctions.<sup>274</sup> This indicates that a significant portion of auctioned timber – 35.2% of cruise-based timber and 56.4% of scale-based timber – was sold to firms other than the five ostensibly "dominant" firms alluded to by the United States.<sup>275</sup> We have already noted above that being dominant consumers of auctioned logs did not by itself enable the five firms to influence auction prices in the absence of a supply overhang. We also consider that the purchase of a large amount of auctioned timber by firms other than the five long-term licence holding firms that the USDOC referred to further weakens the United States' argument that the five firms were in a position to limit the bids made in the auctions. This is because even if the five firms that consumed the majority of auctioned timber were unwilling to pay a sufficient price for the logs, the logs could potentially have been sold to any of the other firms in the market, some of whom would not necessarily have had access to Crown timber directly. Again, the USDOC did not discuss this issue in its determination.

7.129. Canada also contends that the USDOC ignored certain evidence presented in Dr Athey's report that ran contrary to the USDOC's finding that the five largest long-term tenure-holding firms cast a downward pressure on BCTS auction prices.<sup>276</sup> In particular, Canada

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<sup>268</sup> United States' first written submission, para. 378; second written submission, para. 269.

<sup>269</sup> Larry Gardner affidavit, (Exhibit CAN-31 (BCI)); Mark Feldinger affidavit, (Exhibit CAN-34 (BCI)).

<sup>270</sup> Canada's first written submission, para. 173; United States' response to Panel question No. 206, para. 177.

<sup>271</sup> Preliminary determination, (Exhibit CAN-8), p. 37. ("data from the GBC indicate that independent loggers (and not the Crown tenure-holding sawmills) continue to account for the majority of BCTS auction purchases.")

<sup>272</sup> The term "cruise-based" timber is applied to timber sales where stumpage payment is billed as a lump-sum amount for all of the merchantable stand based on the volume that is determined through a timber cruise conducted prior to the auction. (Canada's response to Panel question No. 81, para. 243).

<sup>273</sup> The term "scale-based" timber is applied to timber sales where stumpage payment is billed based on the volume of timber that is measured at the harvest site after the timber is harvested. (Canada's response to Panel question No. 81, para. 242).

<sup>274</sup> Final determination, (Exhibit CAN-10), p. 57.

<sup>275</sup> For a list of entities that purchased timber allocated through the BCTS auctions, see Market memorandum, (Exhibit CAN-80), tables 1.1 and 1.2.

<sup>276</sup> Canada's first written submission, paras. 150 and 159.

argues that the USDOC did not engage with the following aspects of the Athey Report that contradict the USDOC's reasoning:

- a. BCTS auctions and the British Columbia interior MPS produced valid, market-determined stumpage prices that reflected the prevailing market conditions in the British Columbia interior<sup>277</sup>;
- b. the low barrier to entry into the logging sector and the high number of bidders in the BCTS auctions create competition leading to higher auction prices and serve as a check against potential abuse of market power<sup>278</sup>;
- c. in order to attempt to affect BCTS auction prices, a long-term tenure-holding sawmill will have to "curtail lumber production to reduce its log demand, or forego more cost-effective BCTS timber supply in favour of costlier options". Such action would not be in the sawmill's economic self-interest<sup>279</sup>; and
- d. long-term tenure-holding sawmills will also have to "make a credible commitment, in coordination with others" to undertake measures to lower auction prices. Such action would be illegal and would be detected by law enforcement authorities.<sup>280</sup>

7.130. The United States argues that the USDOC was not required to explicitly mention the Athey Report in the determination if it otherwise considered the report.<sup>281</sup> The United States further suggests that the report had limited probative value because Dr Athey designed the auction system under review herself, and because the report relied exclusively upon previous work either of Dr Athey herself or of experts commissioned by Canada.<sup>282</sup> We note that the USDOC did not explicitly state in its determination that it accorded less weight to the Athey Report. Even if the USDOC had stated that expressly, we consider that the USDOC should have demonstrated that the USDOC had properly examined the substantive aspects of the Athey Report referred to above, before deciding what weight to place on the substantive analysis contained therein. This is because placing less weight on evidence after properly evaluating it is different from placing less weight on evidence without first properly evaluating it.<sup>283</sup>

7.131. We note that the USDOC did not evaluate any of the above-mentioned aspects of the Athey Report in the preliminary or the final determination. The USDOC did not, for example, examine whether the Athey Report correctly considered collective coordination among the five long-term licence holders to be a necessary condition for them to cast downward pressure on auction prices, and if so, whether such coordination in fact occurred in British Columbia. In addition, we also note that the USDOC did not consider the Athey Report's finding that harvesting logs from timber held through a long-term licence may not always be cheaper for a firm than purchasing logs sold by successful BCTS auction participants in the open log market.<sup>284</sup> If true, this Athey Report finding would considerably weaken the USDOC's reasoning because long-term licence holding firms cannot "limit" BCTS auction prices if the cost of deriving logs by harvesting timber from long-term tenures is more than the cost of purchasing logs derived from auctioned timber. An objective and impartial investigating authority would have engaged with this evidence, considering its direct relevance to the USDOC's findings. Because the determination does not reveal whether and how the USDOC engaged with the reasoning presented in the Athey Report, which was directly relevant to the USDOC's findings regarding the effect of the level of market concentration in the British Columbia timber market on BCTS auction prices, we consider that the USDOC overlooked evidence that an objective and unbiased investigating authority would not.

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<sup>277</sup> Canada's first written submission, para. 140.

<sup>278</sup> Canada's first written submission, para. 174.

<sup>279</sup> Canada's first written submission, para. 176.

<sup>280</sup> Canada's first written submission, para. 177.

<sup>281</sup> United States' first written submission, para. 388; response to Panel question No. 88, para. 275.

<sup>282</sup> United States' first written submission, para. 389; response to Panel question No. 88, para. 277.

<sup>283</sup> See, above, paras. 7.60-7.61.

<sup>284</sup> Athey Report, (Exhibit CAN-23), pp. 16 and 53.

7.132. Based on the foregoing, we conclude that the USDOC's finding that the BCTS auction prices were distorted due to the nature of the British Columbia timber market was not founded on a reasoned and adequate explanation.

### 7.3.3.2.2 The three-sale limit

7.133. Canada argues that the USDOC improperly concluded that the three-sale limit undermined the validity of the BCTS auction prices as a benchmark.<sup>285</sup> According to Canada, the USDOC did not demonstrate that the three-sale limit in fact affected bidder behaviour and distorted auction prices.<sup>286</sup> The United States argues that the USDOC was justified in finding that the three-sale limit rendered the BCTS auctions invalid as a benchmark because the exclusion of potential bidders from the auctions due to the three-sale limit meant that the BCTS auctions were not "competitively run".<sup>287</sup> The United States also argues that how the BCTS auctions would function without the three-sale limit is unknowable. Hence, according to the United States, the USDOC could not have cited evidence as to whether the three-sale limit in fact distorted auction prices.<sup>288</sup>

7.134. In the final determination, the USDOC found the three-sale limit to render the BCTS auction prices invalid as a benchmark based on the following two grounds:

- a. the exclusion of certain bidders from specific auctions made the BCTS auctions uncompetitive<sup>289</sup>; and
- b. the circumvention of the three-sale limit by excluded firms through the use of proxy bidders resulted in "market distortion" by introducing a "cutting rights fee" that the firms excluded from participating in the auctions paid to their proxies in addition to the auction price in exchange for auctioned timber.<sup>290</sup>

We will examine both grounds in turn.

7.135. As regards the impact of the three-sale limit on competitiveness of the BCTS auctions, the United States argues that the three-sale limit lowered auction prices by excluding bidders from participating in the auctions.<sup>291</sup> The United States contends that the correlation between the number of bidders and the auction prices is "obvious" and "undisputed".<sup>292</sup> To support this contention, the United States relies on certain statements made by British Columbia ostensibly acknowledging a correlation between the number of bidders and the auction prices in its questionnaire response and during its verification visit.<sup>293</sup> We note that the United States has only partially cited one of British Columbia's statements in its questionnaire response regarding the correlation between the number of bidders and the auction prices. The United States overlooked the part of that statement where British Columbia explains that "due to the secret nature of the bid process, the bidders never knows how many other bidders may bid on any particular tract of timber" and are therefore required "to bid with the expectation that there is other competition for the timber".<sup>294</sup> The complete statement reveals that British Columbia was of the view that given the design of the BCTS auctions, the three-sale limit would not cause bidders to lower their bids. The USDOC did not engage with this reasoning in its determination.

7.136. We note that Canada has also argued that the USDOC undermined its own reasoning that the three-sale limit made the BCTS auctions uncompetitive by also finding that this rule was circumvented by respondent companies through proxy bidding.<sup>295</sup> The United States responds to this argument by pointing out that the use of proxy bidders by mills prevented from participating in the auctions due to the three-sale limit "does not obviate its finding that the three-sale limit inhibits competition, but rather demonstrates an additional way in which the BCTS distorts prices", i.e. the

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<sup>285</sup> Canada's first written submission, para. 182.

<sup>286</sup> Canada's first written submission, para. 182.

<sup>287</sup> United States' first written submission, para. 382.

<sup>288</sup> United States' first written submission, para. 383.

<sup>289</sup> Final determination, (Exhibit CAN-10), p. 57.

<sup>290</sup> Final determination, (Exhibit CAN-10), p. 58.

<sup>291</sup> United States' first written submission, para. 384.

<sup>292</sup> United States' first written submission, para. 384.

<sup>293</sup> United States' first written submission, para. 384.

<sup>294</sup> British Columbia questionnaire response, (Exhibit CAN-18 (BCI)), p. BC-I-179.

<sup>295</sup> Canada's first written submission, para. 184.

payment of "cutting rights fee" by large firms to proxies bidding on their behalf.<sup>296</sup> While we separately examine whether proxy bidding did in fact distort prices by necessitating the payment of the cutting rights fee, we do not see anything in the United States' response that counters Canada's argument that the circumvention of the three-sale limit by large mills undermines the USDOC's view that the three-sale limit made the auctions uncompetitive. In response to a Panel question after the second substantive meeting, the United States asserted that the three-sale limit made the BCTS auctions uncompetitive by causing large mills that were blocked from participating in the auctions to partner with independent harvesters to submit joint bids, thus turning potential competitors into partners.<sup>297</sup> We note that this explanation does not appear in the USDOC's determination and is therefore *ex post* rationalization. Furthermore, we consider that the United States' assertion that the three-sale limit turned potential competitors into partners does not explain why bids cast in the auction will be lower than would otherwise be the case considering that a bidder working with one company will have to bid with the expectation of competition from other potential bidders working with other companies.<sup>298</sup> We therefore consider that the USDOC did not offer a reasonable and adequate explanation as to how the exclusion of certain bidders due to the three-sale limit, and their participation in joint bids, was related to auction prices in the specific context of the BCTS auctions.<sup>299</sup>

7.137. The USDOC also found the three-sale limit to undermine the validity of the BCTS auctions as a benchmark on the ground that it introduced a "market distortion" by necessitating the payment of a "cutting rights fee" by firms seeking to circumvent the three-sale limit through proxy bidding.<sup>300</sup> Specifically, the USDOC found:

[C]ompanies who pay these cutting rights fees to harvest a [timber sale licence] from a third party are incurring an additional cost that they would not otherwise incur if bidding for the [timber sale licence] directly – a cost that is likely factored into the auction in the form of lower bids, as the bidder would expect the companies to discount their purchase price accordingly. As we noted in the *Preliminary Determination*, based on a study from the BCLTC, non-harvesting third-party bidders at auction "base their auction bids on what the tenure-holding companies are willing to pay for auction-origin logs."<sup>301</sup>

The United States argues that it was reasonable for the USDOC to infer that the bids were undervalued from the fact that investigated companies incurred additional "cutting rights" costs to acquire auctioned timber from third parties that they would not incur if they were bidding in the auctions directly.<sup>302</sup> According to the USDOC and the United States, these additional costs are "likely factored into the auction in the form of lower bids", as "a middle-man must build its own margin into its bid by bidding lower than the amount for which it will resell the license to the large firm buyer".<sup>303</sup>

7.138. Before examining the validity of the USDOC's and the United States' reasoning on whether the "cutting rights fees" distorted BCTS auction prices, we note Canada's argument that of three respondent companies from British Columbia, only Tolko paid such fees and even Tolko paid a [[\*\*\*]] amount of fees.<sup>304</sup> Further, Canada argues that unlike what the United States assumes, the fees reported as "cutting rights fees" need not necessarily be a payment made to a third party for

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<sup>296</sup> United States' second written submission, para. 277. (emphasis original)

<sup>297</sup> United States' response to Panel question No. 203, para. 164.

<sup>298</sup> Canada's comments on the United States' response to the Panel question No. 203, paras. 156-157.

<sup>299</sup> The United States also points to record evidence indicating that 11% of auctioned licences failed to sell in their first listing in support of its argument that the three-sale limit undermined the competitiveness of the BCTS auction prices. (United States' first written submission, para. 384). We note that this reasoning does not appear in the preliminary or the final determinations and is therefore, *ex post* reasoning. We also consider that an objective and unbiased investigating authority would not assume that certain licences failed to sell in the first listing because the three-sale limit made the auctions uncompetitive, without ascertaining that there was no other explanation for why those licences were unsold. It is possible, for example, that certain harvest areas were less desirable to mills because they had a high beetle-infestation level, or were located in an inaccessible area, and hence did not attract any buyers in the first listing. Neither the United States nor the USDOC provided any reasoning addressing this possibility.

<sup>300</sup> Final determination, (Exhibit CAN-10), p. 58.

<sup>301</sup> Final determination, (Exhibit CAN-10), p. 58.

<sup>302</sup> United States' first written submission, para. 386; second written submission, para. 277.

<sup>303</sup> United States' responses to Panel question No. 85, para. 264, and No. 205, paras. 171-172.

<sup>304</sup> Canada's first written submission, para. 187; comments on the United States' response to Panel question No. 205, para. 159.

acting as a proxy bidder.<sup>305</sup> In this respect, we disagree with Canada in so far as Canada suggests that the record evidence did not indicate the existence of payments made by Tolko and Canfor that could have been considered payments made to third parties for acting as proxy bidders. In case of Tolko, while Canada does not dispute that Tolko made such payments, it suggests that those payments must be disregarded as they were [[\*\*\*]]. We reject this argument by Canada as we see no basis for why the USDOC ought to have disregarded a certain payment made to a third party for acting as a proxy bidder simply because the amount of the payment, in Canada's view, was [[\*\*\*]]. In case of Canfor, we note that the following extract from Canfor's questionnaire response indicates that Canfor did incur an extra expense of the kind that the USDOC characterized as "cutting rights fee":

If [Canadian Forest Products, Ltd.] is bidding directly, it calculates its anticipated logging, hauling and any on-block road costs to access the standing timber. If [Canadian Forest Products, Ltd.] is bidding indirectly, it works with contractors to establish their expectations for their logging and hauling costs and profit expectations in any successful bid which would deliver the logs to one or more of [Canadian Forest Products, Ltd.]'s sawmills.<sup>306</sup>

The reference to "profit expectations" of the third-party proxy bidder in the extract above clearly indicates that Canfor pays an amount to its proxy that it will not otherwise pay, which is precisely the kind of payment that the USDOC referred to as cutting rights fee. As regards West Fraser, however, we consider that the United States has not identified record evidence that would support the USDOC's finding that West Fraser paid any additional amount to a third party to act as a proxy bidder. The USDOC points to page 158 of West Fraser questionnaire response of 14 March 2017 (Exhibit CAN-52 (BCI)) as the basis of its finding that West Fraser paid cutting rights fee to third parties for bidding on West Fraser's behalf. Page 158, in relevant part, states:

As detailed below, these exhibits report the fees West Fraser Mills Ltd. ("West Fraser") paid in CY 2015 for (1) stumpage on Crown timber harvested from its own tenure (2) stumpage on Crown timber harvested from British Columbia Timber Sales ("BCTS") licenses purchased at BCTS auctions by West Fraser, and (3) stumpage on Crown timber harvested from BCTS licenses purchased at BCTS auctions by West Fraser's employees (which West Fraser treats the same way it treats BCTS licenses it purchases directly, since for these licenses West Fraser assumes all of the financial and operational liability associated with the timber sale).

This excerpt does not suggest that West Fraser pays its employees any sort of cutting rights fees, but rather states that West Fraser treats licences that it obtains through its employees the same way it treats licences that it purchases directly.

7.139. Thus, we are of the view that the record evidence supports the USDOC's finding that Tolko and Canfor paid a certain sum to their proxy bidders that they would not have had to pay if these respondents themselves were bidding directly, but does not support such a finding in respect of West Fraser. We will continue to call such payments "cutting rights fees" for the purpose of our analysis and make our findings in this section in respect of Tolko and Canfor, but not West Fraser.

7.140. Although we reject Canada's arguments concerning the existence of cutting rights fees, we consider that the USDOC's finding that the payment of cutting rights fees for proxy bidding distorted BCTS auction prices to be flawed. We agree with Canada's argument that the USDOC's analysis does not establish why a bidder would make a lower bid in the auction even if the bidder intends to subsequently resell auctioned timber to a different entity, considering that the bidder would stand the risk of losing to any of its rival bidders if it lowers its bid for reasons extraneous to the auction itself.<sup>307</sup> Further, we see no valid basis for the USDOC's assumption that any middle-man margin or cutting rights fees will be accounted for in form of lower bids. This is because it is entirely possible that proxy bidders cast a bid that they consider adequate to win an auction, and then resell harvesting rights to larger firms at a mark-up that represents the cutting rights fees. Thus, proxy bidders could conceivably make a margin when reselling the timber after the auction, without having

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<sup>305</sup> Canada's comments on the United States' response to Panel question No. 205, para. 159; second written submission, para. 68.

<sup>306</sup> Canfor initial questionnaire response, (Exhibit CAN-51 (BCI)), p. 105.

<sup>307</sup> Canada's second written submission, para. 67.

to lower their bids in the actual auction.<sup>308</sup> Even assuming that intention to resell the timber being auctioned causes one bidder to cast a lower bid, at the risk of losing the bid, there is no reason to assume that all bidders in a specific auction are bidding with such an intention and are consequently bidding lower than they ordinarily would. We consider therefore that there is no reason to assume that the winning bid in each auction would be suppressed unless all bidders are acting as a proxy for a firm excluded from direct participation in the auctions, even if we assumed that a proxy bidder bids lower than an ordinary auction participant would, as the United States suggests. Neither the United States nor the USDOC has provided record evidence that all bidders in certain auctions were proxy bidders. Hence, the USDOC's analysis does not explain why the bid at which a licence is sold will be lower because of the existence of the practice of proxy bidding, despite the presence of competing bidders. In response to a Panel question inviting the United States to respond to Canada's argument that the cutting rights fee will not lead any bidder to bid lower as "that would only open the door to another bidder at a higher price", the United States responded that a higher bid will not exist, as bids are limited by the prices that long-term licence holding sawmills were willing to pay.<sup>309</sup> We reject this argument because, as explained in section 7.3.3.2.1, the USDOC failed to explain how "bids are limited by the prices that long-term license holding sawmills were willing to pay".

7.141. We therefore conclude that the USDOC did not properly establish that the three-sale limit undermined the validity of BCTS auction prices as a benchmark.

### **7.3.3.2.3 Log export regulations**

7.142. In the preliminary determination, the USDOC found that the log export regulations imposed by the governments of Canada and British Columbia distort BCTS auction prices because "these restraints contribute to an overabundance of log supply that, in turn, depresses the prices that auction participants are willing to pay".<sup>310</sup> In the final determination, the USDOC reaffirmed this finding and further elaborated the reasons behind its conclusion that the log export regulations in British Columbia distorted BCTS auction prices.<sup>311</sup> The principal intermediate findings on which the USDOC's conclusion was based were:

- a. logs cannot be exported by default under the law in force in British Columbia, and an exemption must be sought from the proper authorities in order to export logs;
- b. the length of the process for seeking an exemption discourages exports;
- c. the in-lieu of manufacturing fees that are applied to a request for exemption before an exemption is granted restrain exports;
- d. the existence of the "blocking" system, whereby domestic timber processing firms can cause the denial of export authorization, forces log exporters to sell logs to domestic timber processors at lowered prices to prevent them from blocking their export exemption requests; and
- e. the export regulations affect timber prices in all of British Columbia, and not just the British Columbia coast.<sup>312</sup>

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<sup>308</sup> The fact that the entity that purchases a licence from the successful bidder would incur an additional expense in form of the cutting rights fee that it would not incur if it was bidding in the auctions directly, is immaterial to the validity of the BCTS auctions as a benchmark. If the amount of the winning bid is not lowered in spite of disqualification of certain firms from the auctions due to the three-sale limit, BCTS auction prices will remain a valid benchmark regardless of whether the disqualified firms have to incur an additional expense to purchase that licence from the actual winner of the auction that the firms would not have had to incur if they were participating in the auctions themselves.

<sup>309</sup> United States' response to Panel question No. 85, para. 264.

<sup>310</sup> Preliminary determination, (Exhibit CAN-8), p. 39.

<sup>311</sup> Final determination, (Exhibit CAN-10), pp. 139-149.

<sup>312</sup> Final determination, (Exhibit CAN-10), pp. 139-149.

7.143. The USDOC found that considered in their totality, these intermediate findings establish that the export regulations in operation in British Columbia restrain exports.<sup>313</sup>

7.144. Canada claims that the USDOC's conclusion was inconsistent with Article 14(d) of the SCM Agreement.<sup>314</sup> According to Canada, the record evidence demonstrated that the export regulations neither suppressed log exports, nor cast a downward pressure on timber prices in British Columbia, especially the interior region.<sup>315</sup> The United States argues that the USDOC's analysis conformed to the requirements of Article 14(d) of the SCM Agreement and its findings were supported by record evidence.<sup>316</sup>

7.145. We note that 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 recourse to out-of-country prices is warranted.<sup>317</sup> At the same time, the market from which the benchmark is selected need not be completely free of any government intervention.<sup>318</sup> 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.<sup>319</sup> 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.<sup>320</sup> 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.<sup>321</sup> We therefore consider that whether an export regulation could constitute a form of government intervention that distorts prices is a case-by-case assessment. The question before us, thus, is whether the USDOC provided a reasoned and adequate explanation for its determination that the export regulations distorted the BCTS auction prices in light of the evidence presented by the interested parties, while fully addressing the nature and complexities of the data on the record.

7.146. With these considerations in mind, we proceed to examine whether the USDOC adequately evaluated the record evidence in finding that the export regulations in force in British Columbia distorted the BCTS auction prices by suppressing log exports and provided a reasoned and adequate explanation for that finding. We will examine the USDOC's intermediate findings as well as its overall conclusion and the evidentiary basis for each.<sup>322</sup> We first examine the USDOC's intermediate findings regarding how the export regulations suppressed exports, before reviewing its findings concerning whether the price distortion, if any, caused by the export regulations would be limited to the British Columbia coast or would extend to the interior as well.

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<sup>313</sup> Final determination, (Exhibit CAN-10), p. 139.

<sup>314</sup> Canada's first written submission, para. 192.

<sup>315</sup> Canada's first written submission, paras. 198-201.

<sup>316</sup> United States' first written submission, paras. 391-393.

<sup>317</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.141.

<sup>318</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.135 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 87).

<sup>319</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.146.

<sup>320</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), paras. 5.154-5.155.

<sup>321</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.154.

<sup>322</sup> The Appellate Body has found that:

A key aspect of how a panel must review a determination relates to the evidentiary basis for both the intermediate factual findings made by a national authority, as well as for its overall conclusions. In its Report in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body considered how a panel is to review the evidentiary basis for findings when the overall conclusions are based on the authority's assessment of the totality of multiple pieces of circumstantial evidence. The Appellate Body observed that, even where the investigating authority draws its conclusion from the *totality* of the evidence, it will often be appropriate, or necessary, for a panel "to examine the sufficiency of the evidence supporting an investigating authority's conclusion ... by looking at each individual piece of evidence".

(Appellate Body Report, *US – Softwood Lumber VI* (Article 21.5 – Canada), para. 94 (emphasis original))

7.147. The USDOC reasoned that the presence of a law that requires log producers to sell to domestic consumers unless an exemption for exportation is granted renders exportation uncertain and discourages log-sellers from selling logs in the highest paying markets.<sup>323</sup> We consider that the requirement to obtain an exemption to export that log producers in British Columbia are subject to does make suppression of log exports likelier than would be the case had such regulations not existed. However, the mere existence of export regulations is not in itself sufficient to establish that the log export suppression induced by the export regulations distorted log prices, such that the BCTS auction prices could not be used as a benchmark. This is so because record evidence indicates that the exemption process is widely used and the vast majority of requests for exemption are approved, as evidenced by the fact that over 10,000 applications for exemption were made in the year 2015, over 99% of which were approved.<sup>324</sup> In order to determine whether the USDOC properly concluded that the export regulations suppressed log exports to the point that BCTS auction prices were consequently distorted, we will have to consider whether the USDOC's examination of record evidence other than the mere existence of the export regulations led to that conclusion.

7.148. We now proceed to examine the USDOC's finding that the operation of the "blocking system" in British Columbia restrains exports and suppresses log prices. We note that the USDOC found that pursuant to the "blocking system", consumers of logs in British Columbia could block a log exporter's application for a log export exemption by making a bid on the logs sought to be exported. According to the USDOC, log consumers exploited the "blocking system" by desisting from blocking exports as a *quid pro quo* for sale of logs by exporters to consumers at below market prices. This, in the USDOC's view, depresses log prices in British Columbia.<sup>325</sup> Canada argues that the fact that over 99% of applications for export were approved indicates that the "blocking system" does not meaningfully restrain exports.<sup>326</sup> We agree with the United States' argument that the USDOC correctly reasoned that this high approval rate does not imply that logs could be freely exported out of British Columbia if log producers are pressured into negotiating an informal agreement with domestic log consumers to sell logs at a lower price *before* applying for an export permit.<sup>327</sup> We will, however, examine whether the USDOC provided a sufficient evidentiary basis for its reasoning that the "blocking system" in operation in British Columbia led log exporters to reach such informal agreements with log consumers, even before the exporters initiate the process for obtaining authorization for exports, due to which only a small number of export applications were blocked.

7.149. The record evidence indicates that only 0.37% of log export applications made under federal jurisdiction and 0.46% of applications made under provincial jurisdiction were blocked.<sup>328</sup> We consider that in order for the USDOC's reasoning that the number of log export applications that are formally blocked is small because of informal agreements between exporters and consumers to be true, multiple prospective log exporters ought to have concluded such agreements with multiple potential domestic log consumers. If a consumer would block an exporter's export application without an informal agreement, then in order to avoid having any of its export applications blocked by any consumer, a particular log exporter would need to have secured an informal agreement with not just one, but all potential log consumers. If a potential log exporter reaches informal agreements only with certain log consumers and not with others, the export applications of that log exporter would remain vulnerable to being blocked by those consumers with whom the exporter did not reach an informal agreement. Thus, if the USDOC's reasoning is correct, the minuscule number of blocked applications in British Columbia would mean that almost all exporters reached informal agreements with almost all consumers. Had a significant percentage of exporters not reached informal agreements, their export applications would have been blocked, and the percentage of blocked applications for British Columbia as a whole would be non-trivial. Therefore, for the United States' contention that more than 99% of export applications were not blocked because log exporters had reached informal agreements with log consumers prior to the initiation of the application to be correct, informal agreements among consumers and exporters need to be widely pervasive in British Columbia. The question before us is whether the evidence offered by the USDOC

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<sup>323</sup> Final determination, (Exhibit CAN-10), p. 142.

<sup>324</sup> Canada's first written submission, paras. 201 and 203; opening statement at the first meeting of the Panel (26 February 2019), para. 75; and Canada's presentation at first meeting (26 February 2019), (Exhibit CAN-525), p. 46.

<sup>325</sup> Final determination, (Exhibit CAN-10), pp. 140-141.

<sup>326</sup> Canada's first written submission, para. 203.

<sup>327</sup> United States' first written submission, para. 395.

<sup>328</sup> Overview of the BC export process, (Exhibit CAN-72 (BCI)), pp. 18-19. (18 out of 4844 export applications made under the federal jurisdiction and 28 out of 6049 applications made under the provincial jurisdiction were blocked during the POI).

establishes the degree of pervasiveness of such agreements in British Columbia that an objective and unbiased authority would have relied on in reaching the conclusion that the USDOC did.

7.150. We note that the United States has pointed to the following pieces of evidence from which the USDOC inferred that log exporters in British Columbia enter into informal agreements with domestic log consumers to avoid having their export applications blocked (a) evidence from log exporter Merill & Ring submitted in investment arbitration against the government of Canada; (b) a September 2014 article in a timber industry publication by BC logging company TimberWest; (c) an article by Eric Miller, Global Fellow at the Woodrow Wilson International Center for Scholars' Canada Institute (Wilson Center article); and (d) a report entitled "Generating More Wealth from British Columbia's Timber: A Review of British Columbia's Log Export Policies" (British Columbia Log Export Policies Report).<sup>329</sup> We will review whether these pieces of evidence, either individually or taken together, suffice to show that such informal agreements were a pervasive occurrence in British Columbia. We note that the evidence concerning Merill & Ring and TimberWest is the only firm-specific evidence that the USDOC cited to in relation to informal agreements. We further note that, as Canada points out, the evidence concerning TimberWest is an opinion piece that does not explicitly state anything about informal agreements.<sup>330</sup> The United States argues that TimberWest's description of selling "at a loss into the artificially depressed domestic market" to "satisfy domestic demand" prior to "obtain[ing] an export permit" is a description of TimberWest's experience with informal agreements.<sup>331</sup> We disagree. We understand the statements in the TimberWest piece that the United States underscores to refer to the effects of the log export regulation related processes designed by the government, and not to informal agreements.<sup>332</sup> We are, therefore, of the view that the TimberWest article does not support the USDOC's findings concerning informal agreements. We also note that while the Wilson Center article does refer generally to the existence of informal agreements, it does not provide any citations in support of its observations. The article attributes the observations concerning informal agreements to "a number of industry players that spoke on the condition of anonymity", but states that only "some harvesters" are forced to sell at unprofitable prices.<sup>333</sup> Thus, this article does not speak to the pervasiveness of informal agreements.<sup>334</sup> Further, we ascribe only limited weight to the British Columbia Log Export Policies Report as that report was prepared in December 2006, that is well before the POI.<sup>335</sup> In our view, therefore, that report may not be a reliable reflection of the situation in the relevant log market during the POI. As regards the evidence concerning Merill & Ring, we note that the evidence directly states that Merill & Ring was forced to enter informal agreements.<sup>336</sup> However, as stated above, the question before us is whether the evidence referred to by the USDOC was adequate for an objective and unbiased authority to consider that informal agreements existed between a multitude of log exporters and log consumers *inter se*. In our view, none of the evidence referred to by the USDOC, individually or taken together, suffices in that respect.<sup>337</sup>

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<sup>329</sup> United States' response to Panel question No. 78, paras. 245-248.

<sup>330</sup> Canada's response to the Panel question No. 208, para. 134.

<sup>331</sup> United States' comments on Canada's response to Panel question No. 208, paras. 112-113 (referring to Petition, (Exhibit USA-10), exhibit 252: TimberWest article, p. 153).

<sup>332</sup> We note that while the TimberWest article notes that log exporters are forced to sell logs at depressed prices in the domestic market, the article refers to British Columbia's log export regulations that mandate fulfilment of domestic demand before exportation could be permitted as the cause of such domestic sales. The article also states that the fairness-review mechanism, whereby a government-appointed committee reviews the fairness of the price offered by a domestic purchaser seeking to block an export application, lacks transparency and that the committee in some cases deems an offer to be "fair" even if the offer is less than half of the price that the international market would pay for the same log at the same place. The article, however, does not describe "informal agreements" of the sort that in the USDOC's view caused log exporters to lower their export volumes and domestic prices.

<sup>333</sup> Emphasis added.

<sup>334</sup> Petition, (Exhibit USA-10), exhibit 252: TimberWest article.

<sup>335</sup> Petition, (Exhibit USA-10), exhibit 242, p. 5.

<sup>336</sup> Petitioners' comments on Canada initial questionnaire response, (Exhibit USA-19), exhibit 11, pp. 134-136. We also note that Canada has pointed out that both TimberWest and Merill & Ring operate on the British Columbia coast, and not in the British Columbia interior. (Canada's response to Panel question No. 208, para. 138).

<sup>337</sup> We note that Canada has argued that certain affidavits by two log exporters from the British Columbia interior that were on the record before the USDOC also suggest that exports were not suppressed due to informal agreements. (Canada's response to Panel question No. 208, para. 138). We consider, however, that those affidavits describe the exporters' experiences with the LEP process designed by the government, and are silent on whether the exporters entered into any informal agreements with domestic

7.151. Moreover, we consider that the existence of unutilized export authorizations is contrary evidence that the USDOC did not sufficiently examine.<sup>338, 339</sup> The United States acknowledges that domestic log consumers can no longer prevent log exports once an export authorization is granted.<sup>340</sup> Further, nothing in the USDOC's determination addresses the possibility that unutilized export authorizations indicate that log exporters were able to export as much as the export market required.<sup>341</sup> This unaddressed possibility further undermines the USDOC's reasoning that the "blocking system" or informal agreements restrained log exports from British Columbia because if exporters were not able to export all of the logs that they were authorized to export, nothing in the USDOC's analysis suggests that they would have been able to export any additional volume of logs that may have become available for exportation in absence of the "blocking system" or informal agreements.

7.152. In light of our analysis of the specific pieces of evidence concerning informal agreements relied on by the USDOC, individually and taken together, and the existence of unutilized export authorizations that indicate that informal agreements may not have constrained log exporters from exporting the amount of logs they wanted, we consider that the USDOC failed to offer sufficient evidence demonstrating the existence of informal agreements among a multitude of log exporters and consumers in British Columbia *inter se*. In absence of such evidence, the USDOC did not have any valid basis to find that the high approval rate for export applications was attributable to the existence of a multitude of informal agreements between log exporters and log consumers, leaving open the possibility that log consumers chose not to block export applications despite not having informal agreements with certain exporters for commercial reasons. This undermines the USDOC's intermediate finding that the existence of the "blocking system" in British Columbia led to suppression of log exports.

7.153. We next review the USDOC's findings that (a) the duration of the process for obtaining the log export exemption discouraged exports; and (b) the in-lieu of manufacturing fees hindered log exports and contributed to distortion of log prices in British Columbia.<sup>342</sup> We note that Canada has established that the record evidence demonstrates that the processing time for exemption requests was frequently considerably less than the 7 to 13 weeks estimated by the USDOC.<sup>343</sup> The United States has not rebutted the validity of this evidence.

7.154. As regards the USDOC's finding that in-lieu of manufacturing fees contributed to the suppression of exports, Canada argues that the in-lieu of manufacturing fees did not present a meaningful obstacle to exports.<sup>344</sup> Canada points out that the fee does not apply to exports that arise from the lands under federal jurisdiction, which represented 43% of all log exports from

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log consumers before applying for export authorizations. Hence, we do not consider those affidavits to be pertinent to the question at hand.

<sup>338</sup> Canada's response to Panel question No. 123, para. 342. Canada has shown that even after obtaining permission to export, exporters in the southern interior did not export [[\*\*\*]] of the logs that they were permitted to export. (Canada's response to Panel question No. 91, para. 270). We note that Canada has also referred to the affidavit [[\*\*\*]], which noted that "[[\*\*\*]]". ([[\*\*\*]] affidavit, (Exhibit CAN-35 (BCI)), para. 13). We consider that this evidence indicates that potential log exporters did not fully utilize their export authorizations because they could find a better price in the domestic market compared to the export market.

<sup>339</sup> We understand the United States to argue that the combined effect of the export regulations in British Columbia, which allowed domestic log consumers to block export authorization applications from log exporters, and the informal agreements between exporters and consumers, was the suppression of log exports from British Columbia. This is because due to the informal agreements, exporters agreed "to lower their export volumes" to avoid blockage of their export authorization applications by domestic consumers. (United States' first written submission, para. 394).

<sup>340</sup> United States' response to Panel question No. 209, para. 194.

<sup>341</sup> Record evidence indicates that [[\*\*\*]] of volume of logs authorized to be exported from British Columbia coast and [[\*\*\*]] of the volume of logs authorized to be exported from the interior was not in fact exported. (Overview of the BC export process, (Exhibit CAN-72 (BCI)), p. 20).

<sup>342</sup> Final determination, (Exhibit CAN-10), pp. 141-142 (referring to Preliminary determination, (Exhibit CAN-8), p. 54).

<sup>343</sup> Canada's response to Panel question No. 124, para. 353. Evidence adduced by Canada shows that during the POI, 86.1% of the federal applications and 86% of the volume of logs advertised provincially were authorized for exports within 2 to 3 weeks. (Time between advertising list date and federal surplus decision authorizing export in POI, (Exhibit CAN-91); British Columbia initial questionnaire response on LEP, (Exhibit CAN-49 (BCI)), p. LEP-19). Canada also refers to affidavits of exporters from the southern interior who also stated that [[\*\*\*]]. ([[\*\*\*]] affidavit, (Exhibit CAN-68 (BCI)), paras. 8-9; [[\*\*\*]] affidavit, (Exhibit CAN-35 (BCI)), paras. 10 and 12).

<sup>344</sup> Canada's first written submission, para. 204.

British Columbia in 2015, and that exports from the British Columbia interior are subject to only a nominal fee.<sup>345</sup> The United States defends the USDOC's finding arguing that the in-lieu of manufacturing fees necessarily increased the cost of exporting logs, thereby contributing to suppression of exports.<sup>346</sup> We consider that the United States has not shown why the payment of the fee would suppress exports, when a significant proportion of log producers did not export logs despite having received the requisite export permits and having paid the in-lieu of manufacturing fees.<sup>347</sup> We also consider that the duration of the process for log export exemption was not a determinative factor in log producers' export decisions for the same reason.<sup>348</sup> We note that the United States acknowledges that the USDOC did not explain why the in-lieu of manufacturing fees and the duration of the log export exemption process can be considered to suppress exports when a significant percentage of log producers' export authorizations remained unutilized, even though the producers paid the fees and went through the export authorization process.<sup>349</sup> If the record showed that all the export authorizations were in fact utilized by log producers, an investigating authority may reasonably have taken the view that in absence of the fees in-lieu or a potentially lengthy authorization process, even more export authorizations might have been requested by log producers. In such a scenario, the fees and the duration associated with the log export authorization process could plausibly be suggested as being suppressive of exports. However, the record before us shows that log producers exported less than what they were authorized to export. For this reason, we are unable to accept that the USDOC could properly have found that the fees-in-lieu or the duration of the process could have contributed to suppression of exports. As log producers did not fully utilize the authorizations that they had already acquired, we fail to see how they would export more even if they could get authorizations to export additional volumes of logs without paying any fees. We therefore consider that the USDOC did not establish that the fees in-lieu and the potentially lengthy duration of the export authorization process contributed to the suppression of log exports from British Columbia.

7.155. In light of the foregoing analysis of different individual intermediate findings, which together constituted the basis for the USDOC's conclusion that export regulations operating in British Columbia restrained log exports and therefore caused the distortion of BCTS auction prices, we are of the view that the USDOC did not reasonably and adequately explain that conclusion. We note that since in this case the alleged link between the government intervention, i.e. the export regulations, and the purported price distortion, i.e. lowered BCTS auction prices, was indirect, the USDOC was required to provide a particularly detailed analysis and explanation substantiating any link between the two.<sup>350</sup> We find, for the reasons described above, that the USDOC's analysis and explanation failed to satisfy this standard, and thus conclude that the USDOC's finding that the export regulations distorted the BCTS auction prices was based on insufficient evidence.

#### **7.3.3.2.4 Whether the log export regulation impacted the British Columbia interior**

7.156. Having found that the USDOC did not provide a reasoned and adequate explanation for how log export regulations suppressed exports and distorted log prices, we need not consider the parties' arguments concerning whether the export regulation affected log prices in the British Columbia interior. However, we examine the parties' arguments on that issue in this section of the Panel Report, keeping in view the possibility that on implementation of our report, the USDOC may reaffirm its finding that export regulations in British Columbia suppressed exports and distorted log prices with evidence and explanations that are sufficient to support those findings. In that case, whether log export regulations could be considered to distort auction prices from the British Columbia interior will depend on whether the impact of the regulations will extend to the British Columbia interior.

7.157. Before the USDOC, the Canadian interested parties argued that the impact of log export regulations in British Columbia, assuming *arguendo* that there was any, would be limited to the British Columbia coast, and would not extend to the British Columbia interior. The USDOC, however,

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<sup>345</sup> Canada's first written submission, para. 204 and fn 347.

<sup>346</sup> United States' response to Panel question No. 124, para. 374.

<sup>347</sup> Canada's response to Panel question No. 91, para. 270.

<sup>348</sup> We note that Canada has produced record evidence demonstrating that the processing time for export authorization request was frequently considerably less than the 7 to 13 weeks estimated by the USDOC. (Canada's response to Panel question No. 124, para. 353; Final determination, (Exhibit CAN-10), fn 851). The United States has not rebutted the validity of this evidence.

<sup>349</sup> United States' response to Panel question No. 209, para. 204.

<sup>350</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.154.

concluded that the log export regulations in British Columbia would also impact the British Columbia interior for the following two reasons (a) the export regulations affect the interior directly, as a significant percentage of British Columbia's overall log exports comes from the interior; and (b) the impact of export regulations on the coast would "ripple" through to the interior.<sup>351</sup> We examine the adequacy of the USDOC's reasoning in respect of both of these reasons in turn below.

#### **7.3.3.2.4.1 Whether log export regulations impact the British Columbia interior directly**

7.158. Canada argues that the impact of export regulations would not extend to the British Columbia interior. According to Canada, the USDOC wrongly relied on exports from the Tidewater region of British Columbia to support its finding that a significant percentage of exports from British Columbia came from the interior.<sup>352</sup> Canada submits that the USDOC was mistaken in treating the Tidewater as a part of the interior, because the Tidewater is economically, geographically, and ecologically distinct from the interior.<sup>353</sup> Canada also argues that due to geographic barriers and high transportation costs, the exportation of logs from the non-Tidewater interior was uneconomic.<sup>354</sup>

7.159. We first examine the parties' arguments and the USDOC's findings concerning whether the Tidewater region was a part of the interior. The USDOC noted in the final determination that the Canadian interested parties did not argue before it that the log market in the Tidewater portion of the interior is a separate market unique from the rest of the interior.<sup>355</sup> The USDOC also found that exports from the Tidewater interior account for approximately 8% of the total exports from the entire province and exports from the southern interior account for approximately 2% of the total exports from the entire province, together constituting a significant amount of total exports from the province.<sup>356</sup> We note that if, as Canada contends, the Tidewater was a separate market that was distinct from the interior, the USDOC's finding that exports from the interior "account for a significant amount of the total exports from the entire province" would be undermined.<sup>357</sup> This is because the 8% of British Columbia's overall exports that came from the Tidewater could no longer be counted as exports from the interior, thus leaving the interior's share in overall exports from British Columbia at 2%.<sup>358</sup> In order to determine whether the USDOC properly considered exports from the Tidewater as being exports from the interior, we will need to ascertain whether the Canadian respondents had put forth evidence before the USDOC that supported the view that the Tidewater was not the same market as the interior and whether the USDOC properly engaged with that evidence.

7.160. We note that Canada has pointed to evidence on the USDOC's record that purported to identify differences between the Tidewater and the interior that make the two regions separate markets.<sup>359</sup> The USDOC's determination does not engage substantively with this evidence. Although

<sup>351</sup> United States' first written submission, para. 398.

<sup>352</sup> Canada's first written submission, para. 209.

<sup>353</sup> Canada's first written submission, para. 209.

<sup>354</sup> Canada's first written submission, paras. 211-212; second written submission, para. 83.

<sup>355</sup> Final determination, (Exhibit CAN-10), p. 147.

<sup>356</sup> Final determination, (Exhibit CAN-10), pp. 147-148.

<sup>357</sup> Final determination, (Exhibit CAN-10), pp. 147-148.

<sup>358</sup> We note that the USDOC also alluded to "some requests to export BC logs to Alberta during the POI", which the USDOC "presume[d]" to have come from eastern portion of the interior. (Final determination, (Exhibit CAN-10), fn 884). However, the USDOC does not specify whether such requests converted to actual exports and does not give any indication as to the quantity of logs in respect of which the requests were made as a proportion of overall exports from British Columbia.

<sup>359</sup> Canada's response to Panel question No. 284, para. 11; first written submission, paras. 211-212. We note that Canada has pointed to the following record evidence that was relevant to the issue of differences between the Tidewater region and the interior: Bustard Report, (Exhibit CAN-17), pp. 5, 8-9, and 25 (showing difference between the two regions in predominant geographic features, available log transportation methods, and diameter of harvested logs, and suggesting that there is low demand for logs from mills in the Tidewater region); British Columbia initial questionnaire response on LEP, (Exhibit CAN-49 (BCI)), pp. LEP-5, LEP-27, and LEP-43 (pertaining to transportation methods and costs, noting that "[m]ost transportation of logs on the Coast (and the Tidewater region of the Interior) is by water, which is relatively inexpensive. In the non-Tidewater Interior, on the other hand, most logs are moved by truck, which is a great deal more costly"; also explaining that while exports from the Tidewater region are transported to the coast and exported in the same manner as coastal exports, exports from the southern interior are made in a manner that "does not differ greatly" from domestic sales); British Columbia verification of questionnaire response, (Exhibit CAN-88), p. 18 (noting that the Tidewater was "near enough to the coast that it does not present the same

the USDOC notes that the Canadian interested parties did not argue that the Tidewater was a distinct market from the interior, the nature and amount of record evidence before the USDOC would have led an objective and unbiased investigating authority to examine this issue more closely, engage with the evidence, and provide a reasoned and adequate basis for its conclusion on this issue.<sup>360</sup> As the USDOC did not do so, we consider that the USDOC did not provide a reasoned and adequate basis for its determination that the Tidewater was not a separate market from the interior, and for considering that exports from the Tidewater could be counted as exports from the interior.

7.161. Consequently, the USDOC did not have a valid basis for considering that exports from the interior accounted for 10% of total exports from British Columbia. As exports from the southern interior accounted for only 2% of overall exports from British Columbia, we consider the USDOC's reasoning that log export regulations in British Columbia would have a direct impact on log prices from British Columbia was also flawed. Our view is in keeping with the Appellate Body's finding that a benchmark need not be completely free of any distortion and that not any effect of government intervention on prices could be considered price distortion. Further, the Appellate Body has noted, and we agree, 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.<sup>361</sup> We consider that the USDOC's analysis and explanation concerning whether exports from the interior were "significant" in amount and whether log export regulations in British Columbia will have a direct impact on the interior did not satisfy this standard.

7.162. Canada has also argued, pointing to record evidence, that the potential for exportation from the interior was small.<sup>362</sup> Canada offered evidence that suggests that due to geographic conditions and the long distances involved, the transportation of logs to the United States from southern British Columbia to the border was particularly expensive, thus inhibiting exportation.<sup>363</sup> Canada argues that due to the high transportation costs and low demand for logs from the interior in export markets, less than 0.5% of the interior harvest was permitted for exports, and even less was actually exported.<sup>364</sup> We note that aside from the following footnote in the final determination that the United States points to, the determination does not address this evidence concerning the exportability of logs from the non-Tidewater interior:

In this exhibit, the petitioner provided a map, in which a 100-mile radius is drawn around the sawmills in the BC interior, which demonstrates that the BC interior sawmills all overlap with each other. We note that this figure is consistent with the findings of the [Government of Canada/Government of British Columbia] GOC/GBC's own expert, as the Bustard Report states that "[i]n most Interior areas it is economically feasible to truck export logs for up to about a 7-hour return cycle from harvest sites. This represents approximately a 228 km (142 mile) each way."<sup>365</sup>

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transportation challenges as the rest of the interior"); and Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), pp. 69, 71, 73, and 76-77 (noting about transportation conditions that "[t]he Tidewater Interior is that portion of the Interior adjacent to the northern Coast of BC and to portions of the panhandle of Alaska that is technically part of the Interior but can economically reach Tidewater ports (typically Prince Rupert or Stewart) on the northern Coast due to short enough trucking hauls from point of harvest" and about forest types that "[t]he forest in the Tidewater Interior area is much more like Coastal forests than the remainder of the Interior"; describing conditions of demand in the Tidewater region).

<sup>360</sup> We note that the fact that the USDOC noted that the Canadian interested parties did not argue that the Tidewater was a separate market from the interior indicates that the USDOC was aware that such an argument could conceivably be made. We consider that this awareness would cause an objective and unbiased investigating authority to explore this issue substantively.

<sup>361</sup> See, above, para. 7.145.

<sup>362</sup> Canada's first written submission, para. 209 (referring to Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), pp. 51 and 59).

<sup>363</sup> British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), p. BC-I-48; [[\*\*\*]] affidavit, (Exhibit CAN-33 (BCI)), para. 53; Larry Gardner affidavit, (Exhibit CAN-31 (BCI)), paras. 43-45; Mark Feldinger affidavit, (Exhibit CAN-34 (BCI)), para. 9; and Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), p. 62.

<sup>364</sup> Canada's first written submission, para. 212.

<sup>365</sup> United States' response to Panel question No. 284, para. 8 (referring to Final determination, (Exhibit CAN-10), fn 886).

According to the United States, the overlapping radii of sawmills "transcend [] the British Columbia borders with the United States and Alberta", thus showing that it is possible to export logs from the southern interior.<sup>366</sup>

7.163. We agree with Canada that the mills' overlapping radii as drawn on a map do not take into account "the realities of actual road miles and mountain ranges that exist in the province".<sup>367</sup> Evidence produced by Canada suggests that even if the distance between two mills as the crow flies was less than or equal to 100 miles, the actual path connecting the two mills is intractable due to geographical features such as mountains.<sup>368</sup> We further note that the USDOC's reliance on the quote from the Bustard Report in the footnote above to support its view that it was economic to export logs from the interior is erroneous, because the Bustard Report goes on to note that "[t]he long haul distance required to transport logs to the point where they can be loaded onto a ship or trucked across the BC-US border means that few logs from the BC Interior can be economically exported".<sup>369</sup> Thus, the Bustard Report in fact undermines the USDOC's view instead of supporting it. We therefore consider that nothing in the USDOC's determination properly engaged with the record evidence identified by Canada that suggests that exportation of logs from the non-Tidewater interior was uneconomic, resulting in the low volume of export logs from the interior.

7.164. Because the USDOC did not properly establish that the Tidewater region was not a separate market from the interior, and because the USDOC did not sufficiently engage with the evidence concerning the low exportability of logs from the non-Tidewater interior, we consider that the USDOC's finding that "log export restraints directly impact the interior region of BC – regardless of any ripple effect from the coast to the interior" was not based on a reasoned and adequate explanation and was thus flawed.<sup>370</sup>

#### **7.3.3.2.4.2 Whether the impact of log export regulations will "ripple" through from the coast to the interior**

7.165. Canada argues that the USDOC's determination that the effect of log export regulations will "ripple" through to the interior (ripple-through analysis) was flawed for three reasons (a) the ripple-through analysis ignored the physical separation and the lack of economic transportation between these two markets; (b) the USDOC did not address the point that any alleged price impact would be limited to a subset of coastal species; and (c) the USDOC's premise that prices for similar logs will equalize across different markets was inaccurate.<sup>371</sup> We evaluate the merits of Canada's arguments concerning each of the three alleged flaws in the USDOC's ripple-through analysis below.

##### ***Physical separation between coastal and interior markets***

7.166. In the final determination, the USDOC responded to the arguments concerning the lack of physical connection and economic transportation options between the coast and the interior by finding that the Tidewater region was connected to the coast and that there were no mountain ranges separating these two parts of British Columbia.<sup>372</sup> The USDOC also found that there are at least seven highways that cross between the coast and the interior, and the respondents had mills along these highways.<sup>373</sup>

7.167. We consider that to the extent that the USDOC's rejection of arguments concerning the availability of transportation options between the coast and the interior was based on the availability of transportation options between the Tidewater and the coast, the USDOC's reasoning was flawed.

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<sup>366</sup> United States' response to Panel question No. 284, para. 8.

<sup>367</sup> Canada's comments on the United States' response to Panel question No. 284, para. 5.

<sup>368</sup> Canada's comments on the United States' response to Panel question No. 284, para. 5 (referring to Kalt response on LEPs, (Exhibit CAN-90 (BCI)), p. 10 (that states that "[p]etitioner's circles are 'as the crow flies' miles which ignore the realities of limited road networks and actual road miles over often mountainous terrain, including the series of northwest-to-southeast parallel valleys and mountain ranges in Southern Interior BC. Such realities increase hauling costs, limit east-west transportation in the Southern Interior, and reduce economically feasible hauling distances."))

<sup>369</sup> Bustard Report, (Exhibit CAN-17 (BCI)), p. 12.

<sup>370</sup> Final determination, (Exhibit CAN-10), p. 147.

<sup>371</sup> Canada's first written submission, paras. 215, 217, and 220.

<sup>372</sup> Final determination, (Exhibit CAN-10), p. 147.

<sup>373</sup> Final determination, (Exhibit CAN-10), p. 147.

As noted above, the USDOC did not provide a reasoned and adequate basis for treating the Tidewater region as a part of the interior. Therefore, we do not consider that the existence of transportation linkages between the Tidewater region and the coast implies that the coast was sufficiently connected to the interior for economic transportation of logs.

7.168. As regards the USDOC's reasoning that there were several highways connecting the coast and the interior along which the respondents maintained mills, we consider that the USDOC's reasoning was based on an incomplete examination of all relevant evidence. Nothing in the USDOC's determination responds to the evidence on the record identified by Canada that shows that there was very little log flow between the coast and the interior.<sup>374</sup> Notwithstanding the presence of highways connecting the coast and the interior, we consider that an objective and unbiased investigating authority would also engage with evidence that demonstrates that there was minimal log flow between the two markets before reaching a determination that the impact of log export regulations on log prices on the coast would ripple-through to the interior. Thus, we conclude that the USDOC did not provide a reasoned and adequate explanation for rejecting the Canadian interested parties' arguments concerning the lack of economic transportation options between the coast and the interior.<sup>375</sup>

#### ***Whether price impact would be limited to a subset of coastal species***

7.169. In the underlying investigation, the Canadian interested parties argued before the USDOC that any ripple effect of the log export regulations would be confined to coastal species, which differ from the predominant interior species.<sup>376</sup> The USDOC found that even though logs in the coast and the interior are not identical in their species composition, they are nevertheless interchangeable, and hence any direct impact of the log export regulations on one species will have an indirect impact on other species in the province.<sup>377</sup>

7.170. Canada argues that the USDOC's reasoning was flawed, since most coastal species, including Douglas-fir, balsam, cedar, and hemlock, are not used to produce SPF softwood lumber.<sup>378</sup> Canada also submits that species used to produce SPF lumber comprised approximately 83% of the interior harvest, while those species accounted for less than 1% of the coastal market. Thus, Canada argues there is no overlap between coastal species and the interior species with respect to species used to produce SPF lumber.<sup>379</sup> Canada also asserts that one species that is found in the coast as well as the interior, i.e. Douglas-fir, represented 29% of the coastal harvest, but only 9% of the interior harvest. Canada argues that the USDOC did not explain why an indirect impact on a species that comprised 9% of the interior harvest, that does not produce SPF lumber, can cause substantial distortion of prices for logs of all species in the interior.<sup>380</sup>

7.171. Canada also assails the USDOC's finding that "hemlock and fir species are substitutable for SPF" and that "all three types of species are used to produce similar products, including lumber". Canada argues that the substitutability that the USDOC relied on relates to the downstream product, i.e. lumber, and not the input product, i.e. logs.<sup>381</sup> Canada argues that while hem-fir lumber may be substitutable for certain end-use purposes with certain SPF lumber, this does not mean that mills treat logs of the two species-sets as interchangeable inputs.

7.172. The United States contends that the USDOC properly rejected the Canadian interested parties' argument that any impact of log export regulations will be limited to coastal species as (a) some species overlapped between the coast and the interior harvests; and (b) other species

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<sup>374</sup> Canada has cited to affidavits from Canfor, [[\*\*\*]], [[\*\*\*]], Tolko, and West Fraser, all of which suggest that geographic separation and transportation costs make transfer of logs between the coast and the interior uneconomic. (Canada's first written submission, para. 215 and table 1).

<sup>375</sup> We note that the USDOC also stated that its ripple-through analysis was not dependent on the existence or absence of transportation corridors. We will therefore make a determination as to the overall consistency of the USDOC's ripple-through analysis only after examining the other bases on which the ripple-through analysis rested, and the validity of which Canada has disputed.

<sup>376</sup> Final determination, (Exhibit CAN-10), p. 146.

<sup>377</sup> Final determination, (Exhibit CAN-10), p. 146.

<sup>378</sup> Canada's first written submission, para. 219.

<sup>379</sup> Canada's response to Panel question No. 86, para. 263.

<sup>380</sup> Canada's response to Panel question No. 86, para. 264.

<sup>381</sup> Canada's response to Panel question No. 86, para. 265.

were substitutable for each other and were used to produce similar products, including lumber.<sup>382</sup> The United States also points to the USDOC's finding that both the coast and interior had significant volumes of balsam, cedar, fir, and hemlock.<sup>383</sup> The United States also points to record information concerning the substitutability between coastal species and interior species.<sup>384</sup>

7.173. We note that the USDOC found that the species that are found in both regions are "balsam, cedar, fir and hemlock".<sup>385</sup> Canada produced evidence that indicates that these four species taken together constituted 93% of coastal harvest, but only 23% of interior harvest.<sup>386</sup> Further, we note that Canada has argued, and the United States does not contest, that none of these species is used to produce SPF lumber.<sup>387</sup> We agree with Canada that the interchangeability of lumber products created from the coastal species and the interior SPF species for certain end uses does not imply that logs of these species are interchangeable as inputs for producing lumber. Canada has pointed to record evidence that shows that mills are designed to process the kind of logs that are found in their proximity.<sup>388</sup> As coastal species constitute only a minority of species in the interior, and the dominant species of the interior are not found in the coast<sup>389</sup>, the record evidence referred to by Canada suggests that mills in the interior are not adapted to process logs of the coastal species as their input. Nothing in the USDOC's determination engages with the evidence referred to by Canada in this regard, even though that evidence is directly pertinent to the question of whether coastal species are substitutable as inputs to lumber production for interior species. We therefore consider that the USDOC's rejection of the Canadian interested parties' argument that the impact of log export regulations will be limited to the coastal species and will not affect prices of species used by mills in the interior to not be reasoned and adequate.

#### ***Whether prices for logs will equalize across different markets***

7.174. In the final determination, the USDOC rejected the Canadian interested parties' argument that logs do not follow the "law of one price".<sup>390</sup> The USDOC noted that there was "conflicting evidence" on this question. While the Canadian interested parties had relied on the Kalt Report and the Leamer Report for the proposition that logs do not follow the law of one price, the USDOC noted that those reports were prepared specifically for the purposes of the underlying investigation and hence were potentially biased. The USDOC decided to ascribe greater weight to "numerous other independent reports" that indicated that log markets covering large areas can be integrated.<sup>391</sup> The USDOC noted as "additional support" that logs harvested in Québec and New Brunswick were traded across other provinces and the United States, and the Government of New Brunswick indicated that the log market in New Brunswick is integrated with the surrounding region.<sup>392</sup>

7.175. Canada argues that record evidence showed that prices for logs of the same species and grade would not be transmitted between the coast and the interior, or even between all regions

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<sup>382</sup> United States' first written submission, para. 400.

<sup>383</sup> Final determination, (Exhibit CAN-10), p. 146.

<sup>384</sup> United States' response to Panel question No. 86, para. 267.

<sup>385</sup> Final determination, (Exhibit CAN-10), p. 146.

<sup>386</sup> Summary of BC harvest data, (Exhibit CAN-29).

<sup>387</sup> Canada's first written submission, paras. 109 and 219 (referring to Summary of BC harvest data, (Exhibit CAN-29)).

<sup>388</sup> Canada's response to Panel question No. 86, para. 265 (referring to British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), p. BC-I-56 (noting that "[t]o minimize transportation costs, mills in British Columbia Interior and the United States are not only dispersed, but they also become specialized to the use of logs of the type most readily accessible to them. ... Even though the predominant output of British Columbia Interior as a whole is SPF, mills specialize to maximize returns from characteristics of the particular region in which they source their input, and thus it becomes costly to alter their input diet"); Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), p. 19 (noting that "[i]n both the Interior and the Coast, the design and operation of mills reflect the harvest and logs available to them. Mills match their capital and operations to the available log diet, consistent with expectations about prices and demand in the lumber markets, and competition from other mills. ... Given the large differences between the available harvest on the Coast and in the Interior, mills show substantial differences in specialization in terms of log diets and products"); Jendro and Hart Report, (Exhibit CAN-20 (BCI)), pp. 19-20 ("[t]he mix of species in an area also affects the types and design of manufacturing facilities installed in that area, which in turn affects the demand and price for logs harvested in that area"); and [[\*\*\*]] affidavit, (Exhibit CAN-33 (BCI)), para. 54 ("[[\*\*\*]]").

<sup>389</sup> Canada's first written submission, para. 110.

<sup>390</sup> Final determination, (Exhibit CAN-10), p. 145. The law of one price, as noted by the USDOC, implies that logs of the same species and grade will have the same price at all locations.

<sup>391</sup> Final determination, (Exhibit CAN-10), p. 145.

<sup>392</sup> Final determination, (Exhibit CAN-10), pp. 145-146.

within the interior.<sup>393</sup> Canada points to Dr Kalt's analysis in the Kalt Report that shows that SPF sawlog prices varied significantly across different regions of the interior itself.<sup>394</sup> Dr Kalt further explained that log prices do not transmit from one region to the next due to local changes in supply and demand.<sup>395</sup> Canada also posits that Dr Kalt showed through a statistical analysis of SPF log prices that changes in local log market conditions do not ripple to adjacent markets.<sup>396</sup> In support of its view, Canada has also referred to the Leamer Report and the Jendro and Hart Report.<sup>397</sup> Moreover, Canada points to the statements of Mr Gardner of West Fraser, who in an affidavit stated that the prices that West Fraser paid for logs varied substantially between different regions of British Columbia.<sup>398</sup>

7.176. The USDOC rejected the Canadian interested parties' reliance on the reports on the ground that the reports were potentially biased as they were specifically commissioned for the underlying investigation.<sup>399</sup> We consider that the USDOC's summary dismissal of the reports that the Canadian interested parties relied on was improper. In our view, despite the fact that the reports were prepared for the purposes of the underlying investigation, an objective and unbiased investigating authority would engage with the contents of the reports and the reasoning and data contained therein, and will not reject the reports without doing so.<sup>400</sup> The United States argues that the USDOC properly rejected the argument that log prices would not equalize across the coast and the interior, as it relied on independent studies that confirmed the existence of the law of one price, contrary to the conclusions of the Kalt Report and the Leamer Report.<sup>401</sup> We agree with Canada that the studies that the USDOC relied upon pertained to markets in Scandinavia and southeastern states of the United States, and were therefore not directly relevant to the question whether the law of one price applies across the coast and the interior regions of British Columbia.<sup>402</sup> On the other hand, the reports that Canada relies on pertained specifically to British Columbia. In our view, the conditions due to which log markets across large areas were integrated in the regions studied in the reports that the USDOC relied on need not be the same as the conditions in British Columbia. Indeed, the USDOC neither made a determination that the conditions in the regions studied in the reports that it relied on were the same as those in British Columbia, nor explained why the conclusions of reports concerning distant areas would necessarily apply to British Columbia as well. Furthermore, Canada also points to the critiques of the studies relied upon by the USDOC authored by Dr Kalt and Dr Leamer.<sup>403</sup> We note that the USDOC did not engage with the critiques of the statistical methods used in the studies that the USDOC relied on that Canada has pointed to. We consider that in absence of any engagement with those critiques, the USDOC's determination in respect of the issue of the law of one price cannot be considered reasoned and adequate.

#### **7.3.3.2.4.3 Conclusion regarding the effect of log export regulations on log prices in the Interior**

7.177. As noted above, the USDOC did not provide a valid basis for treating exports from the Tidewater region of British Columbia as exports from the interior, and did not engage sufficiently with the evidence suggesting that it was uneconomic to export logs from the interior (excluding Tidewater). Thus, the USDOC could not properly have found that the log export regulations directly impacted log prices in the interior. Further, we also find that the USDOC did not properly evaluate the Canadian interested parties' arguments that any effect of British Columbia's log export regulations will not "ripple" through from the coast to the interior. The USDOC failed to explain why its "ripple" theory would hold true despite the physical separation between the coast and the interior and the differences in the species composition of forests in the two regions. The USDOC's view that

<sup>393</sup> Canada's first written submission, para. 224.

<sup>394</sup> Canada's first written submission, paras. 220-221 (referring to Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), p. 81).

<sup>395</sup> Canada's first written submission, para. 223.

<sup>396</sup> Canada's first written submission, para. 223.

<sup>397</sup> Jendro and Hart Report, (Exhibit CAN-20 (BCI)), pp. 16-17 ("[p]rices for softwood logs vary substantially among regions" due to physical characteristics of the logs, variability in contractual terms according to which they are sold, and differences in local prevailing market conditions); see also, Leamer Report, (Exhibit CAN-286 (BCI)), p. 48.

<sup>398</sup> Larry Gardner affidavit, (Exhibit CAN-31 (BCI)), paras. 48-49.

<sup>399</sup> Final determination, (Exhibit CAN-10), p. 145.

<sup>400</sup> See, above, paras. 7.60-7.61.

<sup>401</sup> United States' first written submission, para. 401.

<sup>402</sup> Canada's response to Panel question No. 86, para. 261.

<sup>403</sup> Canada's response to Panel question No. 86, para. 261 (referring to Kalt response on LEPs, (Exhibit CAN-90 (BCI)), pp. 9-15; and Leamer Report, (Exhibit CAN-286 (BCI)), paras. 60-68).

log markets in the coast and the interior would follow the law of one price was also based on an insufficient consideration of all pertinent record evidence.

7.178. Thus, we conclude that the USDOC did not provide a reasoned and adequate explanation for its finding that the impact of log export regulations, if any, would extend to log prices in the British Columbia interior.<sup>404</sup>

#### **7.3.3.2.5 Conclusion**

7.179. Having found that the USDOC's analysis in respect of each of the three grounds based on which the USDOC rejected the BCTS auction prices as a valid benchmark was not reasonably and adequately explained and was insufficiently supported by record evidence, we conclude that the USDOC improperly rejected BCTS auction prices as a stumpage benchmark. The USDOC's finding that BCTS auction prices were distorted because the five firms that consumed a major proportion of logs derived from auctioned timber also held the majority of Crown timber via long-term licences, was based on inadequate engagement with evidence that suggested that the five firms could not have induced lower bidding by auction participants, as the firms depended on auctioned timber to meet their demand for logs economically. The USDOC's conclusion that the three-sale limit distorted auction prices by making the auctions uncompetitive was flawed because it did not adequately explain how the exclusion of certain firms due to the three-sale limit would necessarily lead to lower bids in light of the design of the BCTS auctions. The USDOC also did not explain why an auction participant would bid lower despite competition from other bidders merely because that participant intends to subsequently resell the timber to another firm for a price that includes a "cutting rights fee". Further, the USDOC did not provide a sufficiently detailed analysis and explanation to establish that the log export regulations in operation in British Columbia distorted the BCTS auction prices. Because the grounds based on which the USDOC reached its overall conclusion in respect of the BCTS auction prices were flawed individually, by necessary implication they cannot support the USDOC's overall conclusion cumulatively. We therefore uphold Canada's claim that the USDOC rejected the BCTS auction prices as a benchmark inconsistently with Article 14(d) of the SCM Agreement.

#### **7.3.4 Whether the USDOC improperly rejected auction prices in Québec as an appropriate stumpage benchmark**

7.180. In the underlying investigation, the Canadian interested parties had proposed that the USDOC use auction prices for Crown stumpage in Québec as a benchmark to determine the adequacy of remuneration for the Crown's provision of stumpage in the province.<sup>405</sup> Although the USDOC did consider using the proposed auction prices in Québec as a stumpage benchmark, it declined to use them, finding that they were distorted. Canada claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in improperly rejecting, as a stumpage benchmark, auction prices in Québec.

##### **7.3.4.1 Factual aspects**

7.181. The auction prices that the Canadian interested parties proposed as a stumpage benchmark were prices at which Crown standing timber was sold at public auctions conducted by the province's Timber Marketing Bureau, *Le Bureau de mise en marché des bois* (BMMB). Québec used those auction prices to set Crown stumpage prices for the rest of the standing timber on Crown land.

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<sup>404</sup> We note that in its first written submission, Canada also argued that export premia are a normal feature of log export markets and cannot be taken to mean that log export regulations distorted log prices in the interior. (Canada's first written submission, para. 208). We consider that even if log exports were priced higher than domestic log sales, that in itself will not establish that domestic log prices were distorted. In other words, a finding of export premium alone is not dispositive to the question of whether domestic log prices were distorted when the other findings of the USDOC examined above were flawed.

<sup>405</sup> Public version of joint case brief, (Exhibit CAN-311), pp. I-21-I-22 and I-25; Canada's response to Panel question No. 156(a), paras. 22-23; Québec comments on subsidy methodology, (Exhibit CAN-594), pp. 10-12; Québec initial questionnaire response, (Exhibit CAN-170), pp. QC-S-3-QC-S-5; Québec comments on preliminary determination, (Exhibit CAN-595), pp. 1-8.

In particular, the BMMB applied economic regressions to the auction prices to determine those Crown stumpage prices.<sup>406</sup>

7.182. In assessing whether the remuneration for Crown stumpage in Québec was adequate, the USDOC declined to use the auction prices in the province as a stumpage benchmark on the basis that those auction prices were distorted due to government involvement in the market. It found that the Government of Québec was "the largest provider of stumpage" in the province as 73.88% of Québec's stumpage harvest for 2015-2016 was sourced from Crown land. Of that amount, 51.75% was sourced through Crown-administered licences, also known as Timber Supply Guarantees (TSGs), and 22.13% from auctions. The remaining volumes of Québec's stumpage harvest were sourced from the private forest (15.07%) and log imports from the United States and other Canadian provinces (11.05%).<sup>407</sup>

7.183. The USDOC considered that the record showed that the Québec stumpage market is distorted because (a) the government controls the majority of the market, providing long-term timber supply rights or TSGs at administratively-set prices to only firms that process the logs within the province; and (b) other circumstances, including the provincial mandate that logs harvested in the province be processed in the province, decrease firms' incentive to pay above that administratively-set price for private timber or to bid above that price at auction.<sup>408</sup>

7.184. In particular, the USDOC relied mainly on the reasoning below to conclude that it could not use auction prices as a stumpage benchmark:

- a. overall consumption of non-auction Crown timber is large compared to other sources;
- b. a significant amount of timber (15%) offered at auction remained unsold during the POI. This indicated that TSG-holding corporations and non-sawmills may not be making aggressive bids above TSG prices;
- c. a small number of TSG-holding corporations dominate the consumption of Crown timber sourced through TSGs as well as through auction, and therefore influence the auction prices;
- d. under a TSG, a sawmill can source up to 75% of its supply need at a government-set price. A sawmill therefore was strongly motivated to treat its TSG-guaranteed volume as its primary source of supply and its auction volume as an additional or residual supply source. Record evidence for processed wood during 2015-2016 indicates that, in aggregate, TSG-holding sawmills sourced just 20.6% of their Crown supply from the auction;
- e. TSG-holding corporations can shift their allocations of Crown-origin timber amongst themselves, thereby reducing their need to acquire timber in the auction or from non-Crown sources. TSG-holders are permitted to transfer, annually, up to 10% of the total volume harvested under their TSGs without government approval, and recipient mills may receive up to 10% of their total TSG allocated volume annually without government approval;
- f. the ability of sawmills to purchase unharvested volumes from the government at the government-set price further diminishes their need to source supply from the auctions or other non-Crown sources;
- g. harvested timber purchased at the auction must be processed within Québec, effectively limiting bidders. Limiting bidders suppresses auction bids as bidders understand that they face lesser competition; and

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<sup>406</sup> Preliminary determination, (Exhibit CAN-8), p. 24; Québec initial questionnaire response, (Exhibit CAN-170), pp. QC-S-2-QC-S-4.

<sup>407</sup> Final determination, (Exhibit CAN-10), p. 99.

<sup>408</sup> Final determination, (Exhibit CAN-10), p. 98.

h. non-sawmills (i.e. independent bidders) have little incentive to bid above the TSG-administered prices (TSG price).<sup>409</sup>

7.185. Québec had placed on the record of the underlying investigation, among others, the Marshall Report, a study that it had commissioned, and which provides an analysis of auction prices in the province.<sup>410</sup> The study concluded that the auction prices are valid market prices free of government-induced distortions.<sup>411</sup> However, the USDOC, in its assessment, decided to accord less weight to that report considering that it was not prepared in the ordinary course of business but for "the express purpose of submission in this investigation".<sup>412</sup> Further, the USDOC decided to dismiss all the findings in that report, for the reasons set out in its determination.<sup>413</sup>

### 7.3.4.2 Evaluation

7.186. Canada argues that the USDOC rejected the proposed auction benchmark for Québec by speculating about how auction participants *might* act rather than evaluating the positive record evidence of how they *did* act. Canada further asserts that no unbiased and objective investigating authority would rely on speculation to discount actual evidence, as the USDOC did. For Canada, the USDOC's speculative "observations" do not show a causal link between the government presence in the market and, any unproven, distortion.<sup>414</sup> The United States contends, in response, that the USDOC's conclusions were based on record evidence.<sup>415</sup>

7.187. The broad issue before us is whether the USDOC's finding of price distortion in Québec was reasoned, adequately explained, and supported by evidence. As noted above, the USDOC based its overall conclusion that auction prices in Québec were distorted on the following grounds (a) the government's market share in Québec's stumpage market, (b) market concentration, (c) sawmills' access to additional Crown timber, (d) correlation between auction prices and TSG prices, (e) unsold auction timber, and (f) log-processing requirements. In evaluating Canada's claim against the USDOC's finding of price distortion in Québec, we will assess the adequacy of the USDOC's analysis with respect to each of these grounds.

#### 7.3.4.2.1 The government's share in Québec's stumpage market

7.188. We will first examine the USDOC's finding that the Government of Québec was "the largest provider of stumpage" in the province as 73.88% of Québec's stumpage harvest for 2015-2016 was sourced from Crown land. The USDOC further noted that of that amount, 51.75% was sourced through Crown-administered licences, also known as TSGs, and 22.13% from auctions.<sup>416</sup> The parties disagree over whether the Crown's share includes the 22.13% auction-sourced timber. Canada argues that the Crown TSG-supply in Québec cannot be characterized as "predominant" as only half the market is supplied at the government TSG price. Canada further asserts that where the government is a "significant" supplier, as is the case in Québec, the investigating authority faces a higher burden in finding price distortion than in cases where it is a predominant supplier and it *must* rely on factors *other than* the market share.<sup>417</sup> The United States contends that the government's 73.88% market share consists not only of TSG stumpage, as Canada argues, but also the stumpage it sells at auction.<sup>418</sup>

7.189. We note, at the outset, that the USDOC did not itself characterize the Crown's market share in Québec as "predominant".<sup>419</sup> While the USDOC stated that the government was "the largest

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<sup>409</sup> Final determination, (Exhibit CAN-10), pp. 99-102.

<sup>410</sup> Marshall Report, (Exhibit CAN-171 (BCI)).

<sup>411</sup> Marshall Report, (Exhibit CAN-171 (BCI)), p. 81.

<sup>412</sup> Final determination, (Exhibit CAN-10), p. 103.

<sup>413</sup> Final determination, (Exhibit CAN-10), pp. 103-104.

<sup>414</sup> Canada's first written submission, para. 414; opening statement at the first meeting of the Panel (26 February 2019), para. 141.

<sup>415</sup> United States' second written submission, para. 257; first written submission, para. 278.

<sup>416</sup> Final determination, (Exhibit CAN-10), p. 99.

<sup>417</sup> Canada's first written submission, paras. 426-427 (referring to Appellate Body Report, *US – Anti-dumping and Countervailing Duties (China)*, para. 443). (emphasis original)

<sup>418</sup> United States' first written submission, para. 267.

<sup>419</sup> The USDOC noted that the "majority of the market is controlled by the government" without stating whether it based that finding on a consideration that the government market share constituted 73.88% or 51.75%. (Final determination, (Exhibit CAN-10), p. 98).

provider of stumps with 73.88 percent of the stumps harvested for FY2015-2016 sourced from Crown land", it went on to further indicate that "[o]f that amount, 51.75 percent was sourced via administered TSGs and 22.13 percent from the auctions".<sup>420</sup> The observations that led the USDOC to conclude, in its preliminary determination, that the Québec auction prices were distorted, included "the overall consumption of *non-auction Crown timber*", which the USDOC noted was "large relative to other sources". The USDOC considered these observations to "remain significant and informative" in its final determination.<sup>421</sup> This suggests that the USDOC itself was considering the impact of non-auction Crown timber separately from auction timber in its assessment. We therefore reject Canada's arguments set out in the preceding paragraph.

#### **7.3.4.2.2 Market concentration**

7.190. We will next examine the USDOC's finding that a small number of TSG-holding corporations dominate the consumption of Crown timber sourced through TSGs, as well as through auction, and therefore influence the auction prices.<sup>422, 423</sup> The USDOC found that the ten largest TSG-holding corporations accounted for 62.43% of the softwood sawlog auction volume acquired during 2015, and 74.87% of logs acquired through Crown supply guarantees during 2015-2016.<sup>424</sup> It further found that TSG-holding corporations have "little incentive" to bid for Crown timber above the TSG price when those corporations do participate in an auction. Under a TSG, a sawmill can source up to 75% of its supply need at a government-set price.<sup>425</sup> Further, a sawmill can obtain additional wood at the government-set price through transfers from other sawmills and the sale of unharvested timber by the BMMB.<sup>426</sup>

7.191. Canada argues that the USDOC improperly concluded that a small number of TSG-holding corporations dominate the consumption of Crown-origin timber and these sawmills have "little incentive" to bid above the TSG price. The level of competition between private participants is a "prevailing market condition" and has no bearing on whether auctions produce market-determined prices for purposes of Article 14(d).<sup>427</sup>

7.192. We note that market concentration was one among several factors set out in paragraphs 7.183-7.184, including the Crown's market share, which the USDOC considered as contributing to the distortion of auction prices in Québec. We consider, however, that the USDOC did not reasonably and adequately explain in its determination how market concentration *in interaction with* any of these factors indicated that auction prices for stumps in Québec were distorted.

7.193. We take the view that market concentration, neither by itself, nor taken together with the market share of non-auction Crown timber, is determinative of price distortion. If the same group of consumers dominate the purchase of both non-auction and auction Crown timber, and non-auction Crown timber constitutes a large market share, those facts do not necessarily imply that auction prices are distorted. Where non-auction Crown timber does not fully meet the consumption needs of consumers, the consumers will need to rely on other sources, such as auctions, to secure additional timber to fulfil their total demand. In such a case, it will not matter that those consumers are the dominant buyers of both non-auction and auction Crown timber, and that non-auction Crown timber constitutes a large market share. Regardless of those factors, consumers will retain their incentive to bid for, and win, auction timber to fulfil their consumption needs. As such, the dominance of consumers in both markets and the market share of Crown timber, would not necessarily affect the consumers' demand and bids for, and therefore prices of, auction timber.

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<sup>420</sup> Final determination, (Exhibit CAN-10), p. 99. (emphasis original)

<sup>421</sup> Final determination, (Exhibit CAN-10), p. 99. (emphasis added)

<sup>422</sup> Final determination, (Exhibit CAN-10), p. 101.

<sup>423</sup> See our evaluation of similar issues in para. 7.84 above.

<sup>424</sup> Final determination, (Exhibit CAN-10), p. 100.

<sup>425</sup> The USDOC also noted that because the first 100,000 m<sup>3</sup> of a mill's residual need is exempt from the MFFP's 25% auction ratio, certain mills source more than 75% of their supply needs through TSGs. (Final determination, (Exhibit CAN-10), p. 101). In this regard, Canada asserts that the USDOC failed to address the facts underlying its finding that only six small sawmills – representing approximately 2% of sawmill capacity in Québec – have TSGs exceeding 75% of their residual mill need. (Canada's first written submission, para. 437).

<sup>426</sup> Final determination, (Exhibit CAN-10), p. 101.

<sup>427</sup> Canada's first written submission, paras. 428 and 432.

7.194. In its determination, the USDOC noted that "under a TSG, a sawmill can source up to 75% of its supply need at a government-set price".<sup>428</sup>, <sup>429</sup> The USDOC inferred from this fact that a sawmill, had a strong motivation to treat its TSG-guaranteed volume as its primary supply source and its auction volume as an additional or *residual* supply source.<sup>430</sup> We note that the 75% of supply need that the USDOC referred to relates to the portion of a sawmill's residual supply requirements<sup>431</sup> that remained after subtracting from its total supply need the consumption need that was already supplied by private forests in Québec and from forests in the United States and other Canadian provinces. We consider, however, that even if the TSG guaranteed volume met 75% of a sawmill's residual supply need<sup>432</sup>, forming the primary source of their timber supply, it did not *fulfil* the sawmill's total residual supply need. In addition to first obtaining part of their supply from private forests and imports, the sawmill would still need to procure the remaining 25% of its residual timber supply need from any other available sources, including by winning the provincial auctions. The sawmills would therefore still be expected to make the highest bid they possibly could in order to win the auction to satisfy their remaining consumption need.

7.195. We therefore conclude that the USDOC did not provide a reasoned and adequate explanation for why market concentration, taken together with any other factors considered by the USDOC in its analysis, would distort prices in the Québec market.<sup>433</sup>

#### **7.3.4.2.3 Sawmills' access to additional Crown timber**

7.196. We note that the USDOC found that TSG-holding sawmills can transfer their allocations of Crown timber amongst themselves, thereby reducing their need to acquire timber in the auction or from non-Crown sources.<sup>434</sup> The USDOC noted that Québec's law permits TSG-holders to transfer, annually, up to 10% of the total volume harvested under their TSGs without government approval, and recipient mills may receive up to 10% of their total TSG allocated volume annually without government approval.<sup>435</sup> It further observed that "[g]iven that just 22 percent of the stumpage harvested for FY 2015-2016 came from auctioned Crown timber, the ability of a TSG-holder to obtain an additional 10 percent of its TSG volume from another TSG-holder indicates that the auctions may not be a competitive source for wood".<sup>436</sup> The USDOC further noted that the ability of sawmills to purchase unharvested volumes from the BMMB at the government-set price, further diminishes their need to source supply from the auctions or other non-Crown sources. During 2015-2016, 19.5% of

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<sup>428</sup> Final determination, (Exhibit CAN-10), p. 99.

<sup>429</sup> We note that the USDOC observed that the Government of Québec's analysis of "total mill need", is an estimated or anticipated amount of timber that a sawmill may be able to process in a given year, and not an amount that reflects the actual activity of sawmills in a given year. (Final determination, (Exhibit CAN-10), p. 100). We consider that if the USDOC took issue with the nature of the data provided by the Government of Québec on "total mill need" it could have asked the Government of Québec to provide the data that the USDOC considered most suitable. The USDOC's determination, however, does not indicate that the USDOC did so.

<sup>430</sup> Final determination, (Exhibit CAN-10), p. 99.

<sup>431</sup> Québec verification report, (Exhibit CAN-184), p. 9.

<sup>432</sup> Canada asserts that the sawmills can obtain no more than 75% of the sawmills' *residual* need from a TSG. (Canada's first written submission, para. 420 (referring to Marshall Report, (Exhibit CAN-171 (BCI)), pp. 27-31)). The sawmills' residual consumption need was what remained after subtracting from their total supply need the consumption need that was already supplied by private forests in Québec and from forests in the United States and other Canadian provinces. (Marshall Report, (Exhibit CAN-171 (BCI)), p. 24).

<sup>433</sup> The United States argues further that Canada's assertion that TSG stumpage does not account for 100% of the sawmills' needs does not address whether prices are distorted through the combination of TSG and auction pricing policies. (United States' first written submission, para. 267). We note that, as the United States suggests in its argument above, the USDOC in finding that the predominant consumers would have "little incentive" to bid above TSG prices, did not consider only the predominance of those consumers in the auction and non-auction Crown markets, but also considered certain other factors. As noted earlier, the USDOC also considered that a sawmill can obtain additional wood at the government-set price through transfers from other sawmills and the sale of unharvested timber by the BMMB. (Final determination, (Exhibit CAN-10), p. 101). We will next examine this finding of the USDOC.

<sup>434</sup> The USDOC found that pursuant to Sections 92 and 93 of the Sustainable Forest Development Act (SFDA), TSG-holders in Québec are permitted to shift allocated Crown timber volumes among affiliated sawmills and between corporations. (Final determination, (Exhibit CAN-10), p. 102).

<sup>435</sup> Final determination, (Exhibit CAN-10), p. 102. The verification report that the USDOC relies on in making its findings notes that in certain situations, under Section 93 of the SFDA, subject to approval from the Québec Ministry MFFP, a mill or company can effectuate a "larger (greater than 10 percent)" transfer of its TSG volumes to another mill or company. (Québec verification report, (Exhibit CAN-184), p. 15).

<sup>436</sup> Final determination, (Exhibit CAN-10), p. 102.

unharvested timber was sold to sawmills by the Ministry of Forests, Wildlife, and Parks (MFFP) through one-year contracts under a TSG-administered price.<sup>437</sup>

7.197. Canada argues that the record evidence contradicts the USDOC's finding that transfers of timber between sawmills could have a meaningful effect on the auctions. The sawmills transfer such small amounts of timber that sawmills cannot rely on them as an alternative to the auction system.<sup>438</sup> According to Canada, sawmills also have little incentive to transfer timber to other mills, as the transferred timber remains part of the transferring sawmill's allocated timber for that year and the transferring sawmill pays the stumpage fees on that timber, as well as any costs for transporting the logs to the receiving sawmill.<sup>439</sup> The United States replies that in finding that TSG-holding sawmills are permitted to transfer their allocation of Crown timber, the USDOC relied on Section 92 of Québec's Sustainable Forest Development Act (SFDA). That provision permits a TSG-holder to transfer or receive up to 10% of the volume harvested under its TSG and contradicts Canada's assertion that transfers between TSG-holders were relatively limited.<sup>440</sup>

7.198. We consider that, regardless of the quantum of the additional timber supply available to sawmills through transfers from other sawmills and the sale of unharvested timber by the BMMB, the USDOC did not determine whether that additional supply, together with non-auction Crown timber, adequately met the sawmills' total timber need. In the absence of that finding, the USDOC had no basis to consider that the additional supply had diminished the sawmills' need to source supply from auctions.

7.199. The USDOC also did not explain how the transfer of sawmills' allocations of Crown timber to other mills would increase the total volume of Crown timber available in the market. In response to a question from the Panel, the United States submits that certain Québec Government officials explained to the USDOC that a sawmill might seek to transfer a portion of its TSG volume in a particular year because "it experienced a temporarily [sic] shut down or it cannot process certain types of logs, such as oversized logs".<sup>441</sup> For those or other reasons, a mill might seek to reduce its supply of wood fibre used to make softwood lumber products, while another mill, because of technological improvements, might seek to increase its supply of wood fibre. For the United States, in either instance, an individual mill's needs may change over time, which would affect the cumulative need of sawmills throughout Québec.<sup>442</sup> In response, Canada asserts that the statement of the Québec Government official at verification that the United States relies on, confirms that transfers are exceptional and occur, for example, when a sawmill experiences a temporary shutdown, or when it cannot process certain types of wood fibre, such as oversized logs, which Canada argues do not reduce a sawmill's cumulative need to acquire timber from auctions.<sup>443</sup>

7.200. We agree with Canada that the verification report on which the United States relies, as did the USDOC before it, describes certain exceptional circumstances in which the transfers in question are allowed. In particular, before permitting a transfer under section 93 of the SFDA, the MFFP will verify why a sawmill wants to make a change of destination, whether an economic circumstance is present that requires the "receiving" sawmill to need more supply, and whether private forests or auction timber could satisfy the mill need. Moreover, the sending sawmill is billed for the stumpage and the "transferred" volume will remain as part of the sending sawmill's harvested volume.<sup>444</sup>

7.201. We further consider that the USDOC did not explain how the transfer of sawmills' allocation of Crown timber to other sawmills specifically *in instances when they cannot process certain logs* would reduce those sawmills' total need to acquire timber from the auction or non-Crown sources. In such a case, the transferring sawmills would still need to source additional logs that they are able to process, in the amount transferred, from auction or other non-Crown sources, in order to meet their total consumption needs. In any event, in the underlying investigation the USDOC did not

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<sup>437</sup> Final determination, (Exhibit CAN-10), p. 102.

<sup>438</sup> In fiscal year 2015-2016, sawmills transferred only [[\*\*\*]] of non-auction Crown SPF volumes under Section 92 of the SFDA and [[\*\*\*]] of non-auction Crown SPF volumes under Section 93 of that Act. (Canada's first written submission, paras. 453-454).

<sup>439</sup> Canada's first written submission, paras. 452 and 455-456.

<sup>440</sup> United States' first written submission, para. 276.

<sup>441</sup> United States' response to Panel question No. 176, para. 109 (quoting Québec verification report, (Exhibit CAN-184), p. 15).

<sup>442</sup> United States' response to Panel question No. 176, para. 109.

<sup>443</sup> Canada's comments on the United States' response to Panel question No. 176, para. 95.

<sup>444</sup> Québec verification report, (Exhibit CAN-184), p. 15.

specifically find that any sawmills had transferred a share of their allocated Crown timber to other sawmills because they could not process certain types of logs.

7.202. It is possible, in principle, that a sawmill that temporarily shuts down its operations and transfers its unused Crown timber allocation to other sawmills, will not need to source additional timber, because it no longer needs additional timber. However, in the underlying investigation, the USDOC did not specifically find that any sawmills had transferred a share of their allocated Crown timber to other sawmills *because they had experienced a temporary shutdown*. In the absence of these findings, we consider that the USDOC did not reasonably and adequately explain why the additional supply of timber available to sawmills had distorted auction prices.

#### **7.3.4.2.4 Correlation between auction bids and TSG prices**

##### **7.3.4.2.4.1 Whether TSG-holding sawmills and non-sawmills have an incentive not to bid at above TSG prices at auction**

7.203. We will next examine the USDOC's reliance on its finding that TSG-holding corporations and non-sawmills have little incentive to bid for Crown timber above the TSG price.<sup>445</sup>

7.204. Canada argues that the USDOC did not explain why any auction participants would limit their bids at TSG prices, thereby lowering their chances of winning an auction.<sup>446</sup> The United States argues, in response, that the USDOC did not find that auction participants would "limit" their bids to TSG prices. Instead, it found that auction prices for Crown timber "track" the prices for Crown timber allocated to TSG-holding sawmills.<sup>447</sup> The United States contends that, moreover, the USDOC also explained why auction bids tended to track TSG prices. The USDOC found that TSG-holding sawmills have an incentive not to bid at significantly above TSG prices at auction or "have a disincentive to bid competitively at auctions" because alternative sources of timber are available to TSG-holders at or around the TSG price. These additional sources include transfer timber and unharvested timber resold by the province, as well as private forests.<sup>448</sup>

7.205. We take the view, as noted above, that the USDOC's determination does not set out a finding that TSG-holding sawmills in Québec had no need to rely on the auctions because the additional supply fulfilled their total timber supply needs. As long as the sawmills had unmet supply needs, it is unclear, and the USDOC did not explain, why sawmills would have an incentive not to bid at "above TSG prices at auction"<sup>449</sup> or "have a disincentive to bid competitively at auctions". On the contrary, as Canada asserts, record evidence indicates that sawmills cannot source their entire residual needs from TSGs and are therefore sufficiently incentivized to participate in government auctions.<sup>450</sup> The USDOC, however, failed to properly engage with that record evidence.<sup>451</sup> Particularly in light of that record evidence, we consider the USDOC's finding that sawmills would have a disincentive to bid competitively at auctions, devoid of a reasonable basis. If sawmills needed to win an auction in order to access timber, and if winning the auction required that the sawmills bid above the TSG price, they would be expected to bid above that price. In the absence of a finding by the USDOC that non-auction supply sources fully met sawmills' supply needs, or any other reasoned explanation, it is difficult to understand why a sawmill would limit its bid at TSG prices, not

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<sup>445</sup> Final determination, (Exhibit CAN-10), p. 101.

<sup>446</sup> Canada's first written submission, para. 435.

<sup>447</sup> United States' response to Panel question No. 54, para. 175.

<sup>448</sup> United States' response to Panel question No. 54, para. 176.

<sup>449</sup> The USDOC found that TSG-holding corporations and non-sawmills have little incentive to bid for Crown timber "above", and not, as the United States asserts "significantly above", the TSG-administered price. (Final determination, (Exhibit CAN-10), p. 101).

<sup>450</sup> Canada's comments on the United States' response to Panel question No. 167, para. 68 (referring to Marshall Report, (Exhibit CAN-171 (BCI)), p. 29, figure 14). In particular, the Marshall Report found that the vast majority of the total residual capacity of all sawmills with supply guarantees is held by sawmills with supply guarantees equal to or smaller than 75% of their residual capacity. It further noted that for most mills, allocated supply guarantee volume accounts for 40% to 50% of their residual capacity. For some mills, supply guarantees account for less than 40% of their residual capacity. Only six mills in 2015 held supply guarantees in excess of 75% of their residual capacity. (Marshall Report, (Exhibit CAN-171 (BCI)), p. 28).

<sup>451</sup> Later in our evaluation, we set out reasons why we consider that the USDOC improperly dismissed consideration of the findings in the Marshall Report.

"significantly" above TSG prices, or, for that matter at any price, and therefore forgo the opportunity to win auction timber that it needed to perform its operations.

7.206. Further, we consider that an objective and unbiased authority would have analysed actual auction bids and TSG prices before concluding that TSG-holding corporations have an incentive not to bid at significantly above TSG prices at an auction. The record does not show that the USDOC did so. In its determination, the USDOC stated that the "totality of the evidence on the record" led it to conclude that "the auction prices for Crown timber track the prices charged for Crown timber allocated to TSG-holding sawmills".<sup>452</sup> The USDOC however did not cite any pricing data, or any other record evidence, indicative of auction prices tracking Crown prices. Further, Canada asserts that the data on the record before the USDOC showed a wide dispersion of auction bids above and below the TSG prices.<sup>453</sup> According to Canada, the record evidence showed "aggressive bidding above TSG prices". In particular, in the same tariffing zone, the average price for timber sourced from auctions is higher for both TSG-holders and non-TSG-holders than the equivalent Crown stumpage price.<sup>454</sup> We agree with Canada that the USDOC failed to engage with that evidence, which was directly relevant to the issue at hand.<sup>455</sup> The USDOC, therefore, in light of the record evidence, did not properly establish that TSG-holding sawmills have an incentive not to bid at above TSG prices at auction. That finding, therefore, cannot by itself, or together with any of the USDOC's other considerations in question, indicate that auction prices in Québec were distorted.

7.207. The USDOC also found that non-sawmills (i.e. non-TSG-holding independent bidders) had little reason to bid for timber in the auctions above the TSG price. It reasoned that because timber purchased at the auction must be processed within Québec, non-sawmills "must be" selling timber they purchased at the auction to TSG-holding sawmills within Québec. Considering that the sale of timber by the non-sawmills "is competing with" the timber available to sawmills at the guaranteed government price via the TSGs, the USDOC concluded that the "non-sawmills have little motivation to bid for timber at a price above which they can sell the wood to the sawmills".<sup>456</sup>

7.208. Canada argues that contrary to the USDOC's consideration that non-sawmills have "little reason" to bid for timber in the auction above the TSG-administered price, the record evidence shows that non-sawmills bid on average 8% higher for auction blocks than the equivalent TSG price in a tariffing zone. Further, the USDOC's consideration that non-sawmills "must be" selling only to TSG-holding mills lacks evidentiary basis given that several mills in Québec have little to no TSG volume.<sup>457</sup>

7.209. We note that the USDOC concluded that non-sawmills "must be" selling timber they purchased at the auction to TSG-holding sawmills within Québec, without citing any factual evidence. That conclusion was, therefore, speculative, rather than based on facts. An objective and unbiased investigating authority would not have reached that conclusion without verifying whether non-sawmills also sold to non-TSG-holding mills within Québec, and if so, the volume of such sales. Moreover, as Canada asserts, the USDOC failed to engage with evidence that suggests that there are mills in Québec with little to no TSG volume.<sup>458</sup>

7.210. We further consider that an unbiased and objective investigating authority would not have concluded that non-sawmills had little reason to bid for timber in the auctions above the TSG price without verifying whether non-sawmills did *in fact* not bid in the auctions above the TSG price. The USDOC, however, reached that conclusion without such verification.

7.211. In response to the Panel's questioning, the United States acknowledges that it "may be" the case that non-sawmills could sell timber purchased at auctions to non-TSG-holding sawmills in Québec. Nevertheless, according to the United States, the data provided by Québec demonstrates that TSG-holders dominate the need for timber in Québec, accounting for [[\*\*\*]] of the

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<sup>452</sup> Final determination, (Exhibit CAN-10), p. 99.

<sup>453</sup> Canada's first written submission, para. 443 (referring to Québec auction data file, (Exhibit CAN-211 (BCI)); and Québec stumpage data file, (Exhibit CAN-213)).

<sup>454</sup> Canada's first written submission, para. 438.

<sup>455</sup> Québec auction data file, (Exhibit CAN-211 (BCI)); Québec stumpage data file, (Exhibit CAN-213).

<sup>456</sup> Final determination, (Exhibit CAN-10), pp. 99-102.

<sup>457</sup> Canada's first written submission, paras. 442 and 445 (referring to Québec operating permit 2015-2016, (Exhibit CAN-214 (BCI))).

<sup>458</sup> Québec operating permit 2015-2016, (Exhibit CAN-214 (BCI)); Canada's first written submission, para. 445.

province-wide cumulative operating permit size.<sup>459</sup> We, however, dismiss the above reasoning as it was not provided by the USDOC itself and constitutes *ex post* rationalization.

7.212. Further, even if the USDOC had provided that reasoning, it still needed to examine whether as noted above, non-sawmills did *in fact* not bid in the auctions above the TSG price. In this regard, we agree with Canada that the USDOC failed to engage with the data on the record, which showed a dispersion of auction bids made by non-TSG holders and TSG-holders above and below the TSG prices.<sup>460</sup> In particular, the USDOC did not explain why that data showed that auction bids "tracked" TSG prices, as it stated in its determination, and not that the bids widely deviated from those prices. Therefore, we take the view that the USDOC's finding that non-sawmills had little reason to bid for timber in the auctions above the TSG price was not based on record evidence and could not, either by itself, or together with the USDOC's other considerations in question, have indicated that the auction prices were distorted.

7.213. We also consider that the USDOC did not explain why any correlation between TSG prices and auction prices for Crown timber resulted necessarily from a lack of incentive on the part of non-sawmills and TSG-holding sawmills to bid above the TSG prices and not, as Canada asserts<sup>461</sup>, because the TSG stumpage prices are based on the transposition of auction prices using the characteristics of each tariffing zone.

#### **7.3.4.2.4.2 Whether the USDOC properly evaluated the Marshall Report**

7.214. Canada further asserts that the USDOC's findings are contradicted by Dr Marshall's report, which analysed the auction bids and found no evidence that TSG-holders suppress their bids compared to non-sawmills or sawmills without TSGs.<sup>462</sup> Analysing the potential effect of unilateral bid reductions by sawmills, Dr Marshall found that a sawmill reducing the amount of its bid by 10% would affect the volumes available to the sawmill to harvest, and that "any monetary benefits from unilateral bid reductions are small relative to foregone timber volumes".<sup>463</sup> Further, Canada posits that Dr Marshall demonstrated that winning bids are regularly above the estimated price in an auction, which also indicates aggressive bidding in auctions. According to Canada, the USDOC did not question these findings.<sup>464</sup> The United States contends, in response, that the USDOC identified several flaws in the Marshall Report.<sup>465</sup>

7.215. We note that the USDOC stated in its determination that it had accorded less weight in its analysis to "purchased commissioned reports" than to other evidence that had been "prepared in the ordinary course of business" because those reports had been produced for the express purpose of submission in the underlying investigation and therefore ran the "risk of litigation-inspired fabrication or exaggeration".<sup>466</sup> In our assessment of the USDOC's treatment of the Marshall Report, we will consider (a) whether the USDOC properly accorded less weight to the report, and (b) whether the USDOC properly found flaws in the report.

7.216. Canada argues that the USDOC's decision to accord less weight to the Marshall Report on the basis that the report was produced for litigation is inconsistent with the USDOC's duty to seek out relevant information and to evaluate it objectively.<sup>467</sup> Canada also asserts that the Marshall Report placed on the record all data that Dr Marshall had used to draw his conclusions, including all of the winning and losing bids and bidder information from the auction system, bid prospectuses,

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<sup>459</sup> United States' response to Panel question No. 55, para. 180.

<sup>460</sup> Canada's first written submission, para. 443 (referring to Québec auction data file, (Exhibit CAN-211 (BCI)); and Québec stumpage data file, (Exhibit CAN-213)).

<sup>461</sup> Canada's first written submission, paras. 428-438.

<sup>462</sup> Canada's first written submission, para. 436 (referring to Marshall Report, (Exhibit CAN-171 (BCI)), pp. 59-62).

<sup>463</sup> Canada's first written submission, para. 436 (referring to Marshall Report, (Exhibit CAN-171 (BCI)), pp. 62-66).

<sup>464</sup> Canada's first written submission, paras. 439-440.

<sup>465</sup> United States' first written submission, paras. 269-273.

<sup>466</sup> Final determination, (Exhibit CAN-10), p. 103.

<sup>467</sup> Canada's first written submission, para. 470 (referring to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 199; *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; *US – Wheat Gluten*, para. 53; and *US – Carbon Steel (India)*, para. 4.152).

Crown harvest data, and information on mill consumption, among other data. Canada argues that the USDOC did not explain why it disregarded in its analysis even that underlying data.<sup>468</sup>

7.217. For reasons set out earlier in this Report<sup>469</sup>, we consider that it was not reasonable for the USDOC to have accorded less weight to the Marshall Report, on the basis that the report had been commissioned for the purposes of the underlying investigation. Further, given that, as Canada asserts<sup>470</sup>, the USDOC had itself asked Québec "to provide a copy of the empirical study of Quebec's public timber auction system authored by Robert C. Marshall", it is particularly puzzling that the USDOC decided to accord less weight to the Marshall Report on the basis that the report was produced for litigation.<sup>471</sup>

7.218. We note that the USDOC recognized that the Marshall Report analyses auction prices in Québec but dismissed that analysis for certain reasons. It first noted that the Marshall Report did not reference the relevant US regulations that required that government auction prices can only be used as a benchmark if the auction is based solely on an open, competitively-run process.<sup>472</sup> In this regard, Canada argues that the USDOC provided no reasoning to explain "why it needed an economist to refer to a U.S. legal standard". For Canada, Dr Marshall's economic evidence analysed the economics of the auction market while it was for Québec's counsel to show how the legal threshold was met, "which they did".<sup>473</sup>

7.219. We do not consider the Marshall Report's failure to reference the relevant US regulations a flaw that would contribute to causing a reasonable authority to disregard the report. The Marshall Report, as noted above, sought to provide an empirical economic analysis of Québec's timber auctions and concluded that the auction system was open and competitively run. The relevant US regulations, which the Marshall Report did not reference, required that government auction prices be used as a benchmark where the auction is competitively run.<sup>474</sup> In assessing whether the auctions in Québec were open and competitively run, a failure to mention that legal provision would hardly be fatal to that assessment. This is so because, regardless of the requirement set out in that legal provision, the Marshall Report *did* analyse whether the auctions in Québec were open and competitively run.

7.220. The USDOC further considered that because the Government of Québec "requires that all timber sold at auction must be milled within Quebec", Québec's auction did not meet the requirements of an open, competitively-run auction. The USDOC, therefore, found the Marshall Report "not relevant" for determining whether the Québec auction can serve as a benchmark.<sup>475</sup>

7.221. We note, however, that the Marshall Report set out evidence purporting to show that, despite the requirement that all timber sold at auction be processed in Québec, the Québec auction system was an open, competitively-run process. The report specifically addressed the impact of Québec's timber processing requirement on the competitiveness of its auction market.<sup>476</sup> We agree with Canada that the USDOC's finding in question is circular in that it implies that the USDOC chose to ignore the evidence relating to the competitiveness of the auction market by merely asserting that the auction is not competitive.<sup>477</sup> It defies reason that the USDOC should have considered the Marshall Report "not relevant" on the basis that the timber processing requirement in Québec rendered the auction system uncompetitive, when the report itself addressed, through data and analysis, the impact of that very requirement on the competitiveness of the Québec auction. The USDOC engaged neither with that analysis nor with the data underlying that analysis in its determination.

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<sup>468</sup> Canada's first written submission, para. 471.

<sup>469</sup> See, above, para. 7.52.

<sup>470</sup> Canada's second written submission, para. 143 (referring to Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-98).

<sup>471</sup> Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-98.

<sup>472</sup> Final determination, (Exhibit CAN-10), p. 103.

<sup>473</sup> Canada's first written submission, para. 473.

<sup>474</sup> Provision of goods or services, United States Code of Federal Regulations, Title 19, Section 351.511(a)(2)(i).

<sup>475</sup> Final determination, (Exhibit CAN-10), p. 103.

<sup>476</sup> Marshall Report, (Exhibit CAN-171 (BCI)), pp. 76-80.

<sup>477</sup> Canada's first written submission, para. 478.

7.222. Another reason that the USDOC took issue with the Marshall Report was because it considered that the report did not "provide any analysis of Québec auction prices to stumpage prices from markets that have previously been found not to be distorted such as private prices from the Atlantic provinces in Canada and stumpage prices in the United States".<sup>478</sup> In response to our questions regarding the significance of the comparative analysis in question, the United States asserts that the "additional data points" would have assisted the USDOC in its analysis of the Marshall Report as evidence presented by the Government of Québec to establish that its auction system for stumpage operates on a market basis.<sup>479</sup> Canada contends, in response, that the comparative analysis in question is "completely irrelevant".<sup>480</sup> Canada maintains that Article 14(d) does not permit an investigating authority to reject "in-market" prices as a benchmark because those prices do not align with prices in an external market for the good.<sup>481</sup> For Canada, a cross-market comparative analysis would have told Dr Marshall nothing about whether Québec auction prices were market-determined. Canada posits that any comparison by Dr Marshall between Québec auction prices and the prices arising in an external market would merely have measured differences in prevailing conditions as between these different markets.<sup>482</sup>

7.223. We consider that it is not entirely clear, and the USDOC did not explain, why the Québec auction prices could not be analysed in isolation and had to be compared to stumpage prices from "markets that have previously been found not to be distorted", as the USDOC observed.<sup>483</sup> The USDOC did not make a finding that these markets had the same prevailing market conditions as Québec. In the absence of such a finding, and of a reasoned and adequate explanation from the USDOC, the United States has failed to persuade us that comparing Québec auction prices to stumpage prices from an "external, market-based system"<sup>484</sup> such as the Atlantic provinces in Canada and the United States was relevant to the USDOC's assessment of whether Québec's auction prices were distorted. In our view, the absence of the comparative analysis in question did not imply an inherent flaw in the underlying data in the report, nor a flaw in the empirical analysis of that data. An objective and unbiased investigating authority would therefore not have disregarded the Marshall Report due to the absence of that comparative analysis.

7.224. The USDOC additionally observed that the Marshall Report did not analyse "all of the bid prices submitted in the auction, both losing and winning bids, with a comparison between TSG-holders and non-TSG-holders".<sup>485</sup> Canada argues that the USDOC incorrectly concluded that Dr Marshall did not analyse both the losing and winning bids or analyse bids by TSG-holders and non-TSG-holders.<sup>486</sup> The United States asserts that the report did ignore the losing bids, and therefore failed to account for the full range of bidding behaviour.<sup>487</sup>

7.225. We note that the Marshall Report clearly shows, as Canada asserts, that Dr Marshall did examine both winning and losing bids. In particular, Dr Marshall analysed the bids falling below the estimated price set by the government to discern whether those bids represented rational behaviour.<sup>488</sup> Further, we note that the Marshall Report did examine whether the winning bids of TSG-holders were depressed relative to winning bids by non-TSG-holding bidders.<sup>489</sup> The Marshall Report does not, however, as Canada confirms, compare the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders.<sup>490</sup> Canada asserts that Dr Marshall did not undertake that comparison because it was "economically uninformative", but he did examine losing bids where it was relevant to do so.<sup>491</sup> Canada posits that it is the winning, and not the losing bids, that are taken into account when transposing the price for non-auction TSG timber.<sup>492</sup> The

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<sup>478</sup> Final determination, (Exhibit CAN-10), p. 103.

<sup>479</sup> United States' response to Panel question No. 166(a), para. 68.

<sup>480</sup> Canada's comments on the United States' response to Panel question No. 166, para. 61.

<sup>481</sup> Canada's comments on the United States' response to Panel question No. 166, para. 62.

<sup>482</sup> Canada's comments on the United States' response to Panel question No. 166, para. 64.

<sup>483</sup> Final determination, (Exhibit CAN-10), p. 103.

<sup>484</sup> United States' response to Panel question No. 166(b), para. 70.

<sup>485</sup> Final determination, (Exhibit CAN-10), pp. 103-104.

<sup>486</sup> Canada's first written submission, para. 475.

<sup>487</sup> United States' first written submission, para. 273.

<sup>488</sup> Canada's first written submission, para. 475 (referring to Marshall Report, (Exhibit CAN-171 (BCI)), pp. 55-58).

<sup>489</sup> Canada's first written submission, para. 476 (referring to Marshall Report, (Exhibit CAN-171 (BCI)), pp. 58-62).

<sup>490</sup> Canada's response to Panel question No. 167, para. 70.

<sup>491</sup> Canada's response to Panel question No. 167, paras. 70 and 72.

<sup>492</sup> Canada's response to Panel question No. 167, para. 71.

United States argues in response that the USDOC placed significance on comparing the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders because of its finding that there is little incentive for TSG-holding bidders and non-TSG-holding bidders to bid for Crown timber at auction above the TSG-administered price. Such incentives rendered comparisons between the winning bids of TSG-holding bidders and non-TSG-holding bidders of limited value in assessing whether Québec stumpage auction prices are distorted. For the United States, analysing the losing bids of TSG-holding bidders and non-TSG-holding bidders would have captured a more fulsome range of bidding behaviour that would have enabled the USDOC to better assess the competitiveness of Québec's auction system.<sup>493</sup>

7.226. We agree with Canada that the USDOC itself did not provide in its final determination the explanation provided by the United States, referred to in the preceding paragraph, as a reason for placing significance on comparing the losing bids of TSG-holding bidders against the losing bids of non-TSG-holding bidders.<sup>494</sup> That explanation is therefore *ex post* rationalization. Further, that explanation, even if the USDOC had provided it in its determination, would not have sufficed as a basis for necessitating a comparison of the losing bids of TSG-holding and non-TSG-holding bidders and for finding fault with the Marshall Report because it did not conduct that comparison. This is because, for reasons set out earlier in this Report<sup>495</sup>, we conclude that the USDOC, in light of the record evidence, did not properly establish that TSG-holding bidders and non-TSG-holding bidders have an incentive not to bid above TSG prices at auction. That flawed finding in the USDOC's determination could therefore not serve as a valid explanation for necessitating a comparison of the losing bids of TSG-holding and non-TSG-holding bidders.

7.227. The United States further argues that the Marshall Report's comparison of TSG-holders' winning bids to non-TSG-holder's winning bids was circular. That comparison sought to evaluate whether TSG-holders had suppressed their bids, however, as the USDOC found, non-TSG-holding non-sawmills have no incentive to bid over TSG-administered prices because non-sawmill harvesters of auctioned timber must sell the timber purchased at auction to TSG-holding sawmills.<sup>496</sup>

7.228. We consider that, as noted above, the USDOC's finding that non-sawmills (i.e. the non-TSG-holding independent harvesters) have no incentive to bid over TSG-administered prices, is not supported by record evidence. We therefore reject the United States' argument in the preceding paragraph.

7.229. Finally, the USDOC noted that the Marshall Report states that the auctions in Québec are open to bidders from all regions and do not exclude or otherwise discriminate against potential exporters. The USDOC noted that it had, however, verified that harvested timber from the auction must be processed in Québec and that restriction necessarily limited bidders.<sup>497</sup>

7.230. We note that the United States does not disagree with the Marshall Report that, as a matter of law, any potential exporter may submit a bid in the auctions. The United States argues that the USDOC had verified that while a potential exporter may, legally, bid on an auctioned block of timber, it may not export that timber for processing, thus lowering its incentive to participate – and thereby undermining the report's contention that the auction system does not limit bidders.<sup>498</sup> The United States' contention therefore concerns the *effects of Québec's log-processing requirements* on the economic incentives of potential exporters. However, Dr Marshall in his report categorically stated that the report addressed that issue.<sup>499</sup> The Marshall Report sought to demonstrate that Québec's log-processing requirements did not restrict bidders. The USDOC, however, concluded without engaging with Dr Marshall's analysis, that the processing requirements "necessarily" limit bidders. The USDOC's criticism of the Marshall Report's finding that the auctions are open to all bidders relied on that conclusion. We reject that criticism as being inadequately reasoned considering

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<sup>493</sup> United States' comments on Canada's response to Panel question No. 167(a), para. 43; response to Panel question No. 167(b), paras. 73-74.

<sup>494</sup> Canada's comments on the United States' response to Panel question No. 167, paras. 65-66.

<sup>495</sup> See, above, paras. 7.205-7.213.

<sup>496</sup> United States' first written submission, paras. 269-273.

<sup>497</sup> Final determination, (Exhibit CAN-10), p. 104.

<sup>498</sup> United States' first written submission, para. 270.

<sup>499</sup> Marshall Report, (Exhibit CAN-171 (BCI)), pp. 76-80.

that the USDOC did not engage with the record evidence that sought to show that the requirements in question did not restrict bidders.

7.231. For the foregoing reasons, we consider that the USDOC erred in not engaging with the findings of the Marshall Report that were relevant to the USDOC's own line of inquiry in the underlying investigation, that is, whether the auction market for Crown timber in Québec was distorted.

#### **7.3.4.2.5 Unsold auction timber**

7.232. We next turn to examine the USDOC's reliance on its finding that a "significant" amount of Crown timber (15%) offered at auction in Québec remained unsold during the POI, and that the unsold timber was "an additional sign" that TSG-holding corporations and non-sawmills "may not" be making aggressive bids above TSG prices.<sup>500</sup>

7.233. Canada argues that the USDOC provided no evidence or analysis for concluding that the small volume of unsold timber in the auctions demonstrates that auction participants were not bidding aggressively. Canada asserts that the Marshall Report explained that the small number of unsold blocks results from Québec imposing estimated and reserve prices.<sup>501</sup>

7.234. We note that the USDOC found that the unsold auction timber indicated that the TSG-holding corporations and non-sawmills "may not" be, rather than *were not*, making aggressive bids above TSG prices. Therefore, the USDOC did not find that the existence of unsold timber *definitively* showed an absence of aggressive bids above TSG prices. Further, the USDOC's finding in question is at odds with the relevant evidence on the record and alternative plausible explanations. First, as noted above, the evidence on the record, including the Marshall Report, purported to show that the TSG-holding corporations and non-sawmills *did* make aggressive bids above TSG prices.<sup>502</sup> Second, as Canada asserts, the Marshall Report, among other record evidence, explained that the small number of unsold blocks results from Québec imposing estimated and reserve prices<sup>503</sup>, which serve as a lower limit on how much a block may sell for.<sup>504</sup> We note that the Marshall Report found that unsold auction timber indicates aggressively-set reserve and estimated prices for the auction timber.<sup>505</sup> Further, Québec had explained in its response to the USDOC's initial questionnaire that the unsold auction blocks resulted from market conditions, operating difficulties, or incorrect evaluation of the estimated price that did not reflect operating conditions.<sup>506</sup> The USDOC, however, failed to engage with any of that reasoning, omitting to explain why, if at all, it disagreed with that reasoning or found fault with that evidence. In particular, the USDOC did not explain why the unsold auction timber resulted from TSG-holding corporations and non-sawmills failing to make aggressive bids above TSG prices and not from the Crown having aggressively set reserve and estimated prices for the auction timber. We therefore consider that the USDOC did not properly explain, in light of the record evidence, the finding in question.

7.235. We note that the United States also confirms that the USDOC did not find that unsold stumpage, in itself, demonstrated distortion of auction prices.<sup>507</sup> The question is whether that finding, taken together with the USDOC's other findings regarding the allegedly distorted auction market in Québec, could demonstrate distortion of auction prices. However, the USDOC itself did not provide any explanation in that regard. Further, considering that the USDOC did not properly arrive at the finding in question, that finding could not, either by itself or taken collectively with other findings made by the USDOC, indicate that the auction prices for Crown timber in Québec were distorted.

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<sup>500</sup> Final determination, (Exhibit CAN-10), pp. 101-102.

<sup>501</sup> Canada's first written submission, paras. 448-449.

<sup>502</sup> Québec auction data file, (Exhibit CAN-211 (BCI)); Québec stumpage data file, (Exhibit CAN-213); and Marshall Report, (Exhibit CAN-171 (BCI)), pp. 59-62.

<sup>503</sup> In its response to the USDOC's initial questionnaire, the Government of Québec defined the estimated price as "the total price for all the wood to be harvested in an auction block". Further, it defined the reserve price as "the lowest price the BMMB is willing to accept for a sale, given the conditions prevailing at the time of sale". (Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-90).

<sup>504</sup> Canada's first written submission, paras. 448-449.

<sup>505</sup> Marshall Report, (Exhibit CAN-171 (BCI)), p. 43.

<sup>506</sup> Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-91.

<sup>507</sup> United States' first written submission, para. 268.

#### 7.3.4.2.6 Log-processing requirements

7.236. We finally turn to examine the USDOC's finding that Québec's log-processing requirements effectively limited bidders, which in turn suppressed auction bids. The USDOC found that the requirement that timber purchased at the auctions must be processed in Québec effectively excludes potential bidders that would process the timber outside of Québec and bidders that would want to sell the timber for processing outside of the province. Limiting bidders in this manner suppressed auction bids because bidders understand that they face lesser competition. The USDOC found that the log-processing restriction, therefore, demonstrates that the Québec auction is not an open, competitively-run auction.<sup>508</sup>

7.237. Canada argues that the USDOC did not support with evidence or explain its finding that the regulation requiring that timber harvested on Crown lands be processed in Québec distorts auction prices. Canada asserts that the USDOC also disregarded record evidence showing that this regulation has no impact on the auction market because there is no export demand for Québec-origin logs. The Marshall Report showed that the vast majority of the volumes sold in Québec's Crown auctions are located so far from sawmills in the United States that the export of those logs was not economically viable, the distance between them exceeding the 200 kilometres "profitability circle". That private logs, which did not face the export restriction in question, were exported to the United States in negligible amounts further illustrates this point.<sup>509</sup>

7.238. We agree with Canada that the USDOC, considering the record evidence before it, failed to adequately explain its finding that Québec's log-processing requirements effectively limited bidders in Québec's auctions. As Canada asserts, the USDOC failed to engage with Dr Marshall's assessment that this requirement had no impact on the auction market because there was no export demand for Québec-origin logs.<sup>510</sup> Further, we agree with Canada that the USDOC failed to engage with Dr Marshall's assessment of log imports from the United States into Québec as against log exports from Québec to the United States. Dr Marshall considered that if the overall supply of logs was artificially high in Québec, and the prices of private and Crown logs were therefore artificially low, sawmills would be expected to purchase Québec's private logs. Dr Marshall found, however, that data showed that there were negligible exports of private logs to the United States and imports of logs from the United States into Québec far outstrip exports in the opposite direction.<sup>511</sup> The United States asserts, in this regard, that the data in Exhibit CAN-501, which formed the basis for Dr Marshall's assessment of log imports into and log exports from Québec, "does not speak to the existence of the restriction requiring that harvested timber from auctions must be processed in Québec".<sup>512</sup> We disagree. Considering that Dr Marshall drew from that data inferences pertaining to the impact of the log-processing requirements on the overall availability and prices of logs in Québec, that data was relevant to the USDOC's inquiry into the impact of the log-processing requirement on Québec's auction market.<sup>513</sup>

7.239. The United States contends, however, that Québec, by law, restricts export of harvested Crown timber for processing outside of the province. Québec's timber auctions were, therefore, not open to all bidders.<sup>514</sup> We consider that the restriction on export of harvested Crown timber for processing outside Québec did not necessarily mean that the province's timber auctions were not open to all bidders. Even if there were a restriction on export of harvested Crown timber for processing outside Québec, that restriction would not necessarily in practice have an impact on the number of bidders participating in the timber auctions. If there was no export demand for Québec-origin logs due to the location of the auction blocks, as the Marshall Report sought to

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<sup>508</sup> Final determination, (Exhibit CAN-10), p. 102.

<sup>509</sup> Canada's first written submission, paras. 459, 461, and 467.

<sup>510</sup> Marshall Report, (Exhibit CAN-171 (BCI)), p. 77.

<sup>511</sup> Canada's first written submission, para. 461 (referring to Marshall Report, (Exhibit CAN-171 (BCI)), pp. 79-80).

<sup>512</sup> United States' response to Panel question No. 175, para. 106.

<sup>513</sup> We also disagree with the United States that Exhibit CAN-173, showing the distribution of forestland in Québec, was not relevant to the USDOC's inquiry into the impact of log-processing requirements on Québec's auction market. (United States' response to Panel question No. 175, paras. 107-108). We agree with Canada that the map in that exhibit confirms that the public forest is further north than the private forest and far away from any export market. (Canada's comments on the United States' response to Panel question No. 175, para. 93). We therefore consider that an unbiased and objective authority would have engaged with this evidence.

<sup>514</sup> United States' first written submission, para. 274.

indicate, the requirement in question would not have had any impact on the auction market because there would be no bidders looking to process the timber outside of Québec, or wanting to sell the timber for processing outside of the province. In respect of these particular blocks, effectively, no potential bidders would be excluded from the auctions due to the requirement. As noted above, the USDOC failed to engage with this reasoning and related evidence.

7.240. The United States further submits that Canada relies on the Marshall Report's assessment of the quantity of import and exports of private-origin logs to argue that there was a lack of export demand for Québec-origin logs in the United States in the POI. For the United States, the minimal volume of private timber that was eligible for export, however, did not constitute an appropriate basis to conclude that the export demand for Québec-origin timber was minimal.<sup>515</sup> We take the view that the USDOC itself did not make that observation regarding the Marshall Report's assessment. In the absence of that observation by the USDOC itself, the United States' argument above constitutes *ex post* rationalization. But even if the USDOC had made that observation, that observation does not undermine the reasoning and evidence set out in the Marshall Report purporting to show that the export of logs sold in Québec's auctions to sawmills in the United States was not economically viable because of the distance between them. Further, even in these proceedings, the United States does not contest the finding in the Marshall Report that the auction blocks were located so far from the importers in the United States that transportation costs to export unprocessed public logs from Québec to those importers would have been prohibitively high.

7.241. The United States further argues that the Marshall Report did not address inter-province export demand.<sup>516</sup> We consider that, as was the case with the United States' previous argument, the USDOC itself did not make that observation regarding the assessment in the Marshall Report. In the absence of that observation by the USDOC itself, the United States' argument that the Marshall Report did not address inter-province export demand constitutes *ex post* rationalization. Further, even if the USDOC had made that observation, it would not have been enough to undermine the Marshall Report's assessment. If the USDOC considered that the report should have addressed inter-province export demand, in addition to demand from importers in the United States, it could have solicited that information from the Canadian interested parties or could itself have undertaken that analysis.

7.242. Further, for the reasons stated in paragraph 7.52, we reject the United States' argument that the USDOC reasonably accorded the Marshall Report limited weight because Canada had commissioned the report to oppose the USDOC's analysis.<sup>517</sup>

7.243. Canada also asserts that the requirement that Crown timber harvested in Québec be processed in the province is not an absolute rule. That general rule is subject to certain exceptions that allow timber to be processed outside of the province in certain cases.<sup>518</sup>

7.244. We note that Section 118 of the SFDA 2015-2016, on its face, indicates that, in certain cases, the government may allow "incompletely" processed timber to be exported outside of Québec. Section 118 provides that:

The Government may, on the conditions it determines, authorize the shipment outside Quebec of incompletely processed timber from the forests in the domain of the State if it appears to be contrary to the public interest to do otherwise.<sup>519</sup>

7.245. Canada further submits that the ability to authorize timber to be processed outside Québec also explains the province's authorization for export of certain logs from two major regions in 2015, Abitibi-Témiscamingue and Outaouais.<sup>520</sup> The United States contends in response that the authorization of exports from the regions in question, was conditional rather than a blanket

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<sup>515</sup> United States' first written submission, para. 277.

<sup>516</sup> United States' first written submission, para. 277.

<sup>517</sup> United States' first written submission, para. 277.

<sup>518</sup> Canada's first written submission, para. 458.

<sup>519</sup> SFDA, (Exhibit CAN-169), Section 118.

<sup>520</sup> Canada's opening statement at the first meeting with the panel, (26 February 2019), paras. 176 and 180.

authorization.<sup>521</sup> Referring to the Decree<sup>522</sup> that authorized the exports from the regions in question, the United States asserts that the export of timber was allowed only when "no operator of a wood processing plant located in Quebec has shown interest in purchasing these volumes of timber".<sup>523</sup> Considering that a harvester wishing to export logs for milling outside of Québec must first demonstrate that the harvester could "not find a buyer", sawmills located outside of Québec would be disincentivized from purchasing timber in Québec at auction.<sup>524</sup> Further, the amount of timber that could be exported was subject to a volume cap.<sup>525</sup> For the United States, the Decree does not eliminate the log-processing restriction, but merely modifies it for two regions of Québec.<sup>526</sup>

7.246. Canada rejects the United States' assertions. Canada argues that the Decree authorizing exports of logs from the regions in question did provide a blanket authorization. For Canada, the Decree demonstrates that the USDOC, in finding that the log-processing requirement deterred potential bidders from participating in auctions, ignored evidence related to that blanket authorization. Canada submits that the United States misconstrues the Decree as setting out conditions that must be fulfilled prior to the export of timber. The preamble of the Decree, to which the United States refers in its arguments, sets out "considerations" rather than "conditions".<sup>527</sup> Canada asserts that the preamble makes clear that Québec has already determined that these wood volumes do "not find buyers due to the existing industrial structure" and that it is in the interest of Québec that these volumes be processed outside of Québec.<sup>528</sup> Canada posits that accordingly, the volumes of round wood referenced in the Decree were already approved for export and an exporter was not required to fulfil any conditions precedent prior to export.<sup>529</sup>

7.247. We note that the USDOC stated in its final determination that "[it had] verified that timber purchased at the auctions *must* be milled within Québec".<sup>530</sup> We consider that the USDOC's determination therefore does not indicate that the USDOC itself engaged with an assessment of the impact of either Section 118 of the SFDA 2015-2016, or of the Decree, on bidder participation in the auction. Further, as Canada asserts, the USDOC did not make any findings, or engage with Québec, in regard to the Decree or Section 118, despite relevant evidence on the record before the USDOC.<sup>531</sup> Canada submits that Québec had informed the USDOC that there was a processing requirement but that it was subject to exceptions, and that logs may be exported with government permission.<sup>532</sup> The United States does not dispute that the evidence that Canada refers to was before the USDOC.

7.248. In our view, an unbiased and objective authority, in examining the impact of the log-processing requirements on bidder participation in Québec, would have assessed the application of those requirements, including any exceptions to those requirements, such as that set out in Section 118 of the SFDA 2015-2016. The USDOC did not do so.

7.249. Further, whether the Decree authorizing exports of logs from the regions in question did provide a blanket authorization, or alternatively, set out conditions precedent prior to export, was an inquiry that an unbiased and objective authority would itself have embarked upon. Such an authority would have solicited further information from the interested parties as required in order to reach its conclusions and would have provided a reasoned and adequate explanation for those conclusions in light of the record evidence. Again, the USDOC's determination does not indicate that it did so.

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<sup>521</sup> United States' response to Panel question No. 62, para. 196.

<sup>522</sup> Decree 259-2015, (Exhibit CAN-500), pp. 1-2.

<sup>523</sup> United States' response to Panel question No. 62, para. 196.

<sup>524</sup> United States' response to Panel question No. 62, para. 197.

<sup>525</sup> United States' response to Panel question No. 62, para. 198.

<sup>526</sup> United States' comments on Canada's response to Panel question No. 172, para. 50.

<sup>527</sup> Canada's second written submission, para. 149.

<sup>528</sup> Canada's response to Panel question No. 172, para. 78 (referring to Decree 259-2015, (Exhibit CAN-500), pp. 1-2).

<sup>529</sup> Canada's response to Panel question No. 172, para. 78.

<sup>530</sup> Final determination, (Exhibit CAN-10), p. 102. (emphasis added)

<sup>531</sup> Canada's comments on the United States' response to Panel question No. 170, para. 74 (referring to SFDA, (Exhibit CAN-169), Sections 117-118; Decree 259-2015, (Exhibit CAN-500); and Québec, sample BMMB auction tender package, (Exhibit CAN-193), appendix A).

<sup>532</sup> Canada's comments on the United States' response to Panel question No. 170, para. 74 (referring to Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-40).

7.250. We therefore reject the United States' arguments as *ex post* rationalization and find that the USDOC failed to take into consideration in its assessment the exceptions to which the log-processing requirement in Québec was subject, and thus did not properly investigate the application of that requirement in the province.

7.251. In conclusion, we find that the USDOC did not properly establish, in light of record evidence, that log-processing requirements effectively limited bidders in Québec's auction market for Crown timber. That finding therefore cannot, either by itself, or together with the USDOC's other findings pertaining to Québec's auction market, show that auction prices for Crown timber in the province were distorted.

#### **7.3.4.2.7 Conclusion**

7.252. For the foregoing reasons, we conclude that the USDOC improperly rejected using the proposed auction stumpage prices in Québec as a stumpage benchmark.

#### **7.3.5 Whether the USDOC improperly rejected log prices in Alberta as an appropriate stumpage benchmark**

7.253. The Canadian interested parties had proposed to the USDOC that it use certain log prices in Alberta as the basis for a benchmark to determine the adequacy of remuneration for the Crown's provision of stumpage in the province.<sup>533</sup> Although the USDOC did consider using the proposed log prices in Alberta as the basis for a stumpage benchmark, it declined to use them, finding that, among others, they were not "consistent with market principles".<sup>534</sup> Canada claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in improperly rejecting log prices in Alberta as the basis for a stumpage benchmark.

##### **7.3.5.1 Factual background**

7.254. Alberta sets administered prices for Crown stumpage. These prices are set with reference to timber dues for normal coniferous timber, as established by Alberta's Timber Management Regulation (TMR), which are adjusted against weekly published prices for North American lumber.<sup>535</sup>

7.255. In the underlying investigation, Alberta had submitted to the USDOC certain price data pertaining to logs for use as a benchmark to assess the adequacy of the remuneration for the Crown timber purchased by Canfor, Tolko, and West Fraser in the province.<sup>536</sup> This data formed part of an annual Timber Damage Assessment survey (TDA survey).<sup>537</sup> The USDOC found that the TDA data represents a survey of private log transactions and includes a "very small volume" of private stumpage transactions and "many" TDA salvage transactions.<sup>538</sup> In its final determination, the USDOC rejected the TDA survey data for use as a comparable benchmark price against which to assess whether Alberta had provided stumpage for less than adequate remuneration.<sup>539</sup>

7.256. In assessing whether it could use the TDA survey data as a valid stumpage benchmark, the USDOC noted that under its tiered-approach<sup>540</sup> to benchmark selection, its first preference for

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<sup>533</sup> Alberta initial questionnaire response, (Exhibit CAN-97), pp. ABIV-127 and ABIV-130.

<sup>534</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>535</sup> Alberta verification report, (Exhibit CAN-110 (BCI)), pp. 15-17.

<sup>536</sup> Alberta initial questionnaire response, (Exhibit CAN-97), pp. ABIV-127 and ABIV-130.

<sup>537</sup> The TDA survey data is used as a starting point to determine, among other things, the amount of compensation that energy and utility companies owed to tenure-holders for using Crown lands managed by tenure-holders. The TDA values are determined based upon, among other information, data collected from tenure-holding firms concerning the volume and value of timber purchases, as well as harvesting and hauling costs. (United States' first written submission, para. 320).

<sup>538</sup> The USDOC found that TDA salvage transactions occur when Alberta energy and utility companies receive concessions on Crown land that is under timber management by tenure-holders, and these concessions result in the removal of land from timber management. The non-timber concession holders usually ask the tenure-holder to "salvage" timber on the concession land. (Final determination, (Exhibit CAN-10), p. 49).

<sup>539</sup> Final determination, (Exhibit CAN-10), pp. 48-53.

<sup>540</sup> As noted earlier, US law sets out potential benchmarks in hierarchical order of preference (a) a market-determined price for the good in question using actual transactions in the country under investigation (tier-one); (b) world market prices that would be available to the purchasers in the country under investigation

determining the adequacy of remuneration is to compare the government price to a market-determined price "for the good or service resulting from actual transactions in the country in question" ("tier-one" benchmark).<sup>541</sup> The USDOC found that because the TDA survey data sets out prices for logs, rather than stumpage, which was the "good in question" in this investigation, the TDA survey prices did not constitute a "tier-one" benchmark. According to the USDOC, the benchmark it had identified in Nova Scotia, in contrast, did pertain to market-determined prices for stumpage and was therefore the appropriate "tier-one" benchmark.<sup>542</sup> Having found an appropriate "tier-one" benchmark in Nova Scotia stumpage prices, the USDOC nonetheless proceeded to assess whether the TDA survey data was appropriate as a benchmark under "tier-three" of its regulatory hierarchy.

7.257. The USDOC concluded that TDA log prices were not usable even as a "tier-three" benchmark because they did not reflect prices that are consistent with market principles.<sup>543</sup> In particular, the USDOC reasoned that:

- a. salvage timber is cut without regard to the tenure-holder's approved cutting plan, and therefore the prices do not fairly represent the price of mature standing timber;
- b. further, the salvage transactions involved logs that were not offered for sale on the open market. The tenure-holder is required to take part in salvage transactions at the direction of the non-timber concession holder;
- c. 60% of the transactions by volume in the TDA survey are sales of Crown-origin logs for which Crown stumpage was paid and thus these transactions are unreliable insofar as they would yield a circular comparison of Crown stumpage prices with a benchmark that also included Crown stumpage; and
- d. Alberta prohibits exports of timber, which prevents log sellers from seeking the highest prices in all markets, and, thus, artificially creates downward pressure on log prices throughout the province.<sup>544</sup>

7.258. The USDOC further found that private stumpage transactions contained in the TDA survey constitute a relatively inconsequential share (0.3%) of the total volume of sales and are not market-determined. As part of the reasons for concluding that private stumpage prices in the TDA survey were not market-determined, the USDOC found that in the financial year 2015-2016 in Alberta, Crown timber accounted for 98.48% of the harvest volume, while the harvest volume of non-Crown timber accounted for the remaining 1.52%.<sup>545</sup>

### **7.3.5.2 Evaluation**

7.259. Canada claims that the USDOC improperly rejected using the log prices provided in the TDA survey (TDA log prices) to derive a benchmark to determine the adequacy of the remuneration for Crown timber (stumpage benchmark) in Alberta.<sup>546</sup> The United States argues, in response, that the USDOC rejected the TDA log prices as a stumpage benchmark for Alberta mainly because first, it preferred to use in-country benchmark prices for *stumpage*, which were available from Nova Scotia, over prices for *logs*, which the TDA data provided; and second, it found that the TDA log prices were inconsistent with market principles.<sup>547</sup>

7.260. The broad issue before us is whether an objective and unbiased investigating authority would have declined using the TDA log prices to determine a stumpage benchmark for Alberta in light of

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(tier-two); or (c) assessment of whether the government price is consistent with market principles (tier-three). The USDOC explained that the preferred benchmark in the hierarchy, the tier-one benchmark price, is an observed market price from actual transactions, such as prices from private parties or, in certain circumstances, government-run auctions, within the country under investigation. (Preliminary determination, (Exhibit CAN-8), pp. 26-27).

<sup>541</sup> Final determination, (Exhibit CAN-10), p. 49. (emphasis original)

<sup>542</sup> Final determination, (Exhibit CAN-10), pp. 48-49.

<sup>543</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>544</sup> Final determination, (Exhibit CAN-10), p. 50.

<sup>545</sup> Final determination, (Exhibit CAN-10), pp. 51-52.

<sup>546</sup> Canada's first written submission, paras. 264-265.

<sup>547</sup> United States' first written submission, para. 336.

the record evidence. In our evaluation, we will need to assess whether the USDOC improperly rejected the TDA log prices as a valid benchmark on the basis that (a) stumpage prices from Nova Scotia constituted a preferable benchmark; and (b) TDA log prices were inconsistent with market principles. We must therefore examine the adequacy of the USDOC's analysis with respect to each of those findings.

7.261. Canada also argues that the USDOC rejected TDA log prices as a stumpage benchmark for Alberta without first establishing that these prices were distorted by the government, in direct contravention of the United States obligations under Article 14(d) of the SCM Agreement.<sup>548</sup> In our evaluation, we must therefore also examine whether Article 14(d) permitted the USDOC to reject TDA logs prices as a stumpage benchmark for Alberta without first establishing that these prices were distorted by the government, as Canada alleges the USDOC did.

#### **7.3.5.2.1 Whether the USDOC, using its "tier-one" analysis, improperly rejected the TDA log prices as a valid benchmark for Alberta**

7.262. We will first examine whether the USDOC improperly rejected the TDA log prices as a valid benchmark for Alberta on the basis that those prices were not prices for stumpage and a benchmark based on prices for stumpage was available from Nova Scotia.<sup>549</sup>

7.263. Canada argues that the USDOC improperly rejected using the TDA survey data as a benchmark, based on the reasoning that the data in question pertained to logs, and not to stumpage, and that the two goods are not the same. For Canada, the USDOC, in doing so, provided no coherent explanation and departed from its own past practice where it had used log prices to derive a market benchmark for stumpage prices.<sup>550</sup> Canada contends that the USDOC's reasoning is inconsistent with its finding even in the underlying investigation that an appropriate stumpage benchmark for British Columbia could be derived from Washington State log prices, because the timber species and growing conditions in the respective jurisdictions were allegedly "similar".<sup>551</sup> Finally, Canada asserts that the TDA survey data sets out prices for logs sourced and sold in Alberta, which necessarily reflect the prevailing species mix and growing conditions for standing timber in Alberta.<sup>552</sup>

7.264. The United States responds that the USDOC explained that the TDA log prices are not prices "for the good or service in question" provided by Alberta i.e. stumpage.<sup>553</sup> For the United States, while log prices may serve as a benchmark in certain contexts, in the case at hand the USDOC had identified on the record an in-country benchmark that consisted of prices for stumpage itself, which was the good in question in the underlying investigation. The USDOC considered that "[b]ecause the good at issue in this investigation is stumpage, a market-determined stumpage price is the preferred benchmark".<sup>554</sup> The USDOC did, on the other hand, use log prices as a stumpage benchmark for British Columbia because a benchmark relating to the good in question itself (i.e. stumpage for the larger variety of SPF timber in British Columbia) was unavailable on the record.<sup>555</sup>

7.265. We note that the USDOC considered that the TDA log prices that Alberta had proposed as a benchmark set out prices for logs, rather than prices for stumpage, which was the good in question. The USDOC therefore considered that log prices did not constitute a "tier-one benchmark" under the US regulatory hierarchy. The USDOC dismissed as being unnecessary, the examination of non-tier-one benchmark data such as the TDA log prices in Alberta when it had already found a tier-one benchmark in Nova Scotia stumpage prices.<sup>556</sup> We consider, however, that Article 14(d) of the SCM Agreement required the USDOC to determine the adequacy of remuneration for Crown stumpage in Alberta "in relation to prevailing market conditions for the good ... in question".<sup>557</sup>

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<sup>548</sup> Canada's first written submission, para. 276; opening statement at the second meeting of the Panel, para. 57.

<sup>549</sup> Final determination, (Exhibit CAN-10), pp. 48-49.

<sup>550</sup> Canada's first written submission, paras. 269-272.

<sup>551</sup> Canada's first written submission, para. 275 (quoting Final determination, (Exhibit CAN-10), p. 63).

<sup>552</sup> Canada's first written submission, paras. 274-275.

<sup>553</sup> United States' first written submission, para. 332.

<sup>554</sup> United States' first written submission, para. 337 (quoting Final determination, (Exhibit CAN-10), p. 48).

<sup>555</sup> United States' first written submission, para. 338.

<sup>556</sup> Final determination, (Exhibit CAN-10), p. 48 (referring to Provision of goods or services, United States Code of Federal Regulations, Title 19, Section 351.511(a)(2)).

<sup>557</sup> Emphasis added.

Therefore, Article 14(d) required not only that the selected benchmark relate to Crown *stumpage* in Alberta, which is the good in question, but also to the *prevailing market conditions* for that Crown *stumpage*.

7.266. We further note that in the underlying investigation the USDOC, in its questionnaire to the respondents, had itself asked the respondents to provide data on private log prices in Alberta.<sup>558</sup>

7.267. In our view, an objective and unbiased investigating authority, in light of the above considerations and facts of the underlying investigation, would not have dismissed log prices in Alberta as a possible stumpage benchmark without explaining why the Nova Scotia stumpage prices related more closely to the prevailing market conditions for stumpage in Alberta than the log prices in question. Such an explanation is pertinent for several reasons. First, the USDOC had itself asked the respondents to submit data on log prices in Alberta. This indicated that the USDOC regarded log prices as a potential benchmark. Further, pursuant to Article 14(d), a benchmark must reflect the prevailing market conditions for the government-provided good. The USDOC dismissed the log prices on the basis that they did not reflect the price for the good in question, which was stumpage, but did not explain why the stumpage prices that could have been derived from the log prices may not have better reflected the prevailing market conditions for stumpage in Alberta. In this regard, we note that the United States recognizes that "the use of a log-derived benchmark for stumpage may be permissible in certain contexts"<sup>559</sup> and has acknowledged in previous investigations, that stumpage prices can be derived simply by deducting certain costs from log prices.<sup>560</sup> Moreover, even in the underlying investigation, the USDOC found that an appropriate stumpage benchmark for British Columbia could be derived from Washington State log prices because the timber species and growing conditions in the respective jurisdictions were allegedly "similar".<sup>561</sup> Pertinent here also is that we have concluded elsewhere in this Report<sup>562</sup> that the USDOC erroneously found that the benchmark price for stumpage in Nova Scotia "reasonably reflected" the prevailing market conditions for stumpage in Alberta, among other provinces.

7.268. We further note that the respondents had placed before the USDOC the MNP supplemental report, which provided reasons for why it considered that TDA log prices would constitute the best stumpage benchmark for Alberta.<sup>563</sup> The report explained, among other things, that the TDA survey data pertained to logs sourced and sold in Alberta and therefore reflected the sizes and species of trees common in Alberta and that grew in Alberta's climate and conditions. The USDOC, however, did not engage with those explanations set out in the MNP supplemental report, dismissing as being unnecessary, the examination of a "non-tier-one benchmark data such as the TDA survey prices in Alberta"<sup>564</sup> when it had already found a "tier-one" benchmark in Nova Scotia stumpage prices.<sup>565</sup>

7.269. We consider that, faced with a choice between log prices in Alberta and standing timber prices in Nova Scotia as potential stumpage benchmarks, and in light of relevant record evidence, an objective and unbiased authority would have explained why log prices in Alberta, provided they are market-determined, could not be used to derive a benchmark that would more accurately reflect the prevailing conditions for stumpage in the Alberta market than would stumpage prices in Nova Scotia. The United States has not identified where the USDOC provided that explanation in its determination.<sup>566</sup> We, therefore, consider that the USDOC did not provide a reasoned and adequate explanation for rejecting as a stumpage benchmark the log prices, which it had itself requested the

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<sup>558</sup> Alberta initial questionnaire response, (Exhibit CAN-97), pp. ABIV-127 and ABIV-130.

<sup>559</sup> United States' first written submission, para. 338.

<sup>560</sup> First remand determination, (Exhibit CAN-94), p. 11.

<sup>561</sup> Final determination, (Exhibit CAN-10), p. 63.

<sup>562</sup> See, below, paras. 7.397-7.399.

<sup>563</sup> MNP supplemental report, (Exhibit CAN-141), p. 23.

<sup>564</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>565</sup> As noted above, the USDOC did nonetheless examine whether log prices were usable as a "tier-three" benchmark.

<sup>566</sup> We asked the United States to indicate where in its determination the USDOC explained why log prices in Alberta, provided they were market-determined, could not be used to derive a benchmark that would more accurately reflect the prevailing market conditions for stumpage in Alberta than stumpage prices in Nova Scotia. We agree with Canada that, in its response, the United States, rather than pointing to that explanation referred to in our question, simply reiterates the USDOC's conclusion that it preferred to use a stumpage price rather than a log price, based upon the USDOC's regulatory hierarchy, in addition to referring to arguments set out in its previous submissions. (United States' response to Panel question No. 190, paras. 140-148; Canada's comments on the United States' response to Panel question No. 190, para. 125).

respondents to provide, on the basis that those prices set out prices for logs, rather than prices for stumpage, which was the good in question.

7.270. We note that in the underlying investigation, the USDOC did find that the TDA log prices in Alberta were inconsistent with market principles. In the following section, we examine whether that finding was a valid basis to reject using the TDA log prices as a benchmark. However, we consider that rejecting the TDA log prices as a benchmark on the basis that they were prices for logs, rather than prices for stumpage, which was the good in question, without addressing whether the Nova Scotia stumpage prices related more closely to the *prevailing market conditions for stumpage* in Alberta than the log prices in question, was not an approach an objective and unbiased authority would have adopted.

#### **7.3.5.2.2 Whether the USDOC improperly found under its "tier-three" benchmark analysis that TDA log prices were inconsistent with market principles**

7.271. We will next examine whether the USDOC improperly rejected the TDA log prices as a valid benchmark on the basis that those prices were inconsistent with market principles. The USDOC found that TDA log prices were inconsistent with market principles based on the following four grounds (a) salvage transactions in the TDA survey did not reflect the price of mature standing timber; (b) salvage transactions involved logs that were not offered for sale on the open market because the tenure-holder is required to take part in these transactions at the direction of the non-timber concession holder; (c) 60% of the transactions by volume in the TDA survey are sales of Crown-origin logs for which Crown stumpage was paid; and (d) Alberta prohibits exports of timber which artificially creates downward pressure on log prices throughout the province. We must examine whether the USDOC improperly concluded that TDA log prices were inconsistent with market principles based on each of these grounds.

##### **7.3.5.2.2.1 Salvage timber**

7.272. At the outset, the USDOC considered that the TDA data represents "a survey of private log transactions" and includes "a very small volume" of private stumpage transactions and "many" TDA salvage transactions.<sup>567</sup> The USDOC noted that salvage transactions occur when Alberta energy and utility companies (non-timber concession holders) receive concessions on Crown land that is under timber management by tenure-holders, and these concessions result in the removal of land from timber management. Further, the USDOC observed that the non-timber concession holders negotiate with the timber tenure-holders to reimburse the latter for their sunk costs of timber management on the land base removed from timber management, and usually ask the tenure-holders to "salvage" timber on the concession land.<sup>568</sup> It noted that Alberta's TMR requires tenure-holders to salvage timber "under threat" of having the volume charged against their annual allowable cut (AAC) if they refuse. According to the USDOC, the TDA survey data is collected "to inform the negotiation of the value of the standing timber, in order to facilitate the price negotiations for salvage, sunk land-use costs and reforestation".<sup>569</sup> The USDOC further noted that the negotiations for compensating standing timber "damage" are private and do not include the government except in an *ex officio* capacity.<sup>570</sup>

7.273. The USDOC proceeded to find that the TDA survey data did not constitute an appropriate stumpage benchmark, because, among others, the salvage timber is cut without regard to the tenure-holder's approved cutting plan, and therefore the prices of that salvage timber do not fairly represent the price of mature standing timber. Further, the salvage transactions of logs were not offered for sale on the open market and the tenure-holder is required to take part in these transactions at the direction of the non-timber concession holder.<sup>571</sup>

7.274. We will first examine whether the USDOC improperly found that the salvage transactions in the TDA survey do not fairly represent the price of mature standing timber.

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<sup>567</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>568</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>569</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>570</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>571</sup> Final determination, (Exhibit CAN-10), p. 50.

7.275. Canada argues that the USDOC cited no evidence to support its finding that because salvage timber is cut without regard to the tenure-holder's approved cutting plan, salvage timber prices do not fairly represent the price of mature standing timber.<sup>572</sup> Canada further asserts that salvaged logs are not damaged nor necessarily prematurely cut.<sup>573</sup> Canada notes that while "TDA" stands for "Timber Damage Assessment", the name references the use of the TDA survey data and does not imply that the transactions reported in the TDA survey are for damaged timber.<sup>574</sup> Canada submits that the term "salvage" only identifies the source of timber and does not describe the quality of that timber or whether that timber is mature or immature.<sup>575</sup> Canada submits that "the fact that salvage timber originates from an area that may or may not have been cut in accordance with an approved cutting plan provides no information on the maturity of that particular stand of trees".<sup>576</sup>

7.276. The United States contends that Canada "suggests" that whether the timber is cut in accordance with the approved cutting plan is irrelevant because there is little variation in the size and species of Alberta timber.<sup>577</sup> The United States further asserts that Alberta, however, explained during verification that trees in Alberta may take from 90 to 120 years to reach full growth. The United States submits that, according to Alberta, a commercial rotation takes 120 years and larger trees are more valuable by volume because they contain a higher proportion of merchantable timber and have lower hauling, handling, and milling costs by volume. The United States contends that damaged timber that is prematurely cut cannot form the benchmark for standing timber cleared for commercial purposes.<sup>578</sup>

7.277. At the outset, we agree with Canada that the United States' argument that salvage timber was damaged is *ex post* rationalization and therefore reject that argument.<sup>579</sup> The USDOC did not make that determination. Standing timber "damage" for the USDOC meant "the timber removed from tenure production by the granting of the non-timber concession on tenure land".<sup>580</sup>

7.278. We further note that while Canada contests that the salvage timber in question was premature, it does not dispute that the salvage timber was not cut according to the approved cutting plan.<sup>581</sup> We consider that not following an approved cutting plan in cutting certain trees, as is the case with salvage timber, may render it possible, but not *necessary* that those trees are prematurely cut. It may well have been the case that the tenure land on which the non-timber concession was granted, and which was therefore demarcated for removal of timber, could have included mature trees. Therefore, without firm evidence of the maturity of the salvage timber in question, the USDOC could not have conclusively determined that the salvage timber was prematurely cut. We agree with Canada that the USDOC did not support with record evidence its finding that the salvage transactions did not fairly represent the price of mature standing timber.<sup>582</sup>

7.279. Canada submits that the USDOC did not investigate the issue at hand and ask Alberta and forestry companies about the comparative size of timber and logs sourced from salvage. Instead, it simply presumed that the salvage timber was prematurely cut.<sup>583</sup> Canada posits that if undersized timber from an industrial disposition were included in an arm's-length transaction, it would be assigned a timber dues rate pursuant to the TMR and would be disposed of or utilized for products other than sawlog production.<sup>584</sup> Canada further asserts that the record establishes that timber

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<sup>572</sup> Canada's first written submission, para. 285.

<sup>573</sup> Canada's opening statement at the first meeting of the Panel, (26 February 2019), para. 97.

<sup>574</sup> Canada's first written submission, para. 248.

<sup>575</sup> Canada's response to Panel question No. 191, para. 105.

<sup>576</sup> Canada's first written submission, para. 286.

<sup>577</sup> United States' first written submission, para. 339 (referring to Canada's first written submission, paras. 285-286). We note however that Canada does not, in paragraphs 285 and 286 of its first written submission, make the suggestion that the United States asserts it does.

<sup>578</sup> United States' first written submission, para. 339 (referring to Alberta verification report, (Exhibit CAN-110 (BCI)), pp. 4 and 13-14).

<sup>579</sup> Canada's second written submission, para. 91.

<sup>580</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>581</sup> Canada submits that Alberta uses the term "approved forest management plan" rather than "cutting plan". (Canada's response to Panel question No. 191, para. 105).

<sup>582</sup> Canada's comments on the United States' response to Panel question No. 192, para. 136.

<sup>583</sup> Canada's second written submission, para. 90.

<sup>584</sup> Canada's response to Panel question No. 40, para. 160 (referring to Alberta TMR, (Exhibit CAN-115), Sections 81-82).

removed from industrial dispositions and included in the log price data must adhere to the relevant provincial utilization standards.<sup>585</sup>

7.280. We note that the utilization standards that Canada refers to set out certain minimum tree size specifications for purposes of tree utilization. The USDOC's determination does not show that it engaged with that evidence. We asked the United States to indicate where the USDOC considered the utilization standards, to which Canada refers, in finding that the prices of salvage timber are not a fair representation of the price of mature standing timber. In response, the United States points us to a USDOC verification report, where, according to the United States, the USDOC verified that "Alberta provincial utilization standards define a merchantable tree as one that is 16 feet or more in length to a four inch top (with no more than a twelve inch stump)".<sup>586</sup> We note, first, that this observation is not set out in the verification report as a justification for the USDOC's finding that the prices of salvage timber do not fairly represent the price of mature standing timber. More importantly, the USDOC did not find that the salvage timber in question did not meet the specifications that the verification report mentions (i.e. 16 feet or more in length to a 4 inch top (with no more than a 12 inch stump)) and that the salvage timber therefore did not fairly represent the price of mature standing timber. Absent that finding, we have no basis to consider that the USDOC relied on the observation in the verification report that the United States refers us to.

7.281. We therefore consider that the USDOC improperly found that salvage transactions did not fairly represent the price of mature standing timber as it based that finding not on record evidence but on a presumption.

7.282. We will next examine whether the USDOC improperly found that the salvage transactions did not pertain to sales of logs on the open market because the tenure-holder is required to take part in those transactions at the direction of the non-timber concession holder.<sup>587</sup>

7.283. Canada contends that none of the log transactions reported in the TDA survey were the result of a forced purchase.<sup>588</sup> Canada further asserts that the Brattle Report found all these log transactions to reflect competitive prices "between independent, private parties and thus represent prices established by willing participants independent of government intervention".<sup>589</sup> Further, the TDA survey would exclude any kind of transaction that tenure-holders were pressured into because of how the survey defined "arm's length" transactions.<sup>590</sup> Canada submits that the TDA survey requested respondents not to report salvage transactions [[\*\*\*]].<sup>591</sup> The United States contends that Canada wrongly argues that the salvage log transactions do not involve "required" purchases as sales. As the USDOC observed, Alberta's TMR requires tenure-holders to salvage timber under threat of having the volume charged against their AAC in case of refusal. The tenure-holders are therefore "pressured to purchase salvage timber to mitigate losses".<sup>592</sup>

7.284. We first consider Canada's assertion that the Brattle Report found that the log transactions in the TDA survey "are between independent, private parties and thus represent prices established by willing participants independent of government intervention".<sup>593</sup> We note that, as Canada submits, the Brattle Report relied on a 2016 update concerning the TDA survey performed by MNP to support its conclusion that log prices in question were transacted between independent, private parties and represent prices established by willing participants.<sup>594</sup> As Canada asserts, the MNP

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<sup>585</sup> Canada's second written submission, para. 90 (referring to Alberta Timber Harvest Planning, (Exhibit CAN-114), section 4.2.1, p. 16).

<sup>586</sup> United States' first written submission, para. 339 (quoting Alberta verification report, (Exhibit CAN-110 (BCI)), p. 14); response to Panel question No. 192, para. 150.

<sup>587</sup> Final determination, (Exhibit CAN-10), pp. 49-50.

<sup>588</sup> Canada's first written submission, para. 288.

<sup>589</sup> Canada's first written submission, para. 284 (quoting Brattle Report, (Exhibit CAN-93), pp. 35-36).

<sup>590</sup> Canada's first written submission, para. 288 (referring to Alberta JMC survey, (Exhibit CAN-103 (BCI)), p. 2).

<sup>591</sup> Canada's first written submission, para. 288 (quoting Alberta JMC survey, (Exhibit CAN-103 (BCI)), p. 2).

<sup>592</sup> United States' first written submission, para. 340.

<sup>593</sup> Brattle Report, (Exhibit CAN-93), pp. 35-36.

<sup>594</sup> Brattle Report, (Exhibit CAN-93), p. 36 (referring to Alberta MNP damage assessment, (Exhibit CAN-102)); Canada's response to Panel question No. 197, para. 116.

update, which was before the USDOC in the underlying investigation, expressly noted that the reported sales in the TDA survey involve "purchases of timber from arms-length [sic] parties".<sup>595, 596</sup>

7.285. We further consider Canada's reference to the definition of "arm's length" in the TDA survey and the instruction in the survey to report only arm's-length transactions. The survey defines arm's-length transactions as "[[\*\*\*]]".<sup>597</sup> The survey also noted that "[[\*\*\*]]".<sup>598</sup>

7.286. We consider that the USDOC did not explain why the TDA survey would include salvage transactions in which the tenure-holder is "required" to take part "at the direction of the non-timber concession holder" when the TDA survey categorically instructed respondents to not report salvage transactions [[\*\*\*]], and further to report only arm's-length transactions, which it defined as [[\*\*\*]].<sup>599</sup> Further, we note that, as Canada points out, the USDOC itself stated in its Alberta verification report that the TDA survey asks forest product companies to "report *arm's length* volume and value of purchases of timber during their previous fiscal year".<sup>600</sup>

7.287. In our view, therefore, the Brattle Report's observation that the log transactions in question "represent prices established by willing participants independent of government intervention" as well as the instructions in the TDA survey to respondents to not report salvage transactions [[\*\*\*]] and to report only arm's-length transactions, both undermine the USDOC's finding that the TDA survey included salvage transactions in which the tenure-holder is "required" to take part "at the direction of the non-timber concession holder".<sup>601</sup>

7.288. Canada further rejects as *ex post* rationalization the United States' argument that the TMR allows the government to pressure companies to salvage timber. For Canada, the USDOC "did not itself tie any purported pressure from the *government* of Alberta (under Section 153 or otherwise) to its findings pertaining to salvage transactions".<sup>602</sup>

7.289. We note that the USDOC did state in its determination that "[t]he Timber Management Regulations require [Forest Management Agreement] holders and Timber Quota holders to salvage timber under threat of having the volume charged against its AAC for refusal to do so".<sup>603</sup> We therefore do not consider that the United States' argument that the TMR allows the government to pressure companies to salvage timber is *ex post* rationalization.

7.290. We note that the relevant provision in Alberta's TMR, on its face, indicates that if tenure-holders refuse or neglect a request to salvage timber from the Alberta Government, they face the risk that "the volume of salvaged timber may be charged as production against the timber quota or forest management Agreement". Section 153(1) of the TMR requires that:

Where the holder of a forest management Agreement or a timber quota neglects or refuses a request from the director to salvage timber in a management unit in which he has a forest management agreement or timber quota, the volume of unsalvaged timber may be charged as production against the timber quota or forest management agreement.<sup>604</sup>

7.291. Canada asserts that the USDOC did not, at any point during the underlying investigation, enquire about Section 153 or how it operates. Canada argues that had the USDOC done so, the Alberta Government would have confirmed that no demands to salvage had been made, much less refused, during the POI, and that no unsalvaged volume was charged against AACs. Canada contends that this is because "salvage wood is valuable, and companies do not need to be forced to bring it

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<sup>595</sup> Alberta MNP damage assessment, (Exhibit CAN-102), p. 3; Canada's response to Panel question No. 197, para. 116.

<sup>596</sup> As Canada submits, MNP defined "arm's-length transaction" as "[[\*\*\*]]". (Alberta JMC survey, (Exhibit CAN-103 (BCI)), p. 1; Canada's response to Panel question No. 197, para. 117).

<sup>597</sup> Alberta JMC survey, (Exhibit CAN-103 (BCI)), p. 1.

<sup>598</sup> Alberta JMC survey, (Exhibit CAN-103 (BCI)), p. 2.

<sup>599</sup> Alberta JMC survey, (Exhibit CAN-103 (BCI)), pp. 1-2.

<sup>600</sup> Canada's response to Panel question No. 197, para. 118 (quoting Alberta verification report, (Exhibit CAN-110 (BCI)), p. 11 (emphasis added by Canada)).

<sup>601</sup> Final determination, (Exhibit CAN-10), p. 50.

<sup>602</sup> Canada's response to Panel question No. 34, para. 139. (emphasis original)

<sup>603</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>604</sup> Alberta TMR, (Exhibit CAN-115), Section 153(1).

to market".<sup>605</sup> Canada further contends that "a series of cumulatively unlikely events", as set out in Alberta's TMR, must occur before Section 153 becomes operative. First, an oil or gas company (or their contractor) must clear timber and leave the resulting logs "decked" in the forest. Should the logs remain decked for over 60 days, they are forfeited to the Crown, after which the Crown must request a forestry company to salvage the logs. If the forestry company is a tenure-holder and refuses to do so, the unsalvaged timber *may* be charged against their AAC.<sup>606</sup> The United States contends that the Alberta Government had submitted the exhibit containing Section 153 at the very beginning of the underlying investigation, and the interested parties had the opportunity to address that submission and comment on the operation of Section 153 from the beginning of the investigation. Further, it argues that the Alberta Government could not simply disavow its own law and therefore exclude it from consideration.<sup>607</sup>

7.292. We note that in the case at hand, the USDOC did not make any finding of the Alberta Government having requested the tenure-holders to salvage timber during the POI. Further, the plain words of Section 153(1) provide that where a tenure-holder "neglects or refuses a request" from the Alberta Government to salvage timber, the volume of salvaged timber may be charged as production against the tenure-holder's AAC. If the Alberta Government requests the tenure-holder to salvage timber, the consequences for refusing that request set out in Section 153(1), suggest that the tenure-holder may be under pressure to salvage timber as a result of that request. However, it is not clear, and the USDOC did not explain, why a tenure-holder would be under pressure to salvage timber where, in the absence of such a request from the Alberta Government, the tenure-holder had been asked to take part in salvage transactions by the non-timber concession holder. In particular, the USDOC did not explain why a tenure-holder is "required" to salvage timber "at the direction of the non-timber concession holder" even in a situation where no request has been made to the tenure-holder by the Alberta Government to enter into salvage transactions. The USDOC did not therefore explain why a tenure-holder would *necessarily* be under pressure to enter into a salvage transaction when it is approached by a non-timber concession holder for that purpose.

7.293. We therefore consider that the USDOC did not reasonably and adequately explain its finding that the salvage transactions pertained to logs that were not offered for sale on the open market, as the tenure-holder is required to take part in those transactions at the direction of the non-timber concession holder.

7.294. Canada further argues that contrary to the USDOC's findings that the TDA survey data contained "many" salvage transactions, the record evidence shows that salvage logs amounted to only 148,000 m<sup>3</sup>, which was less than 10% of the total reported volume of 1.8 million m<sup>3</sup> of logs in the TDA survey in 2015.<sup>608</sup> Further, the USDOC improperly dismissed all TDA survey transactions as a valid benchmark rather than disregarding only the salvage transactions that were clearly identified in the TDA survey data.<sup>609</sup> The United States, in response, does not contest that the USDOC could have eliminated the salvage transactions from the TDA survey data. The United States argues, however, that even if the salvage transactions could be excluded from the TDA data, that does not address the USDOC's other reasons for finding that the TDA log prices were inconsistent with market principles.<sup>610</sup>

7.295. In our view, even if the USDOC had properly found that the salvage transactions in the TDA survey could not be used as an appropriate market benchmark, that finding could not reasonably have formed a basis for the USDOC to disregard *all* the TDA survey data for use as a benchmark. We agree with Canada that, even if the TDA salvage transactions had properly been found as being flawed, an objective and unbiased authority would have simply eliminated the salvage data from its assessment.

7.296. We next proceed to assess the other grounds on which the USDOC dismissed the TDA survey data as being inconsistent with market principles.

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<sup>605</sup> Canada's opening statement at the first meeting of the Panel, (26 February 2019), para. 98.

<sup>606</sup> Canada's response to Panel question No. 34, para. 142.

<sup>607</sup> United States' response to Panel question No. 35, paras. 121-123.

<sup>608</sup> Canada's first written submission, para. 283.

<sup>609</sup> Canada's first written submission, para. 290.

<sup>610</sup> United States' first written submission, para. 340.

### 7.3.5.2.2.2 Sale of Crown-origin logs

7.297. The USDOC found that 60% of the transactions by volume in the TDA survey were sales of Crown-origin logs for which Crown stumpage was paid. The USDOC considered that these transactions were thus unreliable insofar as they would yield a circular comparison of Crown stumpage prices with a benchmark that also included Crown stumpage.<sup>611</sup> The USDOC further found that these transactions were encumbered by a Crown lien that had priority over all other encumbrances until Crown stumpage is paid; thus, the title did not pass to the buyer until Alberta timber dues were paid in full. This encumbrance created risks for both the tenure-holder and the buyer, which would not exist in an open-market transaction.<sup>612</sup>

7.298. We will first examine the USDOC's finding that 60% of the transactions in the TDA survey were sales of Crown-origin logs and would therefore yield a circular comparison with Crown stumpage prices in Alberta.

7.299. Canada argues that the USDOC improperly concluded that it could not rely on TDA survey transactions involving the sale of Crown-origin logs for which Crown stumpage had been paid, based on the reasoning that these transactions would yield a circular comparison of Crown stumpage prices with a benchmark that also included Crown stumpage. Canada contends that the source of the logs, whether Crown or private, is irrelevant, because the log seller, who is an intermediary seeking to maximize profit, will retain the incentive to obtain the best price from those logs in an arm's-length sale. The price of the harvested log will therefore reflect the supply and demand for the logs available in the marketplace.<sup>613</sup>

7.300. The United States responds that comparing Crown stumpage prices in Alberta to a benchmark that also included Crown stumpage would have been circular. For the United States, contrary to Canada's argument, the USDOC did consider the source of the logs as being relevant, because the transactions involving Crown-origin logs were encumbered by a Crown lien until Crown stumpage is paid, creating a risk for both the tenure-holder and the buyer that would not exist in the open market. Further, even if Alberta may not be the seller of the Crown-origin logs, the Crown stumpage fees is a cost that factors into the pricing of Crown-origin logs.<sup>614</sup>

7.301. We consider that it is *possible* but not *necessary* that sellers of Crown-origin logs would pass on to sawmills that purchase those logs any purported savings with respect to timber dues on those logs. In the absence of any evidence to the contrary, it is equally possible that sellers of Crown-origin logs would seek to maximize profit by securing the best price from those logs in an arm's-length sale, regardless of the quantum of stumpage dues that were paid on those logs. Canada submits that the Appellate Body has cautioned that "in cases where logs are sold by a harvester/sawmill in arm's-length transactions to unrelated sawmills, it may not be assumed that benefits attaching to the *logs* (non-subject products) automatically pass through to the *lumber* (the subject product) produced by the harvester/sawmill".<sup>615</sup> We agree.<sup>616</sup> We further note that the USDOC did not find that the transactions in question, constituting 60% of the transactions set out in the TDA survey did not constitute arm's-length transactions. Bearing in mind these considerations, we take the view that it was not open to the USDOC to simply assume, without evidentiary support or reasoned explanation, that sellers of Crown-origin logs would pass through to sawmills purchasing those logs any benefits attaching to those logs. Because the USDOC relied on that unfounded

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<sup>611</sup> Final determination, (Exhibit CAN-10), p. 50.

<sup>612</sup> Final determination, (Exhibit CAN-10), fn 308.

<sup>613</sup> Canada's first written submission, para. 292.

<sup>614</sup> United States' first written submission, para. 341.

<sup>615</sup> Canada's second written submission, para. 97 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 157 (emphasis original)).

<sup>616</sup> This approach is consistent with our conclusions with respect to the USDOC's consideration of auction prices as a valid stumpage benchmark in British Columbia. In that context, the USDOC had found that most of the bidders in BCTS auctions were logging companies and not long-term tenure-holding sawmills. (Preliminary determination, (Exhibit CAN-8), p. 37). We found that the tenure-holding sawmills that, according to the USDOC, cast downward pressure on auction prices by virtue of holding long-term tenures, were therefore one step removed from the actual bidding transaction in a majority of cases. Because such sawmills were the bidders' customers, and not the bidders themselves, their influence on auction prices could at best have been indirect. (See, above, para. 7.127).

assumption in reaching the finding in question, we consider that the USDOC, for that reason alone, improperly made that finding.

7.302. We further consider that the Kalt Report set out certain economic principles proffering that any alleged subsidy conferred on log harvesters does not pass through to log buyers in arm's-length log transactions.<sup>617</sup> In particular, the report explained that harvesters have the incentive to obtain the highest value from the wood they harvest. Further, it noted that logs harvested from stands subject to Crown stumpage charges are bought and sold at the market price, and the difference between the market price and the cost of log production will be kept by the harvester and not passed through to the log buyer.<sup>618</sup> The USDOC did not engage with those alternative explanations on the record in reaching the finding in question.<sup>619</sup>

7.303. The USDOC thus found that 60% of the transactions in the TDA survey, being sales of Crown-origin logs, would yield a circular comparison with Crown stumpage prices in Alberta simply based on an assumption, and without taking into consideration alternative plausible explanations that were available on the record. We consider that the USDOC therefore improperly made that finding.

7.304. We will next evaluate the USDOC's finding that the transactions involving Crown-origin logs were encumbered by a Crown lien until Crown-stumpage is paid, creating risks for both the tenure-holder and the buyer, which would not exist in the open market. The USDOC, in connection with this finding, referred to Section 32 of the *Alberta Forests Act*.<sup>620</sup> That provision states that:

When timber has been harvested as the result of a timber disposition and there are unpaid Crown charges owing in respect of it, the Minister has a lien against the timber that has priority over all other encumbrances.<sup>621</sup>

7.305. Canada does not contest that the transactions involving Crown-origin logs were subject to a Crown lien. Canada argues, however, that the USDOC failed to consider that the Crown lien is simply a priority encumbrance, which may be encountered in any sale of any product, regardless of Crown or private ownership.<sup>622</sup> Canada disagrees with the USDOC's finding that liens would not exist in an open market situation. For Canada, private timber owners could also encumber their timber and logs.<sup>623, 624</sup>

7.306. We note that the USDOC did not explain why the encumbrance by a Crown lien creates risks for both the tenure-holder and the buyer, which would not exist in an open market transaction.

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<sup>617</sup> Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), pp. 90-95.

<sup>618</sup> Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), pp. 90-91.

<sup>619</sup> We note that the United States argues that the Kalt Report is limited to an analysis of stumpage and log markets in British Columbia and not Alberta, and was therefore not pertinent to the analysis in question. (United States' comments on Canada's response to Panel question No. 196, para. 85). We disagree. We consider, that insofar as the Kalt Report set out general economic principles explaining why it was not in the log harvesters' economic interest to pass through any alleged subsidy conferred on them to log buyers in arm's-length log transactions, it was pertinent for the USDOC to consider those economic principles in the context of a similar situation involving the possibility of "pass through" in Alberta. In this regard, we note that the Kalt Report states that "[h]arvesters with access to timber subject from Crown lands, who may have log production costs lower than that of the marginal log producer, in the same way have the incentive to sell logs at the going market price. To do otherwise would cost the harvester profits and be against the harvester's own economic self-interest". (Kalt Report on LEPs, (Exhibit CAN-16 (BCI)), p. 91). At a minimum, Dr Kalt's analysis of whether log harvesters in British Columbia "pass through" any alleged subsidy conferred on them to log buyers in arm's-length log transactions indicates that it is not necessary that such log harvesters would always effect such a pass through to log buyers, and was therefore relevant to the USDOC's analysis.

<sup>620</sup> Final determination, (Exhibit CAN-10), fn 308.

<sup>621</sup> Alberta Forest Act, (Exhibit CAN-112), Section 32.

<sup>622</sup> Canada's first written submission, fn 533.

<sup>623</sup> Canada's response to Panel question No. 36, paras. 147-148.

<sup>624</sup> The United States argues, in response, that "[e]ven if Canada could establish (which it has not), that government-mandated liens covering, by default, all log sales had no potentially distortive effect, that would in no way undermine the evidence establishing that 60 per cent of TDA transactions by volume are sales of Crown-origin logs", which for the United States, is the primary basis for the USDOC's finding of circularity. (United States' response to Panel question No. 193, para. 151). We recall, however, that we conclude above that the USDOC improperly found that 60% of the transactions in the TDA survey, being sales of Crown-origin logs, would yield a circular comparison with Crown stumpage prices in Alberta. We therefore reject the United States' argument.

Further, the USDOC did not support that finding with any evidence showing that private transactions were not encumbered by liens. Canada asserts that various Canadian provinces, including Alberta and Nova Scotia, have legislation that provides for a lien on timber or logs on behalf of any person who performs labour or services with respect to those logs or timber, for the amount due for their services. Canada notes that this legislation was not put before the USDOC during the underlying investigation, as the USDOC first relied on its reasoning pertaining to the Crown lien encumbrance only in its final determination.<sup>625</sup> In our view, an objective and unbiased authority would have investigated whether liens could also encumber transactions involving private-origin logs in Alberta before making a finding that the encumbrance ensuing from the Crown lien creates risks for the tenure-holder and the buyer "which would not exist in an open market transaction".<sup>626</sup> The USDOC's determination, however, does not indicate that the USDOC did so. We consider that, in any event, the USDOC did not explain why liens would encumber, and create risks for the tenure-holder and buyer in, transactions involving Crown but not private-origin logs.

7.307. Canada also argues that the USDOC did not investigate the factual question as to whether the presence of Crown liens creates uncertainty that reduces the value of logs. Canada submits that there is no record evidence based on which the USDOC could have determined that such liens have an impact on log prices.<sup>627</sup> Had the USDOC raised Section 32 pertaining to the lien issue during the underlying investigation, which it did not, Alberta would have confirmed that in the last 20 years timber had never been seized as a result of a failure to pay stumpage.<sup>628</sup> Canada further asserts that the buyers and sellers of Crown-origin logs ensure that Crown timber dues are paid as a condition of sale, and the Crown lien in no way factors into the price of logs.<sup>629</sup> Canada asserts that had the USDOC actually investigated this issue, it would have found that buyers of Crown-origin logs in Alberta typically ensure that the Crown timber dues on the logs are paid by agreeing with the seller that the buyer will withhold the Crown timber dues owed from the price paid for the logs, and itself remit that payment to the Crown.<sup>630</sup>

7.308. We note that Canada points to record evidence that suggests that as regards 61% of the total volume of logs delivered to the mill, Crown timber dues were paid by the log buyer themselves.<sup>631</sup> We agree with Canada that the USDOC found that the encumbrance by a Crown lien on transactions involving Crown-origin logs created risks for both the tenure-holder and the buyer without investigating, in light of the record evidence, whether Crown timber dues were paid as a condition of sale, and whether the Crown lien factors into the price of logs. In the absence of that assessment, we consider that the USDOC did not provide a reasoned and adequate explanation for that finding. That finding could therefore not serve as a basis for the USDOC's conclusion that the transactions in the TDA survey involving sales of Crown-origin logs would yield a circular comparison with Crown stumpage prices in Alberta.

### 7.3.5.2.2.3 Log export prohibition

7.309. We will next examine the USDOC's reliance on its finding that Alberta prohibits log exports as a basis for rejecting the TDA log prices as a valid benchmark for the province.

7.310. The USDOC found that timber in Alberta is subject to an export prohibition under Section 31 of the *Alberta Forests Act*, which prevents log sellers from seeking the highest prices in all markets and, thus, artificially creates downward pressure on log prices throughout the province.<sup>632</sup>

7.311. Canada rejects the USDOC's conclusion that Alberta prohibits log exports. Canada asserts that Section 31 of the *Alberta Forests Act* does not prohibit, but merely regulates log exports, which are expressly permitted with authorization. In 2015, Alberta received 12 export applications, all of

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<sup>625</sup> Canada's response to Panel question No. 36, paras. 147-148.

<sup>626</sup> Final determination, (Exhibit CAN-10), fn 308.

<sup>627</sup> Canada's response to Panel question No. 36, para. 145.

<sup>628</sup> Canada's opening statement at the first meeting of the Panel, (26 February 2019), para. 101.

<sup>629</sup> Canada's response to Panel question No. 36, para. 143.

<sup>630</sup> Canada's response to Panel question No. 36, para. 146; comments on the United States' response to Panel question No. 193, para. 143 (referring to Alberta MNP TDA log transactions overview, (Exhibit CAN-109), p. 4).

<sup>631</sup> Canada's comments on the United States' response to Panel question No. 193, para. 143 (referring to Alberta MNP TDA log transactions overview, (Exhibit CAN-109), p. 4).

<sup>632</sup> Final determination, (Exhibit CAN-10), p. 50.

which were approved.<sup>633</sup> The United States argues, as the USDOC had reasoned in its determination, that Alberta does prohibit exports of timber which artificially creates downward pressure on log prices throughout the province. That Alberta did not invoke that prohibition, and granted 12 export authorizations during the POI, does not show that the prohibition did not have an impact on log prices. The United States posits that Alberta "presumably" granted those authorizations under one of the limited exceptions in the relevant law.<sup>634</sup>

7.312. At the outset, considering that the USDOC rejected the TDA log prices as a valid benchmark based on, among others, its finding that Alberta's alleged export prohibition under Section 31 depresses log prices in the province, we note that the onus fell on the USDOC to show that Section 31 did have an impact on log prices. We consider that the plain language of Section 31 of the *Alberta Forests Act*, as well as the evidence and alternative explanations on the record pertaining to the operation of that provision, would have given an objective and unbiased investigating authority pause and led it to investigate *how the provision in question operates in practice* before the authority could determine conclusively that the provision prohibited log exports.

7.313. We note that Section 31(1) provides that:

No person shall transport or cause to be transported logs, trees or wood chips, except dry pulpwood or Christmas trees, to any destination outside Alberta from any forest land.

Further, Section 31(2) provides that:

Notwithstanding subsection (1), the director may

- (a) authorize any person to transport logs, trees or wood chips to be used for research or experimental purposes to any destination outside Alberta from any forest land, or
- (b) exempt any logs, trees or wood chips from any specified forest land from the application of this subsection for a period not to exceed one year.

7.314. We note that Section 31(2)(b), on its face, exempts log exports from the application of Section 31(1) for a period not to exceed one year.<sup>635</sup>

7.315. Canada argues that there is *no* log export ban in Alberta and interested companies may, for example, apply for a one-year commercial export authorization or a research export authorization. The application is swift and free.<sup>636</sup>

7.316. We consider that Section 31 indicates, and the United States does not contest, that Alberta does permit log exports in certain circumstances. Further, the explanations on the record before the USDOC indicated that Alberta did authorize log exports. We note that the Brattle Report described Alberta's log export regime. It noted that Section 31 "regulates" the export of logs harvested from Alberta Crown lands. As Canada asserts<sup>637</sup>, the Brattle Report found that logs can be exported by submitting an application to the Alberta Government requesting authorization. The application consists of a letter that includes details such as the relevant species, volume, product, and destination of the intended log exports. No fee or tax is levied in connection with log exports. Further, the Brattle Report indicated that no log applications have been denied in recent years. Alberta approved each of the 12 export authorization applications for logs in 2015.<sup>638</sup>

7.317. In our view, the exemptions under Section 31, and the record evidence that indicated that Alberta had approved all applications for export authorization in the POI, would have prompted an objective and unbiased investigating authority to enquire into how Section 31 operates, and whether it did in fact regulate, rather than prohibit, log exports. Such an investigating authority would have enquired, for instance, whether companies that had received the export authorization for a year

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<sup>633</sup> Canada's first written submission, paras. 294-295.

<sup>634</sup> United States' first written submission, para. 342.

<sup>635</sup> Alberta Forest Act, (Exhibit CAN-112), Section 31.

<sup>636</sup> Canada's opening statement at the first meeting of the Panel, (26 February 2019), para. 102.

<sup>637</sup> Canada's first written submission, para. 294 (referring to Brattle Report, (Exhibit CAN-93), p. 25).

<sup>638</sup> Brattle Report, (Exhibit CAN-93), p. 25.

could, upon a submitting a new application, receive it again, for instance in the following year, without any complications. If companies could regularly renew their export authorizations, Section 31 could not be considered to necessarily prohibit log exports and create downward pressure on log prices throughout the province. Canada asserts, however, that the USDOC did not ask any questions in its questionnaires or at verification concerning Alberta's log export policies or any potential effect they had on the log market and prices.<sup>639</sup> The United States does not contest that assertion.

7.318. The United States argues that Alberta "presumably" granted the export authorizations in question under one of the limited exceptions in the relevant law. For the United States, the fact that Alberta did not need to enforce the prohibition during the POI suggests that the log sellers are aware that they are unauthorized to export logs except in the "limited" circumstances covered by the two exceptions.<sup>640</sup> First, we note that the USDOC itself did not provide that reasoning in its determination, much less ascertain whether those authorizations were granted under one of the two exceptions in Section 31, and if so, which one of the two. We therefore reject as *ex post* rationalization the United States' argument that Alberta "presumably" granted those authorizations under one of the limited exceptions in the relevant law. We further consider that even if the USDOC had reasoned that the export authorizations were granted under one of the two exceptions, the USDOC did not explain why those exceptions pertained to "limited" circumstances and not a situation where companies could apply for, and be granted swiftly and without charge, export authorization year after year.

7.319. Second, we consider the United States' argument that the fact that Alberta did not need to enforce the export prohibition during the POI suggests that the log sellers are aware that they are unauthorized to export logs except in the limited circumstances covered by the two exceptions under Section 31.<sup>641</sup> In our view, in making that argument, the United States suggests that log sellers whose intended log exports are not covered by the two exceptions did not seek export authorization in the first place because they expected their request to be refused. Canada asserts that the USDOC did not provide any evidence to support its finding that companies in Alberta are in any way dissuaded from requesting an export authorization.<sup>642</sup> We consider that the USDOC did not explain why companies in Alberta were dissuaded from requesting an export authorization, when the record evidence indicated that interested companies could receive a one-year commercial export authorization, or, in certain cases where the logs were to be used for research or experimental purposes, a research export authorization, and authorizations were swift and free. Further, if the one-year commercial export authorizations could be renewed upon submission of a new application, companies would have even less reason to be dissuaded. However, the USDOC did not investigate that question.

7.320. In our view, the USDOC, therefore, did not, in light of the record evidence, provide a reasoned and adequate explanation for concluding that Alberta is subject to an export prohibition under Section 31 of the *Alberta Forests Act*, which creates downward pressure on log prices in Alberta.

#### **7.3.5.2.2.4 The Brattle and Kalt Reports**

7.321. We will next examine Canada's argument that the USDOC failed to consider the Brattle and Kalt Reports in rejecting the TDA survey log prices as a valid benchmark for Alberta.<sup>643</sup> Canada asserts that the Brattle Report set out relevant evidence showing that the TDA log prices were

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<sup>639</sup> Canada's response to Panel question No. 38, para. 150; second written submission, para. 101.

<sup>640</sup> United States' first written submission, para. 342.

<sup>641</sup> United States' first written submission, para. 342.

<sup>642</sup> Canada's second written submission, para. 102.

<sup>643</sup> We note that Canada asserts that the USDOC failed to consider two separate reports prepared by Professor Joseph P. Kalt in the USDOC's assessment of TDA survey log prices as a valid benchmark for Alberta. The first of those reports is entitled "Economic Analysis of Remuneration for Canadian Crown Timber: Are In-Jurisdiction Benchmarks Distorted by Crown Stumpage?" (Kalt Report on Crown timber, (Exhibit CAN-14)), and the second "An Analysis of Certain Economic Issues Relating to Petitioner's Claims About the Operation of Stumpage and Log Markets in British Columbia" (Kalt Report on LEPs, (Exhibit CAN-16 (BCI))). In this section, we address the parties' arguments pertaining to the USDOC's treatment of the first Kalt Report. We have addressed the parties' arguments pertaining to the USDOC's treatment of the second Kalt Report in para. 7.302 above.

market determined, which was reinforced by the general conclusions in Dr Kalt's report.<sup>644</sup> The United States replies that contrary to Canada's argument that the USDOC completely ignored the Brattle and Kalt Reports, the USDOC did address these reports in its determination.<sup>645</sup>

7.322. We note that, as the United States asserts<sup>646</sup>, the USDOC found that the Alberta Government had commissioned the Brattle Report for the purposes of the underlying investigation and therefore considered that the report carried only limited weight "given its potential for bias, with data and conclusions that may be tailored to generate a desired result".<sup>647</sup>

7.323. The USDOC further set out certain reasons for concluding that the Brattle Report did not inform the USDOC's private stumpage market distortion analysis.<sup>648</sup> The USDOC noted that the Alberta Government had relied on the Brattle Report to argue that "the existence of supply overhang [in the Crown stumpage market] is consistent with Crown stumpage rates being too high, rather than too low".<sup>649</sup> The USDOC considered that it was not, in its distortion analysis, looking to measure whether Crown stumpage prices are too "high" or "low" but whether private prices are "effectively determined" by Crown stumpage prices, rendering any price comparison circular.<sup>650</sup>

7.324. Canada contends that the USDOC focused on the Brattle Report's analysis of the alleged supply overhang issue, which relates to private market stumpage prices, but not to Alberta's proposed log benchmark. For Canada, the USDOC completely ignored the Brattle Report's most relevant evidence and analysis, which concluded that the TDA log prices constitute an appropriate benchmark.<sup>651</sup> In response, the United States argues that the USDOC found that the appropriate benchmark for respondents' purchases of Crown stumpage was a *stumpage*, rather than a *log*, benchmark. For the United States, the USDOC therefore had no reason to address what Canada describes as "the Brattle report's most relevant evidence and analysis".<sup>652</sup>

7.325. We agree with Canada that the USDOC did not address the Brattle Report's assessment of why the TDA log prices in Alberta constitute an appropriate benchmark for stumpage. In our view, insofar as the Brattle Report provided evidence that was relevant to the USDOC's line of enquiry, the USDOC was required to have considered that evidence in its price distortion analysis. Further, considering that we have found, as discussed above, that the USDOC improperly concluded that the appropriate benchmark for respondents' purchases of Crown stumpage was a *stumpage*, rather than a *log*, benchmark, we consider that that improper conclusion could not justify the USDOC's failure to address relevant evidence set out in the Brattle Report. In any event, the USDOC did not cite that conclusion as a reason to not have considered the findings in question in the Brattle Report, and therefore we reject the United States' assertion in question as *ex post* rationalization.

7.326. Canada contends that the Brattle Report found that because log demand is determined by lumber prices, "the Province cannot exert influence on the demand for logs".<sup>653</sup> The report found that, if anything, Alberta's Crown stumpage system actually tends to increase log prices by decreasing the volume of logs supplied to mills.<sup>654</sup> The Brattle Report concluded that the proposed benchmark derived from the TDA log prices provides a conservative estimate of the value of Alberta standing timber.<sup>655</sup> Further, Canada asserts that the Brattle Report found that "Alberta has a reasonably competitive log market".<sup>656</sup>

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<sup>644</sup> Canada's first written submission, paras. 277-279.

<sup>645</sup> United States' response to Panel question No. 37, paras. 125-126.

<sup>646</sup> United States' second written submission, para. 39.

<sup>647</sup> Final determination, (Exhibit CAN-10), p. 53.

<sup>648</sup> Final determination, (Exhibit CAN-10), pp. 53-54. As noted in the factual background section, the USDOC had also found that the private stumpage market prices in Alberta were distorted.

<sup>649</sup> Final determination, (Exhibit CAN-10), p. 53.

<sup>650</sup> Final determination, (Exhibit CAN-10), pp. 53-54.

<sup>651</sup> Canada's responses to the Panel question Nos. 1-153, annex A, p. A-2.

<sup>652</sup> United States' second written submission, para. 40.

<sup>653</sup> Canada's first written submission, para. 278 (quoting Brattle Report, (Exhibit CAN-93), p. 27).

<sup>654</sup> Canada's first written submission, para. 278 (referring to Brattle Report, (Exhibit CAN-93), pp. 32-34).

<sup>655</sup> Canada's first written submission, para. 278 (referring to Brattle Report, (Exhibit CAN-93), pp. 37-39).

<sup>656</sup> Canada's first written submission, para. 277 (referring to Brattle Report, (Exhibit CAN-93), pp. 26-34).

7.327. We note that the Brattle Report found that demand for logs is a function of the costs of milling them into lumber and the price that mills can obtain for finished lumber in the international market. Therefore, the Alberta Government could not have influenced that demand.<sup>657</sup> It further found that the supply of logs is a function of the costs of harvesting and transporting logs.<sup>658</sup>

7.328. We consider that the findings in the Brattle Report, referred to in the two preceding paragraphs, pertain to whether log prices in Alberta were market determined. These findings are, on their face, relevant to the USDOC's inquiry into whether the TDA log prices reflect market prices that were consistent with market principles. The Brattle Report also discussed Alberta's log export policies, which was directly relevant to the USDOC inquiry into whether the TDA log prices were consistent with market principles.<sup>659</sup> An objective and unbiased authority would therefore have engaged with the assessment in question in the Brattle Report. The USDOC, however, failed to do so.

7.329. As regards the Kalt Report, the USDOC referred to an attachment appended to the Kalt Report, an affidavit from Dan Wilkinson<sup>660</sup> (Wilkinson affidavit), Director of the Alberta Forest Products Association, in the context of its finding that a supply overhang exists in Alberta's Crown stumpage market. The USDOC noted elsewhere in its determination that the report carried only limited weight because it had been commissioned for purposes of the underlying investigation.<sup>661</sup> As the United States asserts<sup>662</sup>, the USDOC also, elsewhere in its final determination, addressed the Kalt Report in the context of issues not directly related to the USDOC's conclusion to reject the TDA log prices as a benchmark for the provision of Crown stumpage in Alberta.<sup>663</sup>

7.330. Canada asserts that Dr Kalt's conclusions confirmed that the proposed benchmark was derived from market-determined log prices.<sup>664</sup> In particular, Canada points to Dr Kalt's finding that "local in-jurisdiction log prices and market-determined stumpage rates provide valid and useable benchmarks for assessing the adequacy of remuneration for government-supplied timber".<sup>665</sup> The United States notes that Canada argues that instead of addressing the Kalt report, the USDOC focused on one of the report's attachments, the Wilkinson affidavit. The United States asserts that the USDOC focused on the Wilkinson affidavit precisely because Alberta relied upon the Wilkinson affidavit – not the general Kalt Report – to support its argument.<sup>666</sup>

7.331. We note however that, as Canada asserts<sup>667</sup>, Alberta did draw the USDOC's attention to the analysis in the general Kalt Report in proposing that the USDOC use the TDA log prices as a benchmark for the provision of Crown stumpage in Alberta.<sup>668</sup> We therefore reject the United States' argument.

7.332. We consider that Dr Kalt's analysis provides economic reasoning on whether, as Canada points out, "local in-jurisdiction log prices and market-determined stumpage rates provide valid and useable benchmarks for assessing the adequacy of remuneration for government-supplied timber".<sup>669</sup> Insofar as that assessment pertains to whether log prices were market determined, it appears, on its face, to be relevant to the USDOC's finding that the TDA log prices do not reflect market prices that are consistent with market principles. We consider that the USDOC was therefore required to have engaged with that reasoning in its finding.

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<sup>657</sup> Brattle Report, (Exhibit CAN-93), pp. 27-28.

<sup>658</sup> Brattle Report, (Exhibit CAN-93), p. 29.

<sup>659</sup> See the Brattle Report's discussion of Alberta's export policies at Brattle Report, (Exhibit CAN-93), p. 25.

<sup>660</sup> Kalt Report on Crown timber, (Exhibit CAN-14), Dan Wilkinson affidavit.

<sup>661</sup> Final determination, (Exhibit CAN-10), pp. 143-144.

<sup>662</sup> United States' response to Panel question No. 37, para. 127.

<sup>663</sup> Final determination, (Exhibit CAN-10), pp. 103 and 145-148.

<sup>664</sup> Canada's first written submission, para. 279 (referring to Kalt Report on Crown timber, (Exhibit CAN-14), pp. 5-9 and 24-30).

<sup>665</sup> Canada's first written submission, fn 518 (quoting Kalt Report on Crown timber, (Exhibit CAN-14), p. 9).

<sup>666</sup> United States' comments on Canada's response to Panel question No. 196, para. 84.

<sup>667</sup> Canada's response to the Panel question No. 196, para. 110.

<sup>668</sup> Alberta case brief, (Exhibit CAN-92), pp. 8-9, fn 9 (referring to Kalt Report on Crown timber, (Exhibit CAN-14), pp. 5-9), and p. 22.

<sup>669</sup> Canada's first written submission, fn 518 (quoting Kalt Report on Crown timber, (Exhibit CAN-14), p. 9).

7.333. Finally, for reasons set out earlier in this Report<sup>670</sup>, we consider that the USDOC could not have entirely disregarded the findings in the Brattle and Kalt Reports that were relevant to its assessment, on the basis that those reports had been commissioned for the purposes of the underlying investigation and that the reports therefore carried only limited weight.

7.334. We therefore find that the USDOC did not adequately and reasonably explain why it did not engage with the analysis and data set out Brattle and Kalt Reports, which were, on their face, relevant to the USDOC's assessment of whether the TDA log prices were consistent with market principles.

#### **7.3.5.2.2.5 Conclusion**

7.335. For the foregoing reasons, we conclude that the USDOC did not properly conclude that the TDA log prices were inconsistent with market principles.

#### **7.3.5.2.3 Whether the USDOC needed to assess that the TDA log prices were distorted as a result of government intervention**

7.336. Canada argues that the USDOC rejected the TDA log prices as a stumpage benchmark for Alberta without first establishing that these prices were distorted by the government, in direct contravention of the United States' obligations under Article 14(d) of the SCM Agreement.<sup>671</sup> For Canada, in doing so, the USDOC ignored the Appellate Body's finding that an investigating authority may only resort to an out-of-market benchmark in very limited circumstances. Canada posits that this could occur, for example, when the government, as a predominant supplier of the good, exercises market power in a manner that distorts in-market prices for that good so that they can no longer be considered market-determined.<sup>672</sup> Canada further asserts that an investigating authority may only reject "in-market" prices for the same or similar good as a benchmark under Article 14(d) if it finds that government intervention in the market caused the distortion of those prices.<sup>673</sup> For Canada, the USDOC was therefore required to find that private log prices in Alberta were distorted in order to reject the proposed benchmark.<sup>674</sup> Canada asserts that the TDA log prices were market-determined prices for a good that was very similar to standing timber.<sup>675</sup>

7.337. The United States contends in response that the USDOC did not evaluate whether the TDA log prices were distorted by the dominance of the government in the market for stumpage. The United States argues, however, that even if no in-country stumpage prices were on the record, the log prices from the TDA survey data could not be used as a benchmark because those log prices were not consistent with market principles. The United States asserts that in evaluating the log prices from the TDA survey data, "the USDOC concluded that those prices were not consistent with market principles (i.e., were distorted)".<sup>676</sup>

7.338. We agree with Canada that the USDOC could not properly have rejected the TDA log prices as a valid stumpage benchmark for Alberta under Article 14(d) of the SCM Agreement without investigating whether those log prices were distorted as a result of government intervention.<sup>677</sup> The Appellate Body has observed that the text of Article 14(d) does not qualify in any way the "market" conditions that are to be used as the benchmark. It further considered that the text of that provision does not explicitly refer to a "pure" market, to a market "undistorted by government

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<sup>670</sup> See, above, para. 7.52.

<sup>671</sup> Canada's first written submission, para. 276; opening statement at the second meeting of the Panel, para. 57.

<sup>672</sup> Canada's first written submission, para. 276 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155).

<sup>673</sup> Canada's response to Panel question No. 200, para. 120.

<sup>674</sup> Canada's response to Panel question No. 200, para. 120.

<sup>675</sup> Canada's first written submission, para. 276.

<sup>676</sup> United States' response to Panel question No. 39, paras. 130-131.

<sup>677</sup> We note further that according to the Appellate Body the concept of "price distortion" is not equivalent to any impact on prices as 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. (Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.146). We agree with the Appellate Body's considerations.

intervention" or to a "fair market value".<sup>678</sup> We agree with the Appellate Body and consider that Article 14(d) thus does not require using as a benchmark prices that emanate from a perfectly competitive market; those prices may reflect certain imperfections, and yet form a suitable benchmark, unless the investigating authority shows that the imperfections result from the fact of government intervention in the market. In our view, an investigating authority may not reject a set of prices as a valid benchmark simply on the basis that those prices reflect certain flaws, unless it can show that those flaws flow directly from the fact of government intervention in the market. In the absence of a finding that the log prices were distorted as a result of government intervention, the investigating authority has no basis to show that any imperfections in the log prices were not simply part of the prevailing market conditions. We consider that our views are consistent with the Appellate Body's finding that the central inquiry under Article 14(d) in choosing an appropriate benefit benchmark is whether government intervention results in price distortion such that recourse to an alternative benchmark is warranted.<sup>679</sup>

7.339. We note that the USDOC stated in its determination that it had not made a finding concerning "distortion in the Alberta log market".<sup>680</sup> The USDOC also noted that it "need not evaluate whether log prices are also distorted as a result of the dominance of the government in the market for stumpage".<sup>681</sup> We consider that the USDOC made these findings in the context of assessing whether the TDA log prices could be used as a "tier-one" benchmark. This follows from the USDOC's consideration that it need not evaluate whether log prices were also distorted because of the dominance of the government in the stumpage market "as a result" of the fact that it did not consider the TDA log prices as a "tier-one" benchmark.<sup>682, 683</sup> We recall, that in the underlying investigation, the USDOC did, nonetheless, examine whether the TDA log prices would be usable as a "tier-three" benchmark. It rejected the TDA log prices as a "tier-three" benchmark because, in its view, those prices did not "reflect market prices that are consistent with market principles".<sup>684</sup> We consider that in assessing whether the TDA log prices were consistent with market principles and therefore usable as a "tier-three" benchmark the USDOC did, as the United States asserts<sup>685</sup>, examine whether log prices were distorted.

7.340. In our view, in assessing whether the TDA log prices were "consistent with market principles", the USDOC examined the impact of government intervention on log prices in Alberta. The USDOC evaluated, for instance, the impact on log prices of an "export prohibition" under Section 31 of the *Alberta Forests Act*. The USDOC found that the alleged export prohibition "prevents log sellers from seeking the highest prices in all markets and, thus, artificially creates downward pressure on log prices throughout the province".<sup>686</sup> Therefore, in assessing whether the TDA log prices were consistent with market principles, the USDOC did assess whether those prices were distorted as a result of government intervention. We therefore reject Canada's argument that the USDOC declined using TDA logs prices as a stumpage benchmark for Alberta without making any findings that these prices were distorted by the government.<sup>687</sup>

7.341. We recall, nonetheless, that we have found that the USDOC improperly concluded that TDA log prices were inconsistent with market principles. In particular, we have found that the USDOC improperly concluded that Alberta is subject to an export prohibition under Section 31 of the *Alberta Forests Act*, which creates downward pressure on log prices in Alberta. We note therefore that although the USDOC did investigate whether log prices in Alberta were inconsistent with market principles, the USDOC did not properly reach a conclusion in that regard. Our finding that the USDOC's assessment of whether log prices in Alberta were inconsistent with market principles could

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<sup>678</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 87.

<sup>679</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.139-5.141.

<sup>680</sup> Final determination, (Exhibit CAN-10), p. 50.

<sup>681</sup> Final determination, (Exhibit CAN-10), p. 50.

<sup>682</sup> This is evident from the USDOC's statement that "[t]he GOA and West Fraser's arguments concerning distortion presupposed that we would consider TDA survey data as a tier one benchmark, however we have not done so". (Final determination, (Exhibit CAN-10), p. 50).

<sup>683</sup> We recall that the USDOC did not consider the TDA survey data as a "tier-one" benchmark on the basis that the TDA survey data pertained not to the good at issue, stumpage, but to a different product i.e. harvested logs.

<sup>684</sup> Final determination, (Exhibit CAN-10), p. 49.

<sup>685</sup> United States' response to Panel question No. 39, paras. 130-131.

<sup>686</sup> Final determination, (Exhibit CAN-10), p. 50.

<sup>687</sup> Canada's response to Panel question No. 200, para. 120.

be considered to constitute an inquiry into whether those prices were distorted, is without prejudice to our finding that the USDOC improperly concluded that TDA log prices were inconsistent with market principles.

### **7.3.5.3 Overall conclusion**

7.342. For the reasons set out in sections 7.3.5.2.1 and 7.3.5.2.2 above, we find that the USDOC did not provide a reasoned and adequate explanation for why it declined using the TDA log prices as a valid benchmark for determining the adequacy of remuneration for Crown stumpage in Alberta. We therefore conclude that the USDOC acted inconsistently with Article 14(d) in rejecting the TDA log prices in Alberta as a valid stumpage benchmark for the province.

## **7.4 Whether the Nova Scotia Benchmark relates to the prevailing market conditions in Alberta, Ontario, and Québec**

7.343. Canada argues that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in concluding that the Nova Scotia benchmark relates to the prevailing market conditions in Alberta, Ontario, and Québec (other provinces) simply because Nova Scotia is a part of Canada.<sup>688</sup> Canada contends that standing timber markets in Canada are inherently regional, as logs cannot be moved over long distances between provinces and because the majority of forests in Canada are provincially owned and regulated.<sup>689</sup> Thus, in Canada's view, Nova Scotia being a part of Canada is irrelevant to the assessment of whether the benchmark from Nova Scotia relates to the prevailing market conditions in the other provinces.<sup>690</sup>

7.344. Canada contends that the prevailing market conditions in Nova Scotia differed from those in the other provinces in a number of ways, including differences in growing conditions for timber, species mix in forests, diameter of trees, the manner in which timber is classified and utilized, transportation costs, and conditions of supply. In light of these differences in the prevailing market conditions, in Canada's view, the USDOC should not have used a benchmark from Nova Scotia, or should have made adjustments to the benchmark prices reflecting these differences.<sup>691</sup> The United States argues that the Nova Scotia benchmark satisfied the requirements of Article 14(d) of the SCM Agreement, as it was a market-determined price for the same or similar good in the country of provision.<sup>692</sup> The United States also argues that the USDOC concluded that the stumpage market in Nova Scotia reflected the prevailing market conditions in the other provinces based on positive record evidence that forests in the other provinces had a similar species mix and average diameter at breast height (DBH) as forests in Nova Scotia.<sup>693</sup> According to the United States, Canada has also failed to establish that any of the other alleged differences between conditions in Nova Scotia and the other provinces to which Canada points caused the stumpage prices in the two provinces to be incomparable.<sup>694</sup> The United States asserts that the Nova Scotia benchmark therefore related to the prevailing market conditions in the other provinces.

### **7.4.1 Evaluation**

7.345. In respect of the parties' arguments concerning whether the Nova Scotia benchmark price related to the prevailing market conditions in the other provinces simply because it was a market-determined price from within Canada, we recall that this issue has already been addressed in section 7.2 above. Consistent with our analysis of Article 14(d) of the SCM Agreement as set out in that section, we consider that the USDOC could not have chosen a benchmark from Nova Scotia to assess the adequacy of remuneration for standing timber in the other provinces simply because Nova Scotia and the other provinces are all in the same country, but only if the USDOC properly established that the Nova Scotia benchmark price related to the prevailing market conditions in the other provinces. The question that we examine in this section, therefore, is whether Canada has

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<sup>688</sup> Canada's first written submission, para. 745.

<sup>689</sup> Canada's first written submission, paras. 747-748 and 752.

<sup>690</sup> Canada's first written submission, para. 744.

<sup>691</sup> Canada's first written submission, para. 821.

<sup>692</sup> United States' first written submission, para. 114.

<sup>693</sup> United States' first written submission, para. 115.

<sup>694</sup> United States' first written submission, paras. 125-129.

established that the record evidence does not support the USDOC's conclusion that stumpage prices in Nova Scotia related to the prevailing market conditions in the other provinces.

7.346. We address this question by examining in turn the parties' arguments and the USDOC's analysis concerning the implication of the following factors that, in Canada's view, distinguished the prevailing market conditions in Nova Scotia from those in the other provinces (a) difference in species mix, (b) difference in DBH, (c) implications of exclusion of pulpwood from benchmark price, (d) difference in transportation-related costs, (e) impact of declining supply of timber in Nova Scotia, and (f) differences in growing conditions. Depending on the outcome of our analysis of such individual factors, we will reach an overall conclusion as to whether Canada has established that the USDOC improperly concluded that the stumpage prices in Nova Scotia related to the prevailing market conditions in the other provinces. Finally, we will consider Canada's arguments concerning the USDOC's failure to make adjustments to the Nova Scotia benchmark and consider alternative benchmarks.

#### **7.4.1.1 Difference in species mix**

7.347. In the preliminary determination, the USDOC found that the standing timber in Nova Scotia is harvested from similar forests and comprises the same core species group, i.e. SPF, as that in Québec, Ontario, and Alberta.<sup>695</sup> The USDOC also found that "minor variations in the relative concentration of individual species across provinces" did not render the standing timber in Nova Scotia incomparable to Crown timber in other provinces.<sup>696</sup> The USDOC offered two reasons in support of this view (a) SPF lumber in Nova Scotia and the other provinces has sufficiently common characteristics to be treated interchangeably in the lumber market; and (b) the governments of other provinces treat SPF timber as a single category for data collection and pricing purposes.<sup>697</sup> Canada refutes the validity of this reasoning.<sup>698</sup>

7.348. Canada asserts that the dominant species in Nova Scotia is red spruce, which is considered the most valuable timber species in Nova Scotia, while this species is completely absent in other provinces. The most dominant species of Ontario and Québec, i.e. black spruce, comprises less than 6% of standing timber in Nova Scotia. Similarly, the most common species of Alberta, i.e. lodgepole pine, is not found in Nova Scotia.<sup>699</sup> We note that the United States has not contested the validity of evidence put forth by Canada regarding the existence of differences in the individual SPF species mix within Nova Scotia and the other provinces. Canada argues that these different species have different properties that affect the cost of harvesting and the value of each tree.<sup>700</sup> Canada contends that the reasons put forth by the USDOC for disregarding such differences between individual species were flawed.

7.349. We first consider Canada's arguments regarding the USDOC's finding that the other provinces treat SPF lumber as a single category for pricing purposes. Canada contends that this finding was invalid because Québec uses an equation for setting stumpage prices that takes into account the zone-specific variation in species mix, thus showing that the province does distinguish between SPF species when setting Crown stumpage prices.<sup>701</sup> Canada also argues that in Alberta and Ontario, where all Crown stumpage is sold at a single price, price is a function of the kind of species mix that is found within the particular province in question.<sup>702</sup> According to Canada, Alberta and Ontario take into account "the differences in the species harvested in their regional market through the cost surveys of the provincial softwood industries, which are used to set stumpage rates in these provinces".<sup>703</sup> Canada further asserts that Alberta also charges lower stumpage rates for certain lower quality SPF timber.<sup>704</sup>

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<sup>695</sup> Preliminary determination, (Exhibit CAN-8), pp. 44-45; Final determination, (Exhibit CAN-10), p. 110.

<sup>696</sup> Final determination, (Exhibit CAN-10), p. 110.

<sup>697</sup> Final determination, (Exhibit CAN-10), p. 111.

<sup>698</sup> Canada's first written submission, para. 767.

<sup>699</sup> Canada's first written submission, para. 763.

<sup>700</sup> Canada's first written submission, paras. 764-765; response to Panel question No. 8, para. 45.

<sup>701</sup> Canada's first written submission, para. 769.

<sup>702</sup> Canada's first written submission, para. 770.

<sup>703</sup> Canada's response to Panel question No. 8, para. 44.

<sup>704</sup> Canada's response to Panel question No. 8, para. 44.

7.350. We consider that the evidence put forth by Canada clearly illustrates that the equation that Québec uses for setting the stumpage rate for a given tariffing zone<sup>705</sup> does take into account the proportion of various individual species in that tariffing zone.<sup>706</sup> Canada has also put forth evidence that the bidders in the auctions that form the basis for the Crown stumpage rate value individual species differently.<sup>707</sup> Based on this evidence, we consider that Canada has shown that the stumpage rates for different tariffing zones in Québec will depend on the proportion of different species in that zone.

7.351. The United States contends that although Québec's transposition equation takes individual species' differences into account, the Crown stumpage price that is calculated using the equation applies to all species in a given tariffing zone, due to which Canada's argument fails.<sup>708</sup> We consider that even though the final stumpage price for a particular tariffing zone in Québec calculated through the transposition equation applies to stumpage of all SPF species in that zone alike, the fact that the proportion of each individual species in that zone is a variable based on which the common stumpage rate is calculated establishes that Québec does ascribe weight to difference in the values of different SPF species in setting the stumpage rate.<sup>709</sup> Although the stumpage rate for a given zone applies to all SPF standing timber in that zone, the stumpage rate itself is a function of the proportion of different SPF species in that zone. We therefore reject the United States' argument and consider that Canada has established that Québec ascribes significance to differences between individual SPF species in calculating stumpage rates.

7.352. With respect to Alberta and Ontario, we agree with Canada that the respective stumpage prices in these provinces reflect the predominant SPF species in these provinces, as the differences in the quality of the SPF species in each province would result in differences in the value of the SPF "basket" in each province, limiting comparability between provinces.<sup>710</sup> We consider that Canada has pointed to a sufficient amount of record evidence demonstrating that individual species of SPF timber have distinct properties that have a bearing on their value. Therefore, we disagree with the USDOC's finding that there was no "evidence that differences in quality or species prevalence precludes a comparison between the Nova Scotia benchmark and reported Crown stumpage in the other provinces".<sup>711</sup> The USDOC did not closely examine whether such differences existed between Nova Scotia on the one hand and Alberta/Ontario on the other, but rather limited its analysis to finding that the imposition of a single stumpage rate by certain provinces proved that differences between species mix in different provinces are immaterial. We thus consider that the USDOC's reasoning that differences between individual species of SPF timber was not material to the question of comparability of Nova Scotia stumpage prices to those in other provinces because certain provinces levied a single stumpage rate for all species of timber was flawed.

7.353. We therefore consider that the USDOC was mistaken in considering that the differences in the species mix of different provinces cannot have a bearing on comparability of the benchmark to the examined Crown prices "as the provinces do not distinguish between SPF species when setting Crown timber prices".<sup>712</sup> This is because the USDOC improperly construed the imposition of a

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<sup>705</sup> Québec's Crown timber market is divided in 187 different tariffing zones.

<sup>706</sup> Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-53.

<sup>707</sup> Canada's response to Panel question No. 8, para. 43 (referring to Québec data file, (Exhibit CAN-211 (BCI))).

<sup>708</sup> United States' first written submission, para. 119.

<sup>709</sup> Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-53.

<sup>710</sup> Canada's response to Panel question No. 8, para. 45.

<sup>711</sup> Final determination, (Exhibit CAN-10), p. 110. For instance, Canada has shown that jack pine, which constitutes a significant percentage of the species mix in Ontario and Québec but not in Nova Scotia, is irregular in shape and prone to defects, due to which it is costlier to process into lumber. (Canada's first written submission, para. 764 (referring to Québec, description of softwood species, (Exhibit CAN-306), p. 7; and Resolute new factual information declaration, (Exhibit CAN-307 (BCI)), p. 2)). Canada has also illustrated that different SPF species have different DBH and produce a different amount of wood fibre per tree. (Canada's first written submission, paras. 765-766 (referring to Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-24)). Canada has also demonstrated that red spruce, which comprises nearly one-third of the species mix in Nova Scotia and is considered the most valuable species in Nova Scotia, is not found in the other provinces. (Canada's first written submission, para. 763 (referring to Nova Scotia tree identification guide, (Exhibit CAN-304), p. 23)).

<sup>712</sup> Final determination, (Exhibit CAN-10), p. 111.

common stumpage rate to all SPF timber by these provinces to reflect those provinces' view that individual SPF species cannot have different values.<sup>713</sup>

7.354. We now proceed to examine the second reason given by the USDOC in support of its finding that the Nova Scotia benchmark was related to the prevailing market conditions in the other provinces notwithstanding the differences in species mix, i.e. that "SPF lumber 'has sufficiently common characteristics to be treated interchangeably in the lumber market'".<sup>714</sup> Canada contends that this reasoning of the USDOC was flawed because the fact that an end-product, i.e. SPF lumber, is treated interchangeably does not imply that its inputs, i.e. different species of SPF timber, are also interchangeable.<sup>715</sup> Neither the USDOC nor the United States have explained why the interchangeability of SPF lumber in the lumber market would imply that SPF timber of different species cannot differ in value as an input in the production of SPF lumber. We agree with Canada that the fact that SPF lumber is treated interchangeably does not *ipso facto* mean all forms of SPF timber have the same value, such that stumpage prices in two forests with different mixes of individual SPF species could be considered comparable without taking the difference in mixes into account.

7.355. Thus, we consider that both reasons offered by the USDOC for disregarding the difference in distribution of individual SPF species in Nova Scotia and the other provinces – i.e. that the provinces set the same stumpage price for all species and that SPF lumber is interchangeable – were flawed. We therefore conclude that the USDOC did not reasonably and adequately explain why a benchmark price arising from the species mix in Nova Scotia could be considered to be related to the prevailing market conditions in other provinces that have a different species mix.

#### **7.4.1.2 Difference in diameter at breast height**

7.356. The USDOC found that the DBH of SPF timber in Alberta, Ontario, and Québec was comparable to the average DBH of SPF standing timber that grows in Nova Scotia.<sup>716</sup> Canada claims that the USDOC was mistaken and that the average DBH of SPF standing timber in Nova Scotia and the other provinces were incomparable.<sup>717</sup> According to Canada, the USDOC's conclusion was incorrect for two reasons:

- a. the USDOC improperly considered Nova Scotia's DBH for "merchantable" standing timber, including pulpwood, but did not include pulpwood in the Nova Scotia benchmark.<sup>718</sup> We understand Canada to argue that the set of trees in Nova Scotia from which the USDOC derived the average DBH was not the same as the set of trees in Nova Scotia from which the USDOC derived the benchmark price<sup>719</sup> (intra-province inconsistency); and
- b. while the USDOC considered the DBH of only harvested timber in Alberta and Ontario, its calculation of the DBH for trees in Nova Scotia included timber that was still growing (inter-province inconsistency).<sup>720</sup>

We examine these two grounds on which Canada disputes the USDOC's conclusion in respect of comparability of DBH of standing timber in Nova Scotia and the other provinces in turn.

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<sup>713</sup> We consider that an objective and unbiased investigating authority would not have made such an inference because a province's decision to set a common stumpage rate could potentially be based on a consideration such as ease of administrative convenience, instead of being a sign of that province's view that all SPF species have the same value. The USDOC overlooked this possibility.

<sup>714</sup> Final determination, (Exhibit CAN-10), p. 111.

<sup>715</sup> Canada's first written submission, para. 771.

<sup>716</sup> Preliminary determination, (Exhibit CAN-8), p. 46; Final determination, (Exhibit CAN-10), pp. 112-113.

<sup>717</sup> Canada's first written submission, para. 773.

<sup>718</sup> We note that, while this argument does not pertain directly to the question whether the DBH of timber in Nova Scotia was comparable to those in the other provinces, it alleges that there was a certain flaw in the process followed by the USDOC in making such comparability analysis.

<sup>719</sup> Canada's first written submission, para. 774.

<sup>720</sup> Canada's first written submission, para. 777.

#### **7.4.1.2.1 Intra-province inconsistency**

7.357. We first examine Canada's contention that the average DBH figure for Nova Scotia SPF timber did not relate to the average DBH of the subset of Nova Scotia timber, the price of which constituted the benchmark.<sup>721</sup> In Canada's view, the exclusion of pulpwood in the determination of the benchmark price and the inclusion of pulpwood in the determination of the average DBH for SPF timber in Nova Scotia was problematic because pulpwood is smaller in diameter and lower in value than sawable logs. This meant, according to Canada, that while the USDOC calculated the average DBH for SPF timber based on an assessment of all forms of timber, it considered only the more expensive and bigger timber in calculating the benchmark price.<sup>722</sup>

7.358. The United States responds to Canada's argument by asserting that Canada incorrectly states that the average DBH for Nova Scotia timber was derived from "all of the timber" in Nova Scotia.<sup>723</sup> Rather, [[\*\*\*]].<sup>724</sup> We consider that this argument of the United States is not relevant to the issue of whether the average DBH figure for Nova Scotia timber included sawable timber as well as pulpwood or not. This is because the United States has not shown that the categorization of standing timber as "merchantable" means that timber is not pulpwood. Hence, we reject this argument by the United States.

7.359. The United States also contends that Canada's argument implies that the other provinces calculated the average DBH figure for timber in their territory based on sawable timber alone, to the exclusion of pulpwood. This implication, in the United States' view, is incorrect because the record is not clear as to whether the average DBH calculated by other provinces was derived from sawable timber alone, or also included pulpable timber.<sup>725</sup> We consider that this argument of the United States is also irrelevant to the issue raised by Canada. The issue raised by Canada is that the average DBH figure for SPF timber in Nova Scotia and the benchmark price in Nova Scotia was determined based on dissimilar categories of timber. While the former was determined based on both sawable and pulpable timber, the latter was based on sawable timber alone. Whether or not the other provinces calculated the average DBH based on sawable timber alone is immaterial to the issue of mismatched categories of timber used for determination of average DBH and benchmark price within Nova Scotia.

7.360. We nevertheless reject Canada's contention that the average DBH figure for Nova Scotia SPF timber did not relate to the average DBH of the subset of Nova Scotia timber, the price of which constituted the benchmark. We consider that Canada has not established that the benchmark price and the average DBH were calculated based on two distinct sets of trees. This is because Canada has itself contended that sawlog, studwood, and pulpwood are three different forms of timber produced from *the same tree*.<sup>726</sup> If pulpwood is produced from the same tree as sawlog and studwood, the exclusion of pulpwood from the determination of the benchmark price would not mean that the benchmark and the average DBH of timber in Nova Scotia were calculated based on different sets of trees. Canada's arguments appear to indicate that the term "pulpwood" refers to a particular category of tree that was not considered in the determination of the benchmark price. However, this is contradicted by Canada's own submission that "pulpwood" refers to a portion of a tree that is used by pulp mills, and not to a whole tree.<sup>727</sup> Thus, we reject Canada's contention.

#### **7.4.1.2.2 Inter-province inconsistency**

7.361. We next examine Canada's contention that while the USDOC calculated DBH figures for SPF timber in Alberta and Ontario based on harvested timber only, it calculated the DBH figure for SPF timber in Nova Scotia based on standing timber that was still growing. The United States refutes Canada's contention asserting that "it is not evident that all provinces reported the diameter at breast height for harvested trees".<sup>728</sup> The United States posits that Québec reported DBH for

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<sup>721</sup> Canada's first written submission, para. 775.

<sup>722</sup> Canada's first written submission, para. 774.

<sup>723</sup> United States' response to Panel question No. 12, para. 41.

<sup>724</sup> United States' response to Panel question No. 12, para. 41.

<sup>725</sup> United States' response to Panel question No. 12, para. 43.

<sup>726</sup> See, below, para. 7.369.

<sup>727</sup> Canada's response to Panel question No. 224, para. 258.

<sup>728</sup> United States' first written submission, para. 123.

SPF trees based on "official forest inventory data for stand[s] that contain a minimum of 25% of softwood" without any indication as to whether those stands measured only harvested trees.<sup>729</sup>

7.362. We note that while Canada's contention regarding this inter-province inconsistency in the type of trees considered for DBH comparison is limited to Alberta and Ontario, the evidence presented by the United States indicating absence of clarity regarding whether other provinces took into account the DBH of growing timber or harvested timber pertains only to Québec.<sup>730</sup> The United States has not provided any evidence countering Canada's contention that Alberta and Ontario calculated the average DBH based on harvested timber.<sup>731</sup> The evidence provided by Canada, on the other hand, makes it amply clear that Alberta and Ontario calculated the average DBH for timber in their provinces based on harvested timber, and not growing timber.<sup>732</sup>

7.363. We also note that the United States has not denied that the average DBH for SPF timber in Nova Scotia was not calculated based on harvested timber. Rather, the United States contends that [[\*\*\*]].<sup>733</sup> According to Canada, "merchantable" trees [[\*\*\*]] include trees that are not necessarily mature enough to be economically harvestable.<sup>734</sup> We consider in this regard that the United States has failed to identify record evidence that would establish that "merchantable" timber is always economically harvestable. Neither the USDOC's finding that trees [[\*\*\*]] were "large enough to be sold for stumpage" nor the evidentiary basis for that finding identified by the United States makes it clear to us that such trees are necessarily economically harvestable.<sup>735</sup> Canada, on the other hand, has pointed to record evidence that suggests that the minimum DBH a tree must have to produce a sawlog is 17.8 centimetres<sup>736</sup>, while the minimum inside-the-bark diameter of a studwood log is 10.16 centimetres<sup>737</sup>, thus indicating that a tree with a DBH of [[\*\*\*]] cannot necessarily be harvested to produce sawlogs or studwood, i.e. the type of timber that was included in the Nova Scotia survey.<sup>738</sup>

7.364. Therefore, we consider that the average DBH for Nova Scotia calculated by the USDOC was not comparable to the DBH figures provided by Alberta and Ontario. This is because Canada has shown that Alberta and Ontario calculated the average DBH for SPF timber in their territory from timber that had already been harvested, and hence Alberta's and Ontario's average DBH figures cannot be compared with a Nova Scotia average DBH figure that includes trees that cannot necessarily be economically harvested to produce the kind of timber that was included in the Nova Scotia survey.

7.365. We note the United States' argument that even if the minimum DBH for sawlogs in Nova Scotia is taken to be 17.8 centimetres as Canada suggests, it would still be proximate to the DBH reported by the other provinces.<sup>739</sup> In this regard, we agree with Canada that the minimum DBH for a tree to be harvested to produce a sawlog in Nova Scotia does not correspond to the DBH

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<sup>729</sup> United States' first written submission, para. 123.

<sup>730</sup> Canada confirmed that the DBH figure for Québec was not based on harvested trees. (Canada's response to Panel question No. 243, para. 326).

<sup>731</sup> We note that the United States has asserted that Alberta did not clarify whether the average DBH that it provided was calculated based on sawable timber alone, or also included pulpable timber. (United States' response to Panel question No. 12, para. 43). However, we consider that this argument of the United States is not relevant to the inquiry whether Alberta calculated the DBH based on timber that was still growing, or timber that had been harvested. The sawable/pulpable distinction is not the same as growing/harvested distinction. Canada's argument being examined in this section only concerns the latter distinction.

<sup>732</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), fn 27; Ontario, diameter distribution of timber, (Exhibit CAN-153), pp. 2-3.

<sup>733</sup> United States' response to Panel question No. 12, para. 41.

<sup>734</sup> Canada's second written submission, para. 235.

<sup>735</sup> United States' response to Panel question No. 244, para. 327 (referring to Nova Scotia verification exhibit NS-VE-4, (Exhibit USA-26 (BCI))).

<sup>736</sup> Nova Scotia forest inventory, (Exhibit CAN-305), p. 12.

<sup>737</sup> Mill specifications, (Exhibit CAN-310), p. 5.

<sup>738</sup> Canada's response to Panel question No. 234, paras. 306-307. We note in this regard that Canada has asserted that the DBH of [[\*\*\*]] required for a tree to be considered "merchantable" is measured outside the bark. (Canada's comments on the United States' response to Panel question No. 244, para. 278).

<sup>739</sup> United States response to Panel question No. 15, para. 54. ("Alberta reported that the DBH of SPF standing timber species in Alberta ranges from 18.2 cm to 24.6 cm (slightly larger than 17.8 cm), Ontario reported that the DBH of SPF logs destined to sawmills and pulpmills in 2015 was 15.32 cm (only 2.5 cm smaller than 17.8 cm), and Quebec reported that the DBH of SPFL standing timber species ranges from 16 cm to 24 cm (a range which encompasses 17.8 cm).")

figures for Québec, Alberta, and Ontario that the USDOC relied on. This is because the DBH figures for those provinces did not represent the minimum DBH for a softwood tree to be harvested for use by sawmills. Rather the DBH figures represented (a) in case of Alberta, the smallest and the largest average DBHs, by species, of softwood trees harvested; (b) in case of Québec, the smallest and the largest average DBHs, by species, of softwood trees standing in Québec; and (c) the average inside-the-bark diameter for all SPF trees harvested during the period of investigation in Ontario.<sup>740</sup> We note that the United States has not contested the factual accuracy of Canada's description of what the DBH figures for various provinces at issue represented. In other words, although the United States argues that DBHs of softwood trees across the provinces at issue were proximate and hence comparable, the underlying measurements that it relies on in making this argument were not consistent.<sup>741</sup> We therefore conclude that the USDOC did not properly establish that the DBH of SPF species in Nova Scotia was comparable to those in other provinces.<sup>742</sup>

7.366. The United States also contends that we must reject Canada's arguments concerning comparability of average DBH in Nova Scotia and the other provinces that the USDOC took into account because the Canadian respondents had failed to establish that any "small variations" in the DBH in Nova Scotia compared to that in other provinces meant that timber in Nova Scotia did not reflect the prevailing market conditions in the other provinces.<sup>743</sup> We reject this argument of the United States. As the USDOC compared dissimilarly calculated DBH figures for the provinces at issue, we cannot conclude whether the difference between the DBH of timber in Nova Scotia and in the other provinces could properly be characterized as "small variations" as the United States suggests. Further, we consider that in light of the significance that the USDOC itself ascribed to comparability of DBH of timber across provinces to establish similarity in the prevailing market conditions, the importance of variation in DBH cannot be underestimated.

#### **7.4.1.3 Implications of exclusion of pulpwood from benchmark price**

7.367. Canada claims that by relying on the Nova Scotia survey that measured the prices of only "sawlogs" and "studwood" and not "pulpwood", the USDOC failed to take into account the prevailing market conditions for the good in question when determining the benchmark price.<sup>744</sup> Canada asserts that the exclusion of pulpwood from the Nova Scotia survey was problematic for three reasons:

- a. the exclusion of pulpwood caused the price for the highest quality timber in the Nova Scotia market to be compared to the price for mixed quality timber in the other provinces<sup>745</sup>;
- b. the exclusion of pulpwood from the survey caused the USDOC to overlook certain differences between the conditions of sale of timber in Nova Scotia and the other provinces<sup>746</sup>; and

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<sup>740</sup> Canada's response to Panel question No. 234, para. 305.

<sup>741</sup> Canada's response to Panel question No. 234, paras. 309-310.

<sup>742</sup> We note that the United States responds to Canada's arguments concerning the inconsistency in the measurements used by the USDOC in comparing the DBH of SPF species across the provinces at issue by asserting that the USDOC used the DBH for SPF trees that grew on private land in Nova Scotia, and not on SPF trees that grew in all of Nova Scotia. We do not understand, and the United States does not explain, why the fact that the DBH figure for Nova Scotia was determined based on trees that grow on private land only and not on all lands in Nova Scotia is material to Canada's contention.

Further, the United States also reiterates the actual DBH figure for Nova Scotia that the USDOC relied on was 15.9 centimetres and not 17.8 centimetres. We consider, however, that the actual DBH figure for Nova Scotia determined by the USDOC was unsuitable to establish the comparability of SPF trees in Nova Scotia to those in the other provinces at issue because of reasons discussed in para. 7.364 above. We also reject the United States' argument that the data that the USDOC relied on to arrive at the DBH figure of 15.9 centimetres for Nova Scotia is more contemporaneous than the data that Canada relies on to argue that the minimum DBH for a softwood tree to be harvested to produce sawlogs, and hence the USDOC's DBH figure is more reliable. This is because the United States has not identified any record evidence that suggests that the DBH of SPF trees in Nova Scotia changed in any manner between the time when the data relied on by Canada was prepared and the time when the data relied on by the USDOC was prepared. (United States' comments on Canada's response to Panel question No. 234, para. 204).

<sup>743</sup> United States' first written submission, para. 124.

<sup>744</sup> Canada's first written submission, para. 787.

<sup>745</sup> Canada's first written submission, para. 787.

<sup>746</sup> Canada's first written submission, paras. 798-799.

c. the USDOC did not consider the impact of the high demand for timber from pulp mills in Nova Scotia on timber prices.<sup>747</sup>

7.368. We examine the merits of these three arguments by Canada in turn before reaching a conclusion regarding whether the exclusion of pulpwood from the Nova Scotia survey led to the establishment of a benchmark price that did not relate to the prevailing market conditions in other provinces.

#### **7.4.1.3.1 Mismatch in the conditions of sale**

7.369. Canada contends that the exclusion of pulpwood from the benchmark price was problematic because by relying on the benchmark data for only sawlogs and studwood, the USDOC failed to consider the whole stumpage transaction, which includes pulpwood.<sup>748</sup> Canada explains that each tree can produce all three types of timber, and in Nova Scotia different types of timber produced from a single tree were sold for different prices.<sup>749</sup> According to Canada, stumpage sellers sell pulpwood for no profit, but offset the absence of profit from pulpwood by selling sawlogs and studwood at a higher price.<sup>750</sup> Canada cites to certain surveys that indicate that pulpwood was priced less than sawlogs in Nova Scotia in support of its contention.<sup>751</sup> Canada explains that this differential pricing of different forms of timber derived from the same stumpage transaction was not a condition of sale in the other provinces, where there is no distinction between "sawlogs" and "pulpwood" for the purposes of setting SPF stumpage rates.<sup>752</sup> Thus, in Canada's view, a benchmark price based solely on the price of sawlogs and studwood was not representative of the whole stumpage transaction and could not be compared to stumpage prices in the other provinces.

7.370. In response, the United States contends that Canada is wrong in asserting that the Nova Scotia benchmark price took into account data concerning a subset of logs derived from a whole tree.<sup>753</sup> According to the United States, "[t]he record is clear that the benchmark prices from the Deloitte survey consist of stumpage prices", and not prices of specific types of logs alone.<sup>754</sup> The United States points to the following observations of the USDOC in the final determination in this regard:

[The] NS [Nova Scotia] Survey explicitly instructed the respondents to submit data on purchases of standing timber and not for harvested logs. ... [T]he source documents demonstrate that the non-sawmills paid a stumpage price for standing timber, and not, as the Canadian Parties' claim, a price that reflects only a portion of a harvested log. Our review of source documents for other transactions contained in the NS Survey also reflect the purchase of standing timber, as opposed to the purchase of a portion of harvested log.<sup>755</sup>

7.371. We note that before we can assess whether the Nova Scotia benchmark price was based on conditions of sale in Nova Scotia that were not the same as those in the other provinces, we must ascertain whether the benchmark price was based on prices of stumpage as a whole, as the United States contends, or only on prices of a subset of logs produced upon harvesting stumpage, as Canada contends.<sup>756</sup> The United States points to the Nova Scotia verification report, which notes that "Deloitte officials provided supporting documentation confirming that the prices in the survey only reflected the purchase prices for private origin standing timber in Nova Scotia".<sup>757</sup> The United States also points to references to the terms [[\*\*\*]] in source documents for transactions that were examined by the USDOC at the verification in support of its view that the Nova Scotia

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<sup>747</sup> Canada's first written submission, para. 800.

<sup>748</sup> Canada's first written submission, para. 796.

<sup>749</sup> Canada's response to Panel question No. 11, paras. 61-62.

<sup>750</sup> Canada's first written submission, para. 797.

<sup>751</sup> Canada's first written submission, fn 1332.

<sup>752</sup> Canada's response to Panel question No. 11, para. 63.

<sup>753</sup> United States' comments on Canada's response to Panel question No. 219, para. 175.

<sup>754</sup> United States' comments on Canada's response to Panel question No. 219, para. 175.

<sup>755</sup> United States' second written submission, para. 180 (quoting Final determination, (Exhibit CAN-10), p. 117).

<sup>756</sup> United States' comments on Canada's response to Panel question No. 219, para. 187; Canada's response to Panel question No. 219, para. 194.

<sup>757</sup> United States' comments on Canada's response to Panel question No. 219, para. 175 (referring to Nova Scotia verification report, (Exhibit CAN-511 (BCI)), pp. 6-7).

benchmark price was based on stumpage prices.<sup>758</sup> The United States underscores that the survey through which the benchmark price was determined instructed the participants to [[\*\*\*]].<sup>759</sup> The United States also refers to verification documents that indicate that [[\*\*\*]] by one of the verified survey participants.<sup>760</sup> In support of its view that the benchmark price was based on the price of a subset of logs produced from a tree rather than the price of the whole tree, Canada argues that "studwood" and "sawlogs", the prices of which were included in the survey, and "pulpwood", the prices of which were excluded, are types of logs rather than types of trees.<sup>761</sup> According to Canada, given that Deloitte collected prices for "sawlogs" and "studwood", i.e. particular log products, the Nova Scotia benchmark price was based on "piece rate transactions", i.e. transactions in which payment is made "of agreed-upon per-unit prices for each of the specific types of products that are actually harvested from the woodlot" and not "lump-sum transactions", i.e. transactions that "involve payment of a single price for the right to harvest all economically harvestable timber on the woodlot".<sup>762</sup> Canada also notes that the USDOC itself quoted Nova Scotia officials as saying that "trees can produce several different types of logs ... [and] the seller would sell the section of the tree to the appropriate mill for that quality of the wood". In Canada's view, "section of the tree" being sold is a reference to sales of harvested logs, and not standing timber.<sup>763</sup> Canada also argues that the fact that Deloitte "surveyed initial studwood and sawmill grade purchases, as brought through the mill gate from the logging site" indicates that the prices being surveyed were necessarily those of logs, as only logs and not standing timber can be "brought through the mill gate from the logging site".<sup>764</sup>

7.372. Based on a review of the record evidence submitted by both parties on the nature of transactions that formed the basis for the benchmark price, we consider that Canada has failed to establish that the benchmark price was based on the price of a subset of logs produced upon harvesting timber, instead of standing timber itself. We consider that nothing in Canada's submissions sufficiently rebuts the record evidence referred to by the USDOC that indicates that the benchmark price was purported to measure prices paid for standing timber, especially given that the survey [[\*\*\*]].<sup>765</sup> In our view, Canada's argument that because the survey included prices of "sawlogs" and "studwood" – terms that refer to types of logs and not types of trees – the benchmark price was not a stumpage price is not dispositive. As the United States points out, Québec's auction system lists auction prices for standing timber in terms of "pulplogs" and "sawlogs".<sup>766</sup> To us, this indicates that the description of a price as the price for "sawlogs", for example, does not establish that the price is a price for logs and not the stumpage price.<sup>767</sup>

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<sup>758</sup> United States' comments on Canada's response to Panel question No. 219, para. 175 (referring to Nova Scotia verification exhibit NS-VE-7, (Exhibit CAN-551 (BCI)); and Nova Scotia verification exhibit NS-VE-8-C, (Exhibit CAN-552 (BCI))).

<sup>759</sup> United States' comments on Canada's response to Panel question No. 219, para. 178 (referring to Nova Scotia verification exhibit NS-VE-6, (Exhibit CAN-512 (BCI)), p. 33).

<sup>760</sup> United States' comments on Canada's response to Panel question No. 219, para. 186 (referring to Nova Scotia verification exhibit VE-9-C, (Exhibit USA-51 (BCI))). We note that the United States also asserts that Nova Scotia verification exhibit VE-8-F indicates that [[\*\*\*]]. (United States comments on Canada's response to Panel question No. 219, para. 186). We, however, do not see how that exhibit shows what the United States asserts it does.

<sup>761</sup> Canada's response to Panel question No. 219, para. 195.

<sup>762</sup> Canada's response to Panel question No. 219, para. 206.

<sup>763</sup> Canada's response to Panel question No. 219, para. 195.

<sup>764</sup> Canada's response to Panel question No. 219, para. 196.

<sup>765</sup> We note that Canada has also argued that because the survey did not properly define the term "transaction", participants to the survey [[\*\*\*]], raising serious doubts about whether the survey in fact measured only stumpage prices. Further, Canada argues that certain surveyed transactions included additional elements like brokerage fees and logging costs. (Canada's response to Panel question No. 219, paras. 205 and 224). We address these arguments in the section on Canada's claims concerning the reliability of the Nova Scotia survey. We note that our analysis in this section is limited to the parties' arguments and record evidence concerning what the survey purported to do. Our conclusion in this respect is without prejudice to our separate analysis of whether the survey could reliably be considered to have in fact executed what it purported to do.

<sup>766</sup> United States' comments on Canada's response to Panel question No. 219, para. 180 (referring to Québec verification exhibit VE-QC-29, (Exhibit USA-92 (BCI)), p. 4).

<sup>767</sup> We note in this regard Canada's submission that in Québec logs are categorized objectively based on their physical characteristics, unlike in Nova Scotia, where a log is categorized based on the subjective intent of the purchaser as to how the purchaser intends of use the log. (Canada's response to Panel question No. 219, para. 212). We nevertheless do not see why "sawlog price" in context of Nova Scotia could not refer to the stumpage price paid by a sawmill for harvesting that tree into, *inter alia*, sawlogs, when the same term could in context of Québec be used to refer to the stumpage price of a tree categorized on the basis of its physical characteristics.

Canada's argument that the fact that Deloitte purported to measure prices of purchases "brought through the mill gate" indicates that the prices surveyed were those of logs and not standing timber is also not persuasive.<sup>768</sup> We note that Canada's argument does not account for the possibility that sawmills and studmills paid the price for standing timber and harvested that timber to produce all types of logs. Given that the record evidence indicates that mills can sell the portion of the harvest not suited to them as roadside sales, sawmills and studmills could have sold off logs not suited for their purposes to other mills subsequently.<sup>769</sup> The mere assertion that Deloitte sought to measure prices at the mill gate does not negate this possibility.

7.373. We therefore consider that Canada has failed to establish that the USDOC established a benchmark price for Nova Scotia based on prices of a subset of logs produced upon harvesting standing timber rather than prices of standing timber itself.

#### **7.4.1.3.2 Mismatch in the quality of timber compared**

7.374. Canada contends that the exclusion of pulpwood from the Nova Scotia survey led the USDOC to compare the price of "a subset of larger logs in Nova Scotia"<sup>770</sup> that represented the "highest quality of timber in ... Nova Scotia"<sup>771</sup> to the price of "virtually all timber"<sup>772</sup> that represented "mixed-quality timber"<sup>773</sup> in the other provinces. In support of this argument, Canada points out that of the "total primary forest product harvest purchased in [Nova Scotia] ... only 48% was classified as either sawlogs or studwood", whereas a much greater proportion of the Crown softwood timber harvest in other provinces was used by sawmills in the other provinces, with the figure being virtually 100% for Québec, approximately 85% for Alberta, and 74% in Ontario.<sup>774</sup> From these figures, Canada infers that the benchmark reflected the price for the timber of the highest quality in Nova Scotia, which could not be equated with the quality of standing timber purchased by respondents in other provinces.<sup>775</sup> The United States responds that the USDOC compared the price paid for standing timber by sawmills in the other provinces to that paid by sawmills in Nova Scotia, and the inclusion of timber that was not used by sawmills in Nova Scotia in the benchmark would have distorted the comparison.<sup>776</sup>

7.375. We note that Canada's arguments rely on the assumption that "[t]he Nova Scotia Survey only measured 'sawlogs' and 'studwood'.<sup>777</sup> In the section above, we reached the conclusion that Canada has failed to establish that the USDOC used a benchmark price for Nova Scotia based on prices of a subset of logs produced upon harvesting standing timber rather than prices of standing timber itself.<sup>778</sup> In light of that finding, we consider that Canada's assumption is invalid. As the record evidence indicates that the Nova Scotia survey purported to examine the prices of standing timber, and not of a subset of harvested logs, we consider that Canada's concern that the USDOC compared only a subset of higher quality logs to timber of mixed quality in the other provinces does not have a valid basis. We therefore reject Canada's argument.

7.376. We also consider that Canada's view that the USDOC compared "highest quality of timber in ... Nova Scotia" to "mixed-quality timber" in the other provinces is mistaken. This view assumes that the logs used by sawmills and studmills in Nova Scotia exclusively comprised the highest quality timber. We consider that, even if inferior quality timber is mostly used by pulp mills, and sawmills and studmills mostly use timber of a higher quality, Canada has not fully addressed the possibility that there might have been lower quality logs that were used by sawmills and studmills, the price of which was therefore included in the benchmark. Likewise, pulp mills may have used some higher quality logs due to which the price of those logs would be excluded from the benchmark. As Canada itself observes, the kind of timber that is used by pulp mills and is hence considered "pulpwood" in

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<sup>768</sup> Canada's response to Panel question No. 219, paras. 196-197 (referring to Redacted version of Nova Scotia verification report, (Exhibit CAN-318), p. 8).

<sup>769</sup> Nova Scotia verification report, (Exhibit CAN-511 (BCI)), p. 8.

<sup>770</sup> Canada's first written submission, para. 792.

<sup>771</sup> Canada's first written submission, para. 787.

<sup>772</sup> Canada's first written submission, paras. 792 and 794.

<sup>773</sup> Canada's first written submission, para. 787.

<sup>774</sup> Canada's first written submission, para. 793; response to Panel question No. 11, paras. 65, 68, and 70.

<sup>775</sup> Canada's response to Panel question No. 11, para. 71.

<sup>776</sup> United States' first written submission, para. 128.

<sup>777</sup> Canada's first written submission, para. 787.

<sup>778</sup> See, above, para. 7.372.

Nova Scotia does not depend on size or quality.<sup>779</sup> This understanding is confirmed by Canada's assertions that "it would be possible for sawmills (and studmills) in Nova Scotia to produce lumber from logs of the quality that is generally used by pulp mills in Nova Scotia" and that "there is significant overlap in the dimensions of logs that may be classified as pulpwood, studwood, and sawlogs".<sup>780</sup> Canada also noted that "in Nova Scotia, pulp and paper mills sometimes 'choose to process logs that would meet sawmills' specifications'".<sup>781</sup>

7.377. For the foregoing reasons, we therefore consider that Canada has failed to establish that the exclusion of pulp wood from Nova Scotia benchmark price led to a comparison between mismatched qualities of timber in Nova Scotia and the other provinces.

#### **7.4.1.3.3 Demand for timber from paper mills in Nova Scotia**

7.378. Canada argues that the USDOC improperly refused to consider the impact of demand for pulpwood from pulp mills in the Nova Scotia market as a difference in the prevailing market conditions between Nova Scotia and the other provinces.<sup>782</sup> Canada argues that the strong presence of the pulp and paper industry created an upward pressure on timber prices in Nova Scotia for two reasons (a) pulp mills competed with sawmills for timber, increasing competition in the timber market; and (b) pulp mills could purchase residual chips from sawmills, thus allowing sawmills to pay more for standing timber.<sup>783</sup> We examine the merits of each of these two reasons in turn.

7.379. We consider that Canada has not established that the mere presence of pulp mills in Nova Scotia and the absence of pulp mills in the other provinces implies that there was more competition for standing timber in Nova Scotia than in the other provinces. This is because the degree of competition depends on the *number* and *the size* of entities competing for a resource and the cumulative demand for that resource from those entities relative to the available supply, and not necessarily only on diversity in the *types* of competing entities. While the presence of pulp mills in Nova Scotia would increase the degree of competition for standing timber *in Nova Scotia* relative to a scenario where those pulp mills did not exist, Canada has provided no evidence that this caused the degree of competition in Nova Scotia to be higher than that *in the other provinces*. Thus, we reject Canada's argument that the presence of pulp and paper mills in Nova Scotia implies that there was greater competition for stumpage in Nova Scotia than in the other provinces.

7.380. We now turn to Canada's argument that the presence of a pulp and paper industry in Nova Scotia exerted an upward pressure on stumpage prices by providing sawmills a market to sell their residual products – a prevailing market condition that, in Canada's view, distinguishes Nova Scotia from the other provinces. Citing to the Asker Report, Canada argues that "[a] sawmill's ability to obtain value for these other log by-products contributes to the price that it is willing to pay for logs, and can affect stumpage prices".<sup>784</sup> Pointing to record evidence, Canada further argues that the ability of sawmills in Nova Scotia to sell certain by-products to pulp mills increases the residual value of timber stands, by saving the sawmills the costs of disposing of those by-products.<sup>785</sup> Canada has also produced record evidence that indicates that the revenue generated by sawmills by selling residual products to pulp mills is vital to the sawmills' financial viability and in the absence of this revenue, "sawmills could not sustain the prices they pay for logs [and stumpage]", causing a decline in the demand for logs.<sup>786</sup> Moreover, Canada supports its argument that the presence of a strong pulp industry in Nova Scotia will be linked to higher stumpage prices in Nova Scotia by pointing to record evidence that shows that the transposition equation used by Québec to establish stumpage prices includes a variable accounting for the proportion of balsam fir in the stand. The price of the stand is inversely proportional to the amount of fir trees in the stand

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<sup>779</sup> Canada's opening statement at the first meeting of the Panel (26 February 2019), para. 270.

<sup>780</sup> Canada's response to Panel question No. 233, paras. 297 and 301.

<sup>781</sup> Canada's first written submission, para. 793.

<sup>782</sup> Canada's first written submission, para. 800.

<sup>783</sup> Canada's first written submission, para. 803.

<sup>784</sup> Canada's response to Panel question No. 222, para. 243 (referring to Asker Report, (Exhibit CAN-15), p. 16).

<sup>785</sup> Canada's response to Panel question No. 222, paras. 241, 243, and 247 (referring to Asker Report, (Exhibit CAN-15), p. 16; and Miller Report, (Exhibit CAN-303 (BCI)), p. 22).

<sup>786</sup> Canada's response to Panel question No. 222, paras. 244-246 (referring to Attachment 62 to Asker Report, (Exhibit CAN-331), p .4; and Attachment 30 to Asker Report, (Exhibit CAN-330), p. 39).

because, *inter alia*, fir chips are lower in value than spruce chips and reduce revenues associated with sale of wood chips.<sup>787</sup>

7.381. We consider that the USDOC's determination does not provide a reasoned and adequate explanation as to why the availability of pulp mills as consumers of by-products of sawmills did not constitute a difference in prevailing market conditions between Nova Scotia and the other provinces, although the record evidence identified above suggests so.<sup>788</sup> We note that the USDOC dismissed this argument by Canadian interested parties in the determination by asserting that the "they fail to quantify the extent of the purported difference or even to demonstrate that such a difference exists".<sup>789</sup> In our view, an objective and unbiased investigating authority would engage more closely with the record evidence identified by Canada in support of its position. If the USDOC considered it necessary to gauge the magnitude of the difference in prevailing market conditions caused by the presence of pulp mills as consumers of sawmills' by-products, it could have questioned the Canadian interested parties further in that respect. The United States has not identified any legal basis regarding why the Canadian interested parties ought to have quantified the impact of this factor on stumpage prices in order to establish that the prevailing market conditions in Nova Scotia and the other provinces differed in this respect.

7.382. We therefore consider that the USDOC did not provide a reasoned and adequate explanation in light of the record evidence as to whether the availability of pulp mills as consumers of by-products of sawmills created a difference between the prevailing market conditions in Nova Scotia on the one hand and the other provinces on the other.

#### **7.4.1.4 Difference in transportation-related costs**

7.383. Canada contends that the USDOC improperly overlooked the difference between transportation conditions in Nova Scotia and the other provinces in determining whether the Nova Scotia benchmark was related to the prevailing market conditions in other provinces.<sup>790</sup> According to Canada, it was important for the USDOC to consider the difference in transportation conditions between Nova Scotia and the other provinces because transportation is a market condition that is explicitly mentioned in the text of Article 14(d) of the SCM Agreement, and because transportation costs significantly impact the price that timber purchasers are willing to pay for timber.<sup>791</sup>

7.384. We note that the USDOC rejected the Canadian interested parties' arguments concerning transportation on the following grounds:

- a. the Asker Report, which formed the basis for the Canadian interested parties' arguments concerning road density difference between Nova Scotia and the other provinces was "based on speculation and not substantial evidence";
- b. some of the respondents' mills were found to be located close to their timber sources, thus resembling conditions that Canadian interested parties claimed existed in Nova Scotia; and
- c. the Canadian interested parties did not adequately substantiate and quantify the extent of the purported differences.<sup>792</sup>

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<sup>787</sup> Canada's response to Panel question No. 222, para. 249 (referring to Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-53; and Québec, description of softwood species, (Exhibit CAN-306), p. 1).

<sup>788</sup> The United States argues that the evidence put forth by Canada in this respect does not include "actual instances in which a sawmill adjusted the amount it was willing to pay for stumpage to account for the residual value of chips". (United States comments on Canada's response to Panel question No. 222, para. 192). We consider that, even though this specific type of evidence has not been put forth by Canada, the record evidence that Canada has identified pertains directly to the mechanism through which, in Canada's view, the availability of pulp mills to buy sawmills' by-products would impact stumpage prices. Further, we note that the Canadian interested parties may not have had access to accounting books of sawmills in Nova Scotia.

<sup>789</sup> Final determination, (Exhibit CAN-10), p. 114.

<sup>790</sup> Canada's first written submission, para. 804.

<sup>791</sup> Canada's first written submission, para. 804; second written submission, para. 252.

<sup>792</sup> Final determination, (Exhibit CAN-10), para. 114.

7.385. The United States argues that these grounds offered by the USDOC for rejecting the Canadian interested parties' arguments concerning cost differences were based on objective evaluation of record evidence and thus the USDOC properly rejected those arguments.<sup>793</sup>

7.386. We first examine the validity of the reasons for which the USDOC dismissed the Asker Report. We note that the aspect of the Asker Report that the USDOC dismissed as being based on speculation was the Report's findings regarding road construction costs. The Report noted that the overall cost of constructing a road to the forest that a sawmill will have to incur will be lower in Nova Scotia than it would be in the other provinces because sawmill-to-forest distance is lower and the road density is higher in Nova Scotia compared to other provinces, *assuming that the cost of constructing one metre of road is the same in all provinces and the road density difference between the provinces holds true for forest regions as well.*<sup>794</sup> We consider that even if the USDOC properly regarded the Asker Report's finding regarding road construction costs to be speculative because it was based on these two assumptions, the USDOC did not engage with other aspects of the Asker Report that were definitive and not based on any assumptions. Specifically, the following findings of the Asker Report that led it to conclude that costs related to transportation are lower in Nova Scotia were not based on assumptions but on definitive evidence (a) Nova Scotia has a relatively low woodlot-to-sawmill distance; (b) trucker wages and the cost of purchasing trucks in Nova Scotia is among the lowest in Canada; and (c) road density in Nova Scotia is higher than that in the other provinces.<sup>795</sup> We consider that the USDOC's dismissal of one aspect of the Report as being based on speculation did not invalidate the other findings of the Asker Report that were not based on assumptions.

7.387. The USDOC noted that any difference in woodlot-to-sawmill distance between Nova Scotia and the other provinces was immaterial because "information from the respondent parties indicates that some mills are located close to their respective timber sources, thereby resembling the conditions that Canadian Parties claim exist in Nova Scotia".<sup>796</sup> We consider this observation of the USDOC to not be a reasonable and adequate basis to reject the significance of difference between woodlot-to-sawmill distances in Nova Scotia and the other provinces. This is because the USDOC's observation is limited to "some mills", without revealing the specific percentage of mills or which province those mills were located in. Further, this observation does not reveal whether the average woodlot-to-sawmill distance in the three other provinces was comparable to that in Nova Scotia.<sup>797</sup>

7.388. We note that there was extensive evidence before the USDOC demonstrating the correlation between transportation costs and stumpage prices.<sup>798</sup> We agree with Canada that in light of the evidence that was before the USDOC showing differences between transportation costs in Nova Scotia and the other provinces and the correlation between transportation costs and stumpage prices, the USDOC ought to have considered the impact of transportation on the suitability of the Nova Scotia benchmark more closely than it did.<sup>799</sup>

#### **7.4.1.5 Impact of declining supply of timber in Nova Scotia**

7.389. Canada contends that the USDOC improperly disregarded the impact of a declining supply of timber in Nova Scotia in its assessment of the prevailing market conditions.<sup>800</sup> Canada argues that the USDOC ought to have taken into account the declining number of loggers who harvest

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<sup>793</sup> United States' first written submission, para. 134.

<sup>794</sup> Asker Report, (Exhibit CAN-15), p. 52.

<sup>795</sup> Asker Report, (Exhibit CAN-15), p. 52.

<sup>796</sup> Final determination, (Exhibit CAN-10), p. 114.

<sup>797</sup> We note that Canada has also argued that the USDOC improperly rejected Alberta's argument that the Nova Scotia benchmark was unsuitable because the cost of transporting manufactured lumber from sawmills to the market was higher for Alberta sawmills than it was for sawmills in Nova Scotia. (Canada's first written submission, para. 812). We reject this argument by Canada for the same reasons as those set out in para. 7.548 of section 7.7.3.2.4.

<sup>798</sup> Canada's second written submission, para. 252.

<sup>799</sup> In this regard, we reject the United States' argument that the Canadian respondent parties did not quantify the impact that any transportation-related differences may have had on the suitability of the Nova Scotia benchmark. We consider that the absence of quantification of such impact by the Canadian interested parties does not negate the evidence that was already there before the USDOC, which indicated that there were differences in transportation costs between the two provinces that the USDOC should have addressed reasonably and adequately.

<sup>800</sup> Canada's first written submission, para. 814.

timber in Nova Scotia<sup>801</sup>, the low participation by private woodlot owners in the standing timber market<sup>802</sup>, the effects of a major hurricane<sup>803</sup>, and the increased designation of forests as protected areas by the Nova Scotia government in examining whether the prevailing market conditions in Nova Scotia were comparable to those in the other provinces.<sup>804</sup>

7.390. We reject this argument by Canada. We consider that the supply of the good in question in the market where the benchmark is being derived from is pertinent to the inquiry of whether the benchmark relates to the prevailing market conditions for the good in question, but that in this particular case Canada has not established a *prima facie* case suggesting that the supply side conditions it points to had a bearing on stumpage prices in Nova Scotia. Canada has not shown or even argued that sawmills in Nova Scotia experienced supply shortages or that they had more difficulty procuring timber than sawmills in the other provinces. We consider that in the absence of any evidence to this effect, Canada has failed to show that the supply side conditions that it points to could have had an impact on stumpage prices in Nova Scotia. We therefore find that Canada has not established that the USDOC erred by not sufficiently accounting for supply side conditions in Nova Scotia.

#### **7.4.1.6 Differences in growing and harvesting conditions**

7.391. Canada argues that differences in the following factors in growing and harvesting conditions between Nova Scotia and the other provinces caused the prevailing market conditions in Nova Scotia to be different from those in the other provinces (a) the length of forest regeneration periods, (b) the differences in terrain in various provinces, and (c) the length of the period over which harvesters can access timber in a given year. We examine Canada's arguments concerning each of these factors in turn in this section.

7.392. Canada contends that the growing season in the other provinces was shorter than the growing season in Nova Scotia, due to which standing timber regenerates more quickly in Nova Scotia than in other provinces.<sup>805</sup> According to Canada, the consequences of the difference in the length of the growing season and the regeneration period is that Nova Scotia sawmills will "likely require a smaller forested geographic area to sustain their operations and will have lower transportation costs".<sup>806</sup> Canada argues that the USDOC improperly disregarded these differences in growing conditions between Nova Scotia and the other provinces.<sup>807</sup> The United States contends that growing conditions are only relevant insofar as they affect the DBH and species of the trees, and that the USDOC properly considered that the evidence did not demonstrate that the growing conditions in Nova Scotia and the other provinces were different and affected the comparability of the trees from those regions.<sup>808</sup>

7.393. We note that Canada has pointed to record evidence that shows that forest land regenerates in 60-75 years in Nova Scotia, whereas the corresponding figure for Alberta is 83-129 years.<sup>809</sup> Canada has also pointed to record evidence that suggests that "[t]he faster growing the forest, the smaller the area required to support sawmills of a given size".<sup>810</sup> Further, record evidence also suggests that higher stand density associated with faster regeneration is a factor that influences stumpage pricing, as denser stands bring down harvesting costs, thus increasing the residual value of timber.<sup>811</sup> In light of this evidence, we consider that the USDOC did not provide a reasoned and

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<sup>801</sup> Canada asserts that the number of loggers in Nova Scotia had declined during the economic recession of 2008, and had not recovered since that time. (Canada's first written submission, para. 817 (referring to Asker Report, (Exhibit CAN-15), p. 48)).

<sup>802</sup> Canada's first written submission, para. 816 (referring to Attachment 60 to Asker Report, (Exhibit CAN-329), p. 2).

<sup>803</sup> Canada argues that Hurricane Juan destroyed approximately 100 million trees in Nova Scotia in 2003. (Canada's first written submission, para. 818 (referring to Asker Report, (Exhibit CAN-15), pp. 49-50)).

<sup>804</sup> Canada's second written submission, para. 255.

<sup>805</sup> Canada's first written submission, paras. 760 and 782.

<sup>806</sup> Canada's first written submission, para. 782.

<sup>807</sup> Canada's first written submission, para. 784.

<sup>808</sup> United States' response to Panel question No. 21, paras. 68-70; Final determination, (Exhibit CAN-10), p. 113.

<sup>809</sup> Canada's first written submission, para. 782.

<sup>810</sup> Alberta, MNP cross-border analysis, (Exhibit CAN-96), p. 37.

<sup>811</sup> Canada's response to Panel question No. 226, paras. 273-274 (referring to Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-53; and Attachment 6 to Kalt Report, (Exhibit CAN-608)).

adequate basis for rejecting the Canadian interested parties' arguments concerning the differences in the regeneration periods in Nova Scotia and Alberta. We consider that the USDOC's reasoning that the differences in regeneration periods are relevant only to the extent that they affect the DBH and species of trees is flawed. Even stands comprising trees of the same species and DBH but of different stand density may entail different harvesting costs because, as the evidence submitted by Canada suggests, stand density has an impact on harvesting costs. As the USDOC's determination does not engage with this evidence sufficiently, we find that the USDOC failed to properly consider whether the prevailing market conditions in Nova Scotia related to those in Alberta despite the differences in the length of growing seasons and forest regeneration periods.<sup>812</sup>

7.394. Canada also argues that the terrain and climate in Nova Scotia allows for harvesting access all around the year, as opposed to Alberta and Québec where access to forests is limited to certain seasons.<sup>813</sup> As regards harvesting access, Canada asserts, pointing to record evidence, that the harvesting season in Alberta is typically 88 days long and Tolko can only harvest standing timber in Alberta after the construction of ice roads during this period.<sup>814</sup> Canada also argues that Resolute can only access some Crown forests in Québec via a winter ice bridge.<sup>815</sup> We consider that the USDOC's determination did not provide a reasoned and adequate explanation for why the shortness of the harvesting season and cost of construction of ice roads during this period did not constitute a difference in the prevailing market conditions in Nova Scotia on the one hand, and those that Tolko operated in on the other. However, we reject Canada's arguments concerning Québec, as Canada has not provided us with any information other than the assertion that Resolute can only access "some" of its Crown timber via a winter bridge. This information is not sufficient for us to consider that the USDOC failed to properly consider a difference between the prevailing market conditions in which Resolute operated in Québec as a whole and Nova Scotia.

7.395. Canada also argues that Nova Scotia and each of the other provinces also differed in the type of forest terrain, that increased the harvesting costs for producers in the other provinces, and consequently the stumpage prices in those provinces.<sup>816</sup> Canada asserts that in Québec "[p]ublic forest terrain is either swampy or hilly and rocky", black spruce in Ontario's forests "is associated with swampy, or wet, harvest sites", and that "parts of Alberta feature harsh terrain, with steep slopes in particular regions".<sup>817</sup> Canada has also put forth evidence in support of its argument that the nature of terrain has an impact on harvesting costs.<sup>818</sup> The United States has argued in response that Canada has not shown that the differences in terrain identified by Canada reflect distinct prevailing market conditions for the good in question that would compel a different result in this case.<sup>819</sup> The United States also asserts that the USDOC properly concluded that none of the alleged differences in terrain resulted in differences that were not captured by the species and DBH characteristics.<sup>820</sup> We evaluate Canada's arguments concerning differences in quality of the terrain in each of these provinces separately.

7.396. In case of Québec, other than pointing to Québec's questionnaire response where Québec states that public forest terrain is "either swampy or hilly and rocky", Canada does not provide any further evidence as to whether this specific feature of Québec's terrain led to a difference between the prevailing market conditions in Québec on the one hand and Nova Scotia on the other. Canada has not, for example, compared the average ground solidity and average slope of the terrain in

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<sup>812</sup> We note that Canada has presented specific evidence concerning differences in forest regeneration periods only between Nova Scotia and Alberta. We also note that Canada has made arguments concerning the impact of regeneration periods on transportation costs as well. However, we do not examine those arguments in this section, as we consider that any differences in transportation costs caused by different regeneration periods would be accounted for by comparing the transportation costs directly. Hence, our analysis in section 7.4.1.4 is sufficient to address Canada's arguments concerning differences in transportation costs that arise as a result of different regeneration periods.

<sup>813</sup> Canada's first written submission, para. 783.

<sup>814</sup> Canada's response to Panel question No. 229, para. 283 (referring to Tolko verification report, (Exhibit CAN-316 (BCI)), p. 9).

<sup>815</sup> Canada's response to Panel question No. 229, para. 283.

<sup>816</sup> Canada's response to Panel question No. 229, paras. 284-285.

<sup>817</sup> Canada's response to Panel question No. 229, para. 284.

<sup>818</sup> Canada's response to Panel question No. 229, paras. 285-287.

<sup>819</sup> United States' comments on Canada's response to Panel question No. 229, para. 198.

<sup>820</sup> United States' comments on Canada's response to Panel question No. 229, para. 198.

which Québec's public forests are located to the corresponding figures for Nova Scotia.<sup>821</sup> In the absence of such evidence, we consider that Canada has not established that there were differences between the terrain in Québec and Nova Scotia that had a bearing on the prevailing market conditions in these provinces that the USDOC did not properly take into account. In case of Ontario, even though Canada argues that black spruce – the most common species in Ontario – is associated with swampy or wet harvest sites, the evidence that Canada relies on in this regard also states that black spruce is also "found on dry and sandy areas".<sup>822</sup> Canada has not put forth any evidence concerning the relative distribution of black spruce in swampy and dry areas. Canada has also not argued that species other than black spruce are also located in difficult terrain in Ontario. Thus, we do not consider that Canada has established that there were differences between the terrain in Ontario and Nova Scotia that had a bearing on the prevailing market conditions in these provinces that the USDOC did not properly take into account. We reach the same conclusion in respect of Canada's argument concerning Alberta, where Canada has simply asserted that "parts of Alberta" feature harsh terrain, without providing any indication as to what percentage of Alberta's total terrain features that type of terrain. Hence, we consider that Canada has not established that the USDOC failed to consider any differences in the prevailing market conditions between Nova Scotia and the other provinces that came into existence as a result of differences in terrain between these provinces.

#### **7.4.1.7 Conclusion**

7.397. We consider that Canada has established that the USDOC did not provide a reasoned and adequate explanation for its finding that the different species mix of SPF timber in Nova Scotia and the other provinces did not constitute a difference in the prevailing market conditions. We also consider that the USDOC did not properly establish that the DBH of standing timber in Nova Scotia was comparable to that in Alberta, Ontario, and Québec because the USDOC calculated a DBH figure for these provinces on dissimilar bases. The USDOC also erred by calculating the DBH figures for Alberta and Ontario based on harvested trees, while it calculated the DBH figure for Nova Scotia based on trees that were not necessarily economically harvestable. Further, we consider that the USDOC did not provide a reasoned and adequate explanation as to whether the availability of pulp mills as consumers of by-products of sawmills created a difference between the prevailing market conditions in Nova Scotia on the one hand and the other provinces on the other.

7.398. Likewise, we consider that the USDOC's analysis did not properly reflect the differences in transportation-related costs in Nova Scotia and the other provinces. Finally, we find that the USDOC failed to properly consider whether the prevailing market conditions in Nova Scotia related to those in Alberta despite the differences in the length of harvesting seasons and forest regeneration periods in the two provinces. We conclude the USDOC acted inconsistently with its obligation under Article 14(d) of the SCM Agreement to determine the adequacy of remuneration in relation to the prevailing market conditions in which the good in question was provided by erroneously finding that the Nova Scotia benchmark price reasonably reflected the prevailing market conditions in the other provinces.

7.399. As Canada has established that the abovementioned differences existed between the prevailing market conditions in Nova Scotia and in the other provinces, we agree with Canada that the USDOC should have made necessary adjustments to the benchmark price such that the benchmark price related or referred to the prevailing market conditions in the market where the good was provided.<sup>823</sup> The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to make such adjustments to the Nova Scotia benchmark.

7.400. We also note that Canada argues that the USDOC acted inconsistently with its obligation to find an "out-of-market" benchmark that is "as comparable as possible" to the prevailing market

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<sup>821</sup> In this regard, we note that the record evidence indicates that the average ground solidity and the average slope were known in case of Québec. (Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-127 ("if a specific tariffing zone presents an average slope higher than the provincial average, the value of the harvesting difficulty index will be higher. The same approach is used for the impact of ground roughness and of ground strength."))

<sup>822</sup> Ontario, the forests, (Exhibit CAN-147), p. 86.

<sup>823</sup> Canada's first written submission, para. 820 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 108). Before applying an adjusted Nova Scotia benchmark to the other provinces, however, the USDOC was obliged to consider using a market-determined benchmark from within those provinces, in accordance with our discussion in section 7.2 of this Report.

conditions in Alberta and Ontario.<sup>824</sup> However, Canada has presented this argument "in the alternative" to its contention that the USDOC ought to have used private market and log benchmarks from within Alberta and Ontario rather than the Nova Scotia benchmark.<sup>825</sup> As we have upheld Canada's contention that the USDOC should have considered benchmarks from within Alberta and Ontario, we need not make findings with respect to Canada's arguments concerning alternative external benchmarks.

## **7.5 Canada's claim concerning the reliability of the Nova Scotia survey**

7.401. Canada claims that the Nova Scotia survey (survey) from which the USDOC derived the benchmark, failed to meet the requirements of reliability, accuracy, transparency, and adequate explanation.<sup>826</sup> Canada claims that the survey and its methodology were not clear and intelligible, in contravention of the *chapeau* of Article 14 that requires the method used to determine benefit to be "adequately explained" and "transparent".<sup>827</sup> The United States contends that Canada's arguments concerning the reliability of the survey lack merit as the USDOC did not act inconsistently with its obligations under the SCM Agreement in using the Nova Scotia benchmark.<sup>828</sup>

### **7.5.1 Legal basis for Canada's claim**

7.402. Canada contends that by relying on an unreliable survey for determining the benchmark price, the USDOC acted inconsistently with Articles 14 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.<sup>829</sup> Canada explains that the *chapeau* of Article 14 requires that the method used to determine whether a benefit exists must be "adequately explained" and "transparent". Hence, by adopting the intransparent survey and its flawed methodology for determining the benchmark, the USDOC acted inconsistently with Article 14 of the SCM Agreement.

### **7.5.2 Evaluation**

7.403. We note that Canada has advanced several arguments questioning the objectivity of the survey based on its view that the survey was "[\*\*\*]".<sup>830</sup> Canada's arguments that question the reliability of the survey based on the alleged "[\*\*\*]" behind creation of the survey include (a) [[\*\*]]; (b) [[\*\*]];<sup>831</sup> (c) [[\*\*]];<sup>832</sup> and (d) the survey was commissioned and [[\*\*]].<sup>833</sup> According to Canada, the USDOC erred by considering the survey to have been made in the ordinary course of business notwithstanding the foregoing factors pertaining to the survey.<sup>834</sup>

7.404. We consider that notwithstanding [[\*\*]] with which the survey was conducted, Canada must point to the flaws in the substantive content of the survey in order to establish that the survey was unreliable. We agree with Canada that "regardless of whether [the survey] was [[\*\*]], [it] needs to be assessed on its own merits".<sup>835</sup> We therefore examine whether the USDOC reasonably considered the evidence that was before it concerning various flaws in the content of the survey in order to determine whether the survey was reliable.

#### **7.5.2.1 Specific flaws in the Nova Scotia survey**

7.405. Canada points to the following specific aspects of the content of the Nova Scotia survey that, in Canada's view, establish the survey's unreliability (a) uncertainty regarding representativeness of the data; (b) absence of information regarding what survey respondents reported as a stumpage "transaction"; (c) exclusion of lower value pulpwood transactions; and (d) use of an inaccurate

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<sup>824</sup> Canada's first written submission, para. 823.

<sup>825</sup> Canada's first written submission, paras. 822-823.

<sup>826</sup> Canada's first written submission, para. 825.

<sup>827</sup> Canada's first written submission, para. 827.

<sup>828</sup> United States' first written submission, para. 155.

<sup>829</sup> Canada's first written submission, para. 862.

<sup>830</sup> Canada's first written submission, para. 833. We note that the Nova Scotia survey was conducted by the firm Deloitte.

<sup>831</sup> Canada's first written submission, para. 834.

<sup>832</sup> Canada's first written submission, para. 835.

<sup>833</sup> Canada's first written submission, para. 836.

<sup>834</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), paras. 103-106.

<sup>835</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 117.

<sup>836</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 99.

conversion factor.<sup>837</sup> We will examine Canada's submissions with respect to each of these aspects of the survey in turn and will then form a view on whether Canada has established that the survey was unreliable.

#### **7.5.2.1.1 Representativeness of data in the survey**

7.406. Canada argues that the Nova Scotia survey was unrepresentative in two ways (a) in terms of the number of registered buyers in Nova Scotia covered by the survey; and (b) in terms of the geographic representativeness of the survey. Canada contends that due to its unrepresentativeness, the survey did not provide adequate information on "market conditions in Nova Scotia", and therefore the USDOC could not have relied on the Nova Scotia survey to determine whether the provision of standing timber in other provincial markets was for adequate remuneration "in relation to prevailing market conditions".<sup>838</sup> We will examine in turn Canada's arguments concerning both ways in which the Nova Scotia survey was allegedly unrepresentative.

7.407. As regards the survey's representativeness in terms of number of participants covered, Canada asserts that the survey was based on data collected from 21 registered buyers that represented only 13% of registered buyers in the province.<sup>839</sup> Canada also underscores that of the 21 registered buyers who responded to the survey, [[\*\*\*]].<sup>840</sup> Canada argues that the USDOC did not provide any information as to the basis on which the surveyed buyers were chosen and asserts that the record indicates that "sample volumes were not representative, geographically, of the harvest volumes in Nova Scotia".<sup>841</sup> Canada contends that because the survey was not representative, the survey did not have enough information about "market conditions" in Nova Scotia and could not have been used to determine the adequacy of remuneration in the other provinces "in relation to prevailing market conditions".<sup>842</sup> In response, the United States points to the USDOC's finding that the survey represented approximately 36% of the private softwood volume purchased in Nova Scotia during the survey period, which the USDOC considered to be a "sufficiently robust and representative" sample size of Nova Scotia's private harvest.<sup>843</sup>

7.408. We note that Canada has not challenged the USDOC's finding that the survey was based on 36% of Nova Scotia's private timber harvest and does not argue that a survey based on 36% of the private harvest would be unrepresentative. Canada has only focused on the *number of registered buyers* that were included in the survey to argue that the survey was unrepresentative. We consider that the percentage of the volume of private timber harvested in Nova Scotia that the survey represented was a more appropriate metric for judging the representativeness of the survey than the percentage of registered buyers that the survey included. If a small number of buyers purchase a representative volume of private timber harvest in Nova Scotia, the survey should not be considered unrepresentative because of the small number of buyers alone. Conversely, a survey that considers a large number of buyers that purchase small volumes of timber could arguably be considered unrepresentative, notwithstanding the number of buyers it includes. As Canada has not disputed the USDOC's finding that the survey was representative because it included a sufficiently high percentage of volume of private timber harvest in Nova Scotia, we reject Canada's argument that the survey was unrepresentative because it considered data from only [[\*\*\*]].

7.409. Canada also contends that "the sample volumes were not representative, geographically, of the harvest volumes in Nova Scotia".<sup>844</sup> Canada argues that the geographical representativeness of the survey matters because the location of the timber has a significant effect on its value.<sup>845</sup> In response, the United States points to record evidence that indicates that Deloitte undertook steps to ensure that survey results were geographically representative.<sup>846</sup>

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<sup>837</sup> Canada's first written submission, para. 837.

<sup>838</sup> Canada's first written submission, para. 840.

<sup>839</sup> Canada's first written submission, paras. 831 and 841.

<sup>840</sup> Canada's comments on the United States' response to Panel question No. 237, para. 266.

<sup>841</sup> Canada's first written submission, para. 841.

<sup>842</sup> Canada's first written submission, para. 840.

<sup>843</sup> United States' first written submission, para. 165.

<sup>844</sup> Canada's first written submission, para. 841 (referring to Deloitte Report, (Exhibit CAN-312), p. 8).

<sup>845</sup> Canada's comments on the United States' response to Panel question No. 237, para. 267.

<sup>846</sup> United States' response to Panel question No. 237, para. 314 (referring to Nova Scotia verification exhibit NS-VE-6, (Exhibit CAN-512 (BCI)), pp. 7 and 17 ([[\*\*\*]])).

7.410. In support of its argument that the Nova Scotia survey was not geographically representative, Canada points to the following excerpt of the Deloitte Report:

[A]s noted previously in this report, the sample volumes are not a constant share of the total actual harvest volumes in Nova Scotia's three regions during 2015. We therefore employed a methodology whereby: (1) the average stumpage price by product category and species was calculated based on the region of harvest reported; and (2) these averages were then reweighted based on NSDNR [Nova Scotia Department of Natural resources] actual harvest volumes, creating a new provincial weighted average. This regional reweighting approach accounts for price-by-distance economics inherent in the forestry industry.<sup>847</sup>

We note that in this excerpt, Deloitte acknowledges that "the sample volumes are not a constant share of the total actual harvest volumes in Nova Scotia's three regions". However, Deloitte also goes on to describe the methodological steps that it took to address this imbalance in the sampled volume. We note that Canada has not argued that the survey would remain geographically unrepresentative despite the methodological steps taken by Deloitte to create a "provincial weighted average" price. Rather, Canada takes issue with the fact that the USDOC [[\*\*\*]].<sup>848</sup> Canada asserts that the USDOC [[\*\*\*]] Deloitte's attempt to control for its unrepresentative sample and [[\*\*\*]].<sup>849</sup> We consider that Canada's arguments in this regard do not relate to the geographical representativeness of the Nova Scotia survey *per se*, but to the USDOC's alleged decision to depart from the survey in a certain manner. Canada has not argued that the survey remained geographically unrepresentative even after "Deloitte's attempt to control for its unrepresentative sample". As the claim that we are currently examining concerns the reliability of the survey itself, and not with the manner in which the USDOC itself [[\*\*\*]], we reject Canada's argument. We note that as Canada did not challenge this aspect of the USDOC's determination before commenting on the United States' response to a question posed after the second substantive meeting, we will not rule on whether the USDOC erred by [[\*\*\*]].

7.411. Thus, we consider that Canada has not established that the Nova Scotia survey was unreliable on account of being unrepresentative, either numerically or geographically.

#### **7.5.2.1.2 Definition of "transaction"**

7.412. Canada argues that the USDOC failed to assess whether the transactions that made up the survey accurately reported the price of the right to access private timber, because the survey did not unambiguously define the meaning of the term "stumpage transaction".<sup>850</sup> Canada asserts that absence of certainty and uniformity in what the surveyed buyers reported as a "transaction" was problematic, given that timber transactions in Nova Scotia can be structured in many different ways and hence some reported transaction prices could have included elements in addition to the consideration paid to the landowner for standing timber, thus skewing the stumpage prices upwards.<sup>851</sup> The United States argues that Canada's concerns regarding the surveyed buyers' potential misinterpretation of the term "stumpage transactions" are unwarranted, as the USDOC found no evidence of misreporting during the verification visit.<sup>852</sup> The United States also asserts that there was no discrepancy in the manner in which transactions were reported as the survey conductor also conducted on-site verifications of survey respondents to ensure accurate reporting.<sup>853</sup>

7.413. We consider that the general definition of a "transaction" employed by Deloitte when collecting data for the survey, did not indicate that only the stumpage price must be reported, leaving open the possibility for survey participants to report prices for differently structured transactions.<sup>854</sup> In this regard, we note the United States' assertion that the "survey clearly instructed survey

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<sup>847</sup> Deloitte Report, (Exhibit CAN-312), p. 8.

<sup>848</sup> Canada's comments on the United States' response to Panel question No. 237, para. 269.

<sup>849</sup> Canada's comments on the United States' response to Panel question No. 237, para. 269.

<sup>850</sup> Canada's first written submission, para. 843.

<sup>851</sup> Canada's first written submission, para. 847; response to Panel question No. 13, para. 73; and opening statement at the first meeting of the Panel (28 February 2019), para. 126.

<sup>852</sup> United States' first written submission, para. 168.

<sup>853</sup> United States' first written submission, para. 168.

<sup>854</sup> The general definition that Deloitte employed was: [[\*\*\*]]. (Nova Scotia verification exhibit NS-VE-6, (Exhibit CAN-512 (BCI)), p. 40).

respondents to report the 'stumpage rates' they paid for 'softwood sawlogs'.<sup>855</sup> However, we note that Deloitte itself indicated that the term "transaction" was [[\*\*\*]].<sup>856</sup> In light of the fact that the record evidence clearly indicates that there are many different ways in which timber transactions could be structured in Nova Scotia, we consider that the rather ambiguous definition of the term "transaction" that the survey provided could have led the survey participants to report prices based on different understandings of that term.<sup>857</sup> This view is supported by the outcome of a verification of transactions reported by survey participants conducted by Deloitte, as explained below.

7.414. Deloitte conducted a verification in which it sought "[c]onfirmation that the reported value included only the transaction price for the private stumpage, excluding the payment of private silviculture fees, and excluding any non-stumpage charges that may have been 'bundled' in the Registered Buyer's records".<sup>858</sup> It found, however, that "[i]n some limited cases, Registered Buyers recorded a single entry for the price they paid for stumpage, along with other costs incurred in harvesting the standing timber, such as brokerage fees or commissions paid to third parties, harvesting costs, trucking costs, etc".<sup>859</sup> We note that Deloitte did not indicate what percentage of the transactions contained in the survey they examined in this verification process.<sup>860</sup> We also note that Deloitte did not specify what percentage of the examined transactions the "limited cases" in which prices for standing timber were found to be lumped with other costs represented.<sup>861</sup> Further, there is no evidence on the record that suggests that any rectification to such erroneously reported "limited cases" made by Deloitte pursuant to its verification exercise was also extended to the rest of the data set.<sup>862</sup> We also agree with Canada that the fact that the USDOC found errors concerning the basis on which prices were recorded in the survey, even during its own verification visit, indicates that Deloitte [[\*\*\*]].<sup>863</sup> These considerations concerning the presence of erroneously reported transactions in the survey indicate to us that even though Deloitte may have purported to collect pure stumpage prices from survey transactions, the ambiguity in the definition of "transaction" in the survey caused the survey participants to report prices based on different understandings of that term.<sup>864</sup>

7.415. In light of the evidence referred to above, we consider that Canada has made a *prima facie* case that the survey was unclear as to the definition of "transactions", and hence unreliable. We consider that the United States has not sufficiently rebutted Canada's contention, and hence we uphold Canada's claim.

#### **7.5.2.1.3 Exclusion of pulpwood transaction**

7.416. Canada argues that the survey was unreliable because the USDOC had no indication of how the survey respondents understood and applied the definitions of the terms "sawlog", "studwood", and "pulpwood".<sup>865</sup> Canada also argues that the market for pulpwood was essential to understanding

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<sup>855</sup> United States' response to Panel question No. 13, para. 46 (referring to Nova Scotia verification exhibit NS-VE-6, (Exhibit CAN-512 (BCI)), p. 27 (which contains email instructions sent to survey participants)).

<sup>856</sup> Nova Scotia verification exhibit NS-VE-6, (Exhibit CAN-512 (BCI)), p. 40.

<sup>857</sup> Nova Scotia addendum questionnaire response, (Exhibit CAN-313), pp. 9-10 (providing multiple examples of ways in which private stumpage is sold in Nova Scotia).

<sup>858</sup> Deloitte Report, (Exhibit CAN-312), p. 4.

<sup>859</sup> Deloitte Report, (Exhibit CAN-312), p. 4.

<sup>860</sup> United States' response to Panel question No. 235, para. 300.

<sup>861</sup> United States' response to Panel question No. 235, para. 302.

<sup>862</sup> United States' response to Panel question No. 235, para. 306.

<sup>863</sup> Canada's comments on the United States' response to Panel question No. 235, para. 260. See section 7.5.2.1.5 below.

<sup>864</sup> We note that Canada has also argued that an indication that the survey contained transactions reported on a lump-sum basis is that Port Hawkesbury paper, a company that was likely included in the survey, most commonly purchased stumpage on a lump-sum basis. (Canada's response to Panel question No. 13, para. 76). The United States contends that this argument by Canada is speculative and is not supported by positive record evidence. The United States also points out that in the final determination, the USDOC noted that it is not clear whether Port Hawkesbury participated in the survey at all.

(United States' second written submission, para. 204 (referring to Final determination, (Exhibit CAN-10), pp. 117-118)). We consider that having found, for reasons explained above, that the ambiguous definition of "transaction" rendered the survey unreliable, we need not rule on whether the Port Hawkesbury paper also reported transactions based on a mistaken understanding of that term.

<sup>865</sup> Canada's first written submission, para. 851.

the market for sawlogs and studwood in Nova Scotia and for determining how the market was to be compared to the other provinces.<sup>866</sup>

7.417. With respect to Canada's first argument, we consider that Canada has provided no evidence that indicates that the definitions of the terms "sawlog", "studwood", and "pulpwood" were not properly applied by survey participants. With respect to Canada's second argument, we consider that the issue raised by Canada has been dealt with in the context of Canada's arguments concerning comparability of the Nova Scotia benchmark to stumpage prices in the other provinces.<sup>867</sup>

#### **7.5.2.1.4 Conversion factor used to convert tonnes to cubic metres**

7.418. Canada argues that the conversion factor that the survey used to convert quantity of logs from tonnes to cubic metres tended to underestimate the volumes actually purchased by survey respondents, leading to an imprecise benefit calculation.<sup>868</sup> Canada argues that the Canadian interested parties presented the USDOC with conversion factors that were designed to take into account differences in log types, species, and seasons, while the conversion factor that the survey used and the USDOC accepted was not sensitive to these differences.<sup>869</sup> The United States argues that the conversion factor that the USDOC used was reliable, as the USDOC found this conversion factor to have been used by Nova Scotia in the ordinary course of business.<sup>870</sup>

7.419. We note that the USDOC rejected the Canadian interested parties' concerns regarding the conversion factor used in the Nova Scotia survey based on two reasons (a) the government of Nova Scotia relies upon the conversion factor in question as part of its ordinary course of business; and (b) the conversion factor in question was found to be accurate pursuant to a sampling programme conducted between the years 2001 and 2005.<sup>871</sup> Canada contests the validity of both reasons that the USDOC offered in defence of the conversion factor used in the Nova Scotia survey.

7.420. Canada argues that while the government of Nova Scotia did use this conversion factor, there was no evidence that the Nova Scotia industry, that had the incentive to accurately measure and price private timber, also used this conversion factor.<sup>872</sup> We note that the premise underlying Canada's argument is that the government does not have the incentive to use an accurate conversion factor. In response to a question from the Panel asking Canada to substantiate this premise, Canada asserted that "as long as the same conversion factor is used both to derive the rates from per-tonnes prices and to convert harvested tonnes to cubic metres, the choice of conversion factor is effectively arbitrary and has no effect on pricing".<sup>873</sup> Canada illustrated this assertion with hypothetical figures, and inferred therefrom that there was "no business or other incentive for the Government of Nova Scotia to develop or use an accurate and precise conversion factor within Nova Scotia".<sup>874</sup> We consider that this assertion and the inference Canada draws therefrom is not sufficient to substantiate Canada's view that the government of Nova Scotia has no incentive to use an accurate conversion factor. We also note that Canada has not explained why the same considerations will not apply to private stumpage transactions that take place within Nova Scotia. We therefore reject this argument by Canada.

7.421. Canada has also argued that the USDOC improperly considered the conversion factor used in the survey to be reliable, based on its reasoning that the accuracy of the survey was confirmed in 2005. Canada argues that Nova Scotia adopted a new scaling manual in 2007, due to which the logs measured to calculate Nova Scotia's 1.167 conversion factor would generate a different

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<sup>866</sup> Canada's first written submission, para. 853.

<sup>867</sup> See section 7.4.1.3.1.

<sup>868</sup> Canada's first written submission, para. 855.

<sup>869</sup> Canada's first written submission, para. 860.

<sup>870</sup> United States' first written submission, para. 170.

<sup>871</sup> Final determination, (Exhibit CAN-10), p. 119. We note that while the final determination states that the accuracy of the conversion factor was confirmed between the years 2001 and 2009, the reference that the USDOC provided for this statement indicates that the sampling programme to verify the accuracy of the conversion factor took place between 2001 and 2005. We therefore consider that the USDOC's finding that the accuracy of the conversion factors was ascertained between 2001 and 2009 was an error. We also note that the conversion factor in question was first developed based on sampling conducted between 1989 and 1994. (Nova Scotia addendum questionnaire response, (Exhibit CAN-313), p. 14).

<sup>872</sup> Canada's first written submission, para. 861.

<sup>873</sup> Canada's response to Panel question No. 238, para. 316.

<sup>874</sup> Canada's response to Panel question No. 238, para. 317.

conversion factor after 2007.<sup>875</sup> We note that the USDOC did not explain why a conversion factor the accuracy of which was examined in 2005 would remain suitable for use after 2007, when a new log scaling system was adopted by Nova Scotia, and particularly in the POI. In this regard, we consider that the mere reference to continued use of that conversion factor by the government of Nova Scotia is not adequate to justify the survey's use of that conversion factor, if the conversion factor otherwise does not remain suitable for use pursuant to the adoption of a new scaling system. As the USDOC did not explain why the conversion factor used in the survey was suitable for use despite the adoption of the new scaling system, we consider that the USDOC did not provide a reasoned and adequate basis for finding the conversion factor, and hence the survey, to be reliable.

7.422. We also note that Canada has pointed to record evidence that indicates that "different variables – such as moisture content, tree size, and tree species – can have dramatic effects on how much a particular volume of wood fibre weighs".<sup>876</sup> Canada contends that these factors have changed in Nova Scotia over time, and hence the conversion factor ought to change as well. In support of this contention, Canada points out that Nova Scotia's forest has started to recover from a devastating hurricane, undergone new silvicultural treatments, and has undergone other natural changes that occur in Nova Scotia forests over time.<sup>877</sup> Canada argues that these changes necessitated a recalibration of the conversion factor. We note that the USDOC did not offer any explanation as to why this evidence was not material to the issue of the reliability of the conversion factor used in the survey, as we consider an objective and unbiased authority would have done.

7.423. Canada has also argued that the use of the conversion factor in question made the survey unreliable because the survey was based on transactions that took place from April to December 2015, to the exclusion of transactions that took place in the winter, while the conversion factor in question was an annual average conversion factor.<sup>878</sup> According to Canada, the use of this conversion factor made the survey unreliable because logs are heavier in the winter due to ice and snow accumulation on logs and the conversion factor failed to account for this seasonal variation.<sup>879</sup> We note that Canada has shown that the survey participants informed Deloitte that conversion factors differed by season, and yet the government of Nova Scotia instructed Deloitte to apply the annual average conversion factor.<sup>880</sup> We note that the USDOC did not explain why the conversion factor contained in the survey was reliable, even though survey participants themselves informed Deloitte that conversion factors vary by season and the survey itself excluded transactions conducted in certain winter months.

7.424. Based on the foregoing, we consider that the USDOC did not provide a reasoned and adequate explanation as to whether the conversion factor used in the survey was reliable, and consequently it also failed to explain whether the survey itself was reliable.

#### **7.5.2.1.5 Errors detected in verification**

7.425. Canada argues that the verification conducted by the USDOC was not comprehensive of the survey responses, and the transactions that the USDOC did review contained multiple errors.<sup>881</sup> Canada asserts that the USDOC reviewed only 13 transactions, which constitute only [[\*\*\*]] and found errors in five of the thirteen examined transactions.<sup>882</sup> In Canada's view, the USDOC erred by concluding that it found "no evidence of misreporting" despite the errors detected in the reported transactions during the verification visit.<sup>883</sup> Canada asserts that the errors in the transactions

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<sup>875</sup> Canada's response to Panel question No. 238, para. 322 (referring to Nova Scotia scaling manual, (Exhibit CAN-616), p. 35).

<sup>876</sup> Miller Report, (Exhibit CAN-303 (BCI)), p. 34; see also, Canada's response to Panel question No. 238, para. 321.

<sup>877</sup> Canada's response to Panel question No. 238, para. 321 (referring to Asker Report, (Exhibit CAN-15), pp. 49-50; and Nova Scotia questionnaire response, (Exhibit CAN-313), pp. 7-8 and 14).

<sup>878</sup> Canada's first written submission, para. 859.

<sup>879</sup> Canada's first written submission, para. 859.

<sup>880</sup> Deloitte Report, (Exhibit CAN-312), p. 4.

<sup>881</sup> Canada's first written submission, para. 842.

<sup>882</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 121. We note that Canada also asserts that it found a [[\*\*\*]] of the examined transactions "exhibited cause for concern" but does not point to verifiable evidence to support this contention. We therefore proceed on the basis that the USDOC found five transactions to contain errors.

<sup>883</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 122.

examined during the USDOC's verification included [[\*\*\*\*<sup>884</sup>]].<sup>885</sup> According to Canada, the USDOC improperly assumed that the problems found in the examined transactions are unique and could not recur in the remaining population.<sup>886</sup>

7.426. The United States argues that Canada's concerns that prices other than that of standing timber were included in certain transactions recorded in the survey are unfounded because Deloitte sought to confirm that the reported transactions were limited to purchases of stumpage and excluded other costs.<sup>887</sup> However, as noted above in section 7.5.2.1.2, we consider that the survey remained problematic despite Deloitte's verification. In respect of the inclusion of a [[\*\*\*]] in certain transaction prices, the United States contends that [[\*\*\*]].<sup>888</sup> We consider that the United States' argument is not a persuasive defence for the presence of a transaction price that included a [[\*\*\*]] in the survey. This is because absence of evidence regarding what the [[\*\*\*]] precisely was not a valid reason to include an inaccurate transaction price in the survey considering that it was known that part of that transaction price was a [[\*\*\*]].

7.427. The United States also contends that it observed the expected standard of diligence in the verification, as evidenced by the fact that it examined six transactions during the verification as "surprise transactions" in addition to the seven transactions that were preselected for verification.<sup>889</sup> We consider that the fact that the USDOC conducted a "surprise" verification of certain transactions is not a persuasive defence of the USDOC's continued reliance on the survey despite the detection of errors in the examined transactions. We note that record evidence clearly indicates that there were errors in not just the preselected transactions, but also the surprise transactions that the USDOC examined during the verification visit.<sup>890</sup> As the USDOC continued to rely on the survey, notwithstanding the detection of these errors in the transactions included in the survey examined during the verification visit, we agree with Canada that the USDOC improperly assumed that the errors were unique to the examined transactions and that the remaining transactions would be accurate.

7.428. The United States also asserts that suggesting that the USDOC ought to have rejected the survey because Nova Scotia sought to make "minor corrections" to the examined transactions would also mean that the USDOC ought to have rejected all questionnaire responses filed by company respondents and provincial governments, as all of those respondents also made corrections to their submissions.<sup>891</sup> We consider that the issue before us is not whether the nature of corrections that the other respondents sought to make to their submissions before the USDOC should have led the USDOC to reject those submissions, but we have enough information to consider that the errors that the USDOC detected in the survey would have led an impartial and objective investigating authority to not find the survey reliable for establishing benchmark prices.

#### **7.5.2.1.6 Use of the survey**

7.429. Canada argues that the USDOC wrongly assumed that the survey was [[\*\*\*]].<sup>892</sup> Canada refers to certain documents obtained through [[\*\*\*]] requests in order to support its contention that Nova Scotia [[\*\*]].<sup>893</sup> According to Canada, the USDOC's mistaken assumption that the survey was [[\*\*\*]].<sup>894</sup> The United States, in response, contends that whether the survey was [[\*\*\*]] is immaterial to the USDOC's conclusions, which relied on the fact that the survey was commissioned

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<sup>884</sup> [[\*\*\*]]

<sup>885</sup> Canada's response to Panel question No. 33, para. 133; opening statement at the first meeting of the Panel (28 February 2019), para. 123.

<sup>886</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 124; second written submission, para. 262.

<sup>887</sup> United States' response to Panel question No. 33, para. 112.

<sup>888</sup> United States' response to Panel question No. 33, para. 113.

<sup>889</sup> United States' response to Panel question No. 33, paras. 110 and 114.

<sup>890</sup> Nova Scotia verification report, (Exhibit CAN-511 (BCI)), pp. 8-9.

<sup>891</sup> United States' response to Panel question No. 33, para. 115.

<sup>892</sup> [[\*\*\*]]

<sup>893</sup> Nova Scotia, freedom of information response, (Exhibit CAN-516 (BCI)).

<sup>894</sup> Canada's second written submission, para. 259.

for the purpose of setting Crown timber prices.<sup>895</sup> The United States points to the "Statement of Work provided by Deloitte to Nova Scotia", which indicated that the [[\*\*\*]].<sup>896</sup>

7.430. We note that in the final determination, the USDOC noted the following about the survey's purpose:

The [Government of Nova Scotia], in the ordinary course of business, relies on periodic surveys of private-origin standing timber as the basis for setting Crown-origin stumpage prices. The data in the NS Survey collected on behalf of the [Government of Nova Scotia] was for a similar purpose.<sup>897</sup>

We consider that the USDOC's observation regarding the purpose of the survey does not suggest that the survey was [[\*\*\*]] by the government of Nova Scotia for setting Crown timber prices. The USDOC's observations appear to be consistent with the description in the statement of work that the United States points to where the survey was stated to have been commissioned for the purpose of creating an updated survey of private timber transactions. We therefore reject Canada's argument that the USDOC [[\*\*\*]].

### **7.5.2.2 Conclusion**

7.431. We conclude that Canada has established a *prima facie* case not sufficiently rebutted by the United States that the ambiguity in the definition of the term "transaction" in the survey made the survey unreliable. Further, we conclude that unlike the USDOC, an objective and unbiased investigating authority would not have relied on the Nova Scotia survey for determining the benchmark price upon finding the kind of errors in the survey that the USDOC did during its verification visit. The USDOC also failed to provide a reasoned and adequate explanation as to whether the conversion factor used in the survey was reliable and accurate. We therefore uphold Canada's claim that by relying on an unreliable survey, the USDOC failed to satisfy the requirements of the *chapeau* of Article 14 of the SCM Agreement. We exercise judicial economy in respect of Canada's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

## **7.6 Canada's claim concerning the USDOC's failure to consider the full remuneration paid by producers in Alberta, Ontario, Québec, and New Brunswick**

7.432. Canada claims that the USDOC erred by comparing the administered price for stumpage in various provinces or, in Québec, the transposed price (together "the administered price") to the price paid for privately owned standing timber in Nova Scotia without adjusting the administered price to account for various other charges paid by tenure-holders to provincial governments. Canada contends that by so doing the USDOC failed to take into account the full cost of standing timber and conditions of purchase and sale in Alberta, Ontario, Québec, and New Brunswick, as required under Article 14(d) of the SCM Agreement.<sup>898</sup> Instead, in Canada's view, the USDOC ought to have considered the cost paid by recipients in the form of various mandatory dues, fees, charges, and in-kind costs as remuneration for Crown stumpage.<sup>899</sup>

7.433. The United States contends that the USDOC need not have provided adjustments for the additional expenses that Canada points to as the USDOC had found that those costs were not directly related to stumpage prices, that they were billed as separate line items, and that no record evidence indicated that any such additional items were included within the Nova Scotia benchmark prices.<sup>900</sup>

### **7.6.1 Legal standard**

7.434. 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

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<sup>895</sup> United States' response to Panel question No. 32, para. 104.

<sup>896</sup> United States' response to Panel question No. 31, para. 98 (quoting Nova Scotia first supplemental questionnaire response, (Exhibit USA-32 (BCI)), p. 8).

<sup>897</sup> Final determination, (Exhibit CAN-10), p. 118.

<sup>898</sup> Canada's first written submission, paras. 863-865.

<sup>899</sup> Canada's first written submission, para. 864.

<sup>900</sup> United States' second written submission, para. 215.

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).<sup>901</sup> 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.<sup>902</sup>

7.435. 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.

### **7.6.2 Evaluation**

7.436. We note that the USDOC rejected the Canadian interested parties' request for adjusting stumpage prices in Alberta, Ontario, New Brunswick, and Québec for the following reasons:

- a. the costs identified by the respondents were not incorporated into the prices paid by harvesters of private timber in Nova Scotia<sup>903</sup>;
- b. certain "administrative costs" incurred by tenure-holders in the other provinces for which adjustments were sought were "overhead expenses", which were not directly related to stumpage prices;
- c. the USDOC did not find any evidence that stumpage rates set by provincial governments were adjusted to account for revenue from any fees or charges required under long-term tenure agreements<sup>904</sup>; and
- d. the costs associated with long-term tenure rights were billed on separate invoices or as separate line items by provinces, rather than being incorporated into the stumpage price.<sup>905</sup>

7.437. We examine these reasons offered by the USDOC for declining to make the proposed adjustments in turn.

#### **7.6.2.1 Costs not incorporated into the Nova Scotia benchmark**

7.438. As noted above, the USDOC refused to adjust the stumpage price to account for certain payments made by tenure-holders in the other provinces on the basis that those payments were not incorporated into the prices paid by harvesters of private timber in Nova Scotia. Canada contends that this reasoning of the USDOC was flawed because the USDOC was obliged to determine the full remuneration paid and costs incurred by the respondent companies in exchange for the right to harvest Crown-origin timber, including all charges and in-kind payments made for that timber.<sup>906</sup>

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<sup>901</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.148.

<sup>902</sup> Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 7.154. (fn omitted)

<sup>903</sup> The USDOC decided not to adjust for "post-harvest activities", "in kind costs (e.g., for silviculture, road construction, forest management and planning, etc.)", and "cost of long-term tenure obligations (e.g., annual fees, [Forest Resource Improvement Association of Alberta (FRIAA)] dues, holding and protection charges, etc.)" on this basis. (Final determination, (Exhibit CAN-10), pp. 136-138).

<sup>904</sup> The USDOC considered annual fees, FRIAA dues, holding, and protection charges to be examples of long-term tenure obligations.

<sup>905</sup> Final determination, (Exhibit CAN-10), pp. 137-138.

<sup>906</sup> Canada's first written submission, para. 869.

The United States contends that the USDOC's reasoning was proper as it would not be accurate to adjust the stumpage price that the respondents were charged when the benchmark reflects a market-determined price for the good in question, i.e. what the recipient would have paid under market conditions.<sup>907</sup>

7.439. 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.

7.440. We also consider that the USDOC's approach of comparing only the stumpage price component of the overall payment made for timber by tenure-holders in the other provinces, to the stumpage price component of the overall payment made for timber in Nova Scotia was improper, even though the United States argues that by so doing the USDOC was comparing like-for-like. This is because, as noted in the legal standard section above, we 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 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.

7.441. We also note that while the USDOC did not consider individually the merits of each cost in respect of which an adjustment was sought, it did make certain specific findings about silviculture costs in the final determination. The USDOC noted that the Government of Nova Scotia charges registered buyers CAD 3.00/m<sup>3</sup> to cover the cost of silviculture, or requires them to perform their own silviculture activities in lieu of the fee. As these silviculture costs were not included in the Nova Scotia benchmark price, the USDOC declined to make adjustments for silviculture costs for respondents in the other provinces.<sup>908</sup> Canada argues that the USDOC was mistaken in refusing to provide adjustments for silviculture costs incurred by tenure-holders in the other provinces on the ground that the silviculture cost of CAD 3.00 /m<sup>3</sup> payable in Nova Scotia was not included in the benchmark, because almost all facilities in Nova Scotia chose to conduct their own silviculture activities at a cost that was "far less than \$3m<sup>3</sup>".<sup>909</sup> We note that Canada has demonstrated that only one payment of CAD 9.00 was made as silviculture fee during the POI in Nova Scotia, whereas one Nova Scotia facility (Irving) incurred only [[\*\*\*]] as expenses for conducting its own silviculture operations.<sup>910</sup> As Canada has shown that the silviculture costs in Nova Scotia were lower than what the USDOC estimated them to be, and the silviculture costs in the other provinces were not mentioned by the USDOC in the determination, we find that the USDOC did not provide a reasonable and adequate explanation for refusing to make adjustments for silviculture costs on the basis that

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<sup>907</sup> United States' first written submission, para. 140.

<sup>908</sup> Final determination, (Exhibit CAN-10), p. 137.

<sup>909</sup> Canada's first written submission, para. 876.

<sup>910</sup> Canada's first written submission, paras. 876-877 (referring to Redacted version of Nova Scotia verification report, (Exhibit CAN-318), p. 5; and Irving submission of factual information, (Exhibit CAN-353 (BCI)), pp. 7-8).

the Nova Scotia benchmark did not include silviculture costs either. This is because the silviculture costs in the other provinces could have been more than what they were in Nova Scotia, and therefore the exclusion of silviculture costs on both sides of the equation does not necessarily yield a fair comparison.

#### **7.6.2.2 Administrative costs were not directly related to stumpage prices**

7.442. We note that the USDOC applied the reasoning that certain costs for which adjustments were sought were not directly related to stumpage prices, only to what it considered "administrative costs". We consider that because the USDOC applied this reasoning only to "administrative costs", this reasoning could not have been the basis for the USDOC's refusal to adjust the stumpage price to account for other costs that Canada points to. Therefore, this reasoning will have no bearing on our findings with respect to the USDOC's refusal to make adjustments for other costs.

7.443. We note that USDOC does not specify the costs that it classified as "administrative costs".<sup>911</sup> In response to a question from the Panel asking it to clarify which specific costs the USDOC referred to as "administrative costs", the United States pointed to a question directed by the USDOC to Alberta, asking how Alberta took into account certain factors in adjusting the stumpage price.<sup>912</sup> We note that "administrative costs" is only one item in the list of factors mentioned in the question, and the question does not indicate which particular costs are to be considered "administrative costs". We also note that neither the United States nor the USDOC have described the scope and coverage of the term "administrative costs" in the context of Ontario, Québec, and New Brunswick. We consider that in the absence of a clear finding as to which specific costs the USDOC referred to as "administrative costs", the USDOC failed to adequately explain how such costs were not directly related to stumpage prices. Thus, we conclude that the USDOC did not provide a reasoned and adequate explanation for refusing to make the requested adjustments.

#### **7.6.2.3 Absence of evidence that provincial governments considered long-term tenure obligations when fixing stumpage prices**

7.444. The United States contends that the USDOC properly rejected the proposed adjustments because it considered evidence on the record regarding the costs incorporated by provincial governments into stumpage rates and found no evidence that the costs in respect of which adjustments were being sought were affirmatively considered by provincial governments when setting stumpage rates.<sup>913</sup> Canada contends, in response, that whether the provinces took into account other Crown-imposed costs when setting the administered stumpage rate portion of the full remuneration, does not change the reality that all of the charges and costs that the USDOC ignored are part of the full price of Crown-origin timber, and therefore this inquiry is irrelevant.<sup>914</sup>

7.445. We agree with Canada and consider that even if there was no evidence before the USDOC regarding the manner in which the existence of charges other than the stumpage price and in-kind payment obligations arising from various obligations that tenure-holders were subject to affected the amount of stumpage prices fixed by the provincial governments, the USDOC ought not to have rejected the proposed adjustments on that basis. So long as there was evidence that tenure-holders were under an obligation to furnish payments, in cash or in-kind, other than the stumpage price to

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<sup>911</sup> We also note that in commenting on the United States' response to our question referred to above, Canada has pointed to the following excerpt from the final determination, that indicates that the USDOC adopted an inconsistent approach to the question of whether adjustments ought to be provided for administrative costs in context of British Columbia on the one hand, and Ontario, Québec, Alberta, and New Brunswick on the other:

The Department does not agree with the petitioner that cost adjustments should not be granted for indirect costs or for [General and Administrative] costs reported by the respondents with operations in British Columbia. The respondents must incur these costs in order to access and harvest Crown timber. The Department examined these costs at verification and found that the reported costs were tied to either the respondents' tenure obligations or to expenses relating to accessing, harvesting, or hauling timber to the mills.

(Canada's comments on the United States' response to Panel question No. 232, para. 248 (quoting Final determination, (Exhibit CAN-10), p. 73))

<sup>912</sup> United States' response to Panel question No. 232, para. 290.

<sup>913</sup> United States' first written submission, para. 151.

<sup>914</sup> Canada's response to Panel question No. 19, para. 92.

provincial governments in order to obtain or maintain their tenures, such payments are part of the remuneration paid to the provincial government.<sup>915</sup>

7.446. For example, Canada has demonstrated that the holders of a TSG have to pay an annual royalty pursuant to Québec's SFDA.<sup>916</sup> The obligation to pay an annual royalty is also set out in TSG contracts.<sup>917</sup> The rate of this royalty is determined by the timber market board, and Canada has produced evidence demonstrating that the rate was 18% of the TSG-holder's prior year's stumpage fees during the POI.<sup>918</sup> Canada has shown that the payment of this charge was mandatory.<sup>919</sup> The fact that the USDOC did not find evidence that the Government of Québec took this royalty fee into consideration in fixing the amount of the stumpage prices, does not mean that the annual royalty fees was not a mandatory part of the remuneration that TSG-holders had to pay to the Government of Québec.

7.447. We therefore consider as flawed the USDOC's reasoning that the absence of evidence as to whether the provincial governments affirmatively took into account revenue from long-term tenure obligations in fixing the amount of stumpage prices made the requests for adjustments liable to be rejected.

#### **7.6.2.4 Costs associated with long-term tenure obligations were billed on separate invoices**

7.448. In the final determination, the USDOC ruled against making adjustments for long-term tenure obligations on the ground that "[c]osts associated with long-term tenure rights are billed on separate invoices or as separate line items by the provinces, rather than incorporated into the stumpage price".<sup>920</sup> In Canada's view, there is no basis in the SCM Agreement to reject part of the remuneration on the basis that certain dues were charged via separate invoices or line items.<sup>921</sup>

7.449. We agree with Canada and consider that an objective and impartial investigating authority will not reject costs incurred by tenure-holders in the other provinces as being a part of the remuneration for standing timber, merely on the basis that those costs were not charged on the same invoice or as the same line item as stumpage prices.<sup>922</sup>

#### **7.6.2.5 Conclusion**

7.450. We conclude that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to consider the payments in question as part of the remuneration for timber paid by tenure-holders in the other provinces. By not adjusting for any mandatory payments, arising either from monetary charges or in-kind obligations, the USDOC underestimated the remuneration that tenure-holders made for standing timber in various provinces, thus inflating the amount of benefit determined to exist or finding benefit where none existed.

7.451. We note that Canada has put forth specific arguments and evidence about several individual payments made by tenure-holders in the other provinces, either by way of mandatory charges or mandatory in-kind obligations, contending that the USDOC ought to have provided adjustments in respect of each of those payments. We consider that we need not make findings as regards whether

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<sup>915</sup> We consider that there could be circumstances in which an investigating authority may have reason to consider a charge or an in-kind payment not to be a part of remuneration for the good in question even if paying that payment is mandatory to get access to the good in question. For example, an investigating authority may decide to exclude payments associated with certain mandatory obligations from the remuneration amount, because the receiver of good derives benefits from making that payment other than getting access to the good. However, the USDOC did not explain why, in this case, mandatory payments should not be included in the remuneration amount.

<sup>916</sup> SFDA, (Exhibit CAN-169), Section 95.

<sup>917</sup> TSG 206, (Exhibit CAN-358 (BCI)), [[\*\*\*]].

<sup>918</sup> Québec initial questionnaire response, (Exhibit CAN-170), p. QC-S-48.

<sup>919</sup> SFDA, (Exhibit CAN-169), Sections 88 and 109-110.

<sup>920</sup> Final determination, (Exhibit CAN-10), p. 138.

<sup>921</sup> Canada's response to Panel question No. 29, para. 124.

<sup>922</sup> We also note that in the *EU – Biodiesel (Indonesia)* case, the panel took the view that the fact that the premium for the product at issue was paid in a different invoice from the price did not mean that the premium should not be considered a part of the price paid for the product. (Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.117).

each of those payments merited a specific adjustment. We, instead, limit our findings to ruling that the USDOC failed to offer a reasonable and adequate explanation for not making the requested adjustments, as each of the reasons were invalid. The USDOC should instead have engaged more closely with the evidence before it concerning each individual payment for which an adjustment was requested. The USDOC should then have made adjustments for payments the evidence pertaining to which indicated that it was mandatory for the tenure-holders to make those payments in order to engage in their harvesting operations, or explained why a mandatory payment should not be included in the remuneration amount despite its obligatory nature.<sup>923</sup>

## 7.7 Canada's claims concerning the USDOC's use of a Washington logs benchmark

### 7.7.1 Introduction

7.452. In the underlying investigation, the USDOC sought to use a benchmark that reflected prices for comparable goods, and related to the prevailing market conditions in British Columbia.<sup>924</sup> In making its benefit determination, the USDOC rejected an "in-market" stumpage benchmark proposed by the Government of British Columbia and the Canadian respondents, which was the stumpage price based on auctions conducted by the BCTS. The USDOC also rejected, as a possible benchmark, prices of standing timber in the Canadian province of Nova Scotia because it took the view that standing timber in British Columbia is not comparable to standing timber in Nova Scotia.<sup>925</sup>

7.453. Having rejected these benchmarks, the USDOC used an out-of-country benchmark, which was based on log prices in the United States Pacific North-West (PNW) (Washington logs benchmark). In section 7.3.3 of this Report, we reviewed Canada's claim concerning the USDOC's rejection of the benchmark based on auctions conducted by BCTS. In this part of our Report, we review Canada's claim concerning the USDOC's use of the Washington logs benchmark.

7.454. Canada claims in this regard that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in using the Washington logs benchmark to ascertain whether stumpage was provided to the Canadian respondents in the province of British Columbia for less than adequate remuneration. The United States asks us to reject Canada's claims.

### 7.7.2 Legal standard

7.455. Article 14 of the SCM Agreement, as noted above, states that "any" method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to Article 1 of this Agreement shall be consistent with the guidelines set out in Articles 14(a)-(d). Article 14(d) of the SCM Agreement states, *inter alia*, that the government's provision of goods and services shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration. The second sentence of Article 14(d), in turn, states that the adequacy of remuneration shall be determined "in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".

7.456. While the second sentence states that the adequacy of remuneration shall be determined in relation to the prevailing market conditions for the good "in the country of provision", relying on the phrase "in relation to", the Appellate Body has clarified in previous cases that a benchmark may be based on out-of-country prices provided certain conditions are met.<sup>926</sup> For instance, the Appellate Body has clarified that when an investigating authority uses out-of-country prices, it "is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)".<sup>927</sup> The investigating authority may be required to make appropriate adjustments to

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<sup>923</sup> See fn 915 to para. 7.445.

<sup>924</sup> Final determination, (Exhibit CAN-10), p. 63; United States' first written submission, paras. 403 and 413; and Canada's first written submission, para. 602.

<sup>925</sup> See, e.g. Canada's first written submission, para. 602 (referring to Preliminary determination, (Exhibit CAN-8), Issues and Decision Memorandum, p. 46; and Final determination, (Exhibit CAN-10), Issues and Decision Memorandum, p. 63).

<sup>926</sup> Appellate Body Reports, *US – Softwood Lumber IV*, para. 89; *US – Carbon Steel (India)*, para. 4.188.

<sup>927</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 106.

ensure that the benchmark reflects prevailing market conditions in the country of provision.<sup>928</sup> In particular, the Appellate Body has noted that the inclusive list of prevailing market conditions identified in the second sentence of Article 14(d) (i.e. price, quality, availability, marketability, transportation, and other conditions of purchase or sale) describes factors that may affect the comparability of the financial contribution at issue with a benchmark.<sup>929</sup> If a proposed benchmark does not reflect prevailing market conditions in the country of provision, adjustments in the light of the factors listed in the second sentence of Article 14(d) would be necessary to ensure comparability, and by extension a meaningful benefit comparison.<sup>930</sup>

7.457. In determining whether the investigating authority has complied with these obligations under Article 14(d) of the SCM Agreement, we must examine whether the conclusions reached by the investigating authority are reasoned and adequate.<sup>931</sup> Such an examination, as we have consistently noted, must be critical, based on the information contained on the investigating authority's record and the explanations given by that authority.<sup>932</sup> We also note that to assess the adequacy of remuneration in relation to the prevailing market conditions in the country of provision, as required by Article 14(d) of the SCM Agreement, it is necessary for an investigating authority to seek, and engage with, evidence concerning the prevailing market conditions for the good in question.<sup>933</sup> Investigating authorities bear the responsibility of conducting the necessary analysis to determine, on the basis of information supplied by petitioners and respondents in a countervailing duty investigation, whether proposed benchmark prices are market determined and are, therefore, reflective of prevailing market conditions in the country of provision such that they can be used to determine whether remuneration is less than adequate.<sup>934</sup>

### **7.7.3 The USDOC's use of the Washington Log benchmark for British Columbia**

7.458. In the underlying investigation, the USDOC constructed the Washington log benchmark based on a methodology of derived demand. The USDOC's starting premise was that standing timber values are largely derived from the demand for logs produced from a given tree; the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is in turn derived from the demand for the type of lumber produced from these logs.<sup>935</sup> Starting with delivered log prices from eastside Washington<sup>936</sup>, collected by the Washington Department of Natural Resources (WDNR), the USDOC deducted harvesting and other costs reported by the Canadian respondents to derive a stumpage price in British Columbia.<sup>937</sup> The USDOC compared this derived stumpage price (i.e. the benchmark price) to the stumpage prices paid by Canadian respondents to ascertain the existence, and extent, of the benefit.<sup>938</sup>

7.459. Canada contends that the USDOC's use of WDNR log prices as a benchmark was inconsistent with Article 14(d) of the SCM Agreement. Canada submits in this regard that Article 14(d), as interpreted by the Appellate Body, requires the use of a benchmark that relates or refers to, or is connected with, prevailing market conditions in the country of provision.<sup>939</sup> According to Canada, the WDNR log prices did not meet this requirement because they represented an out-of-country benchmark that did not relate to the prevailing market conditions in British Columbia.<sup>940</sup>

7.460. Canada provides two underlying bases to support its claim. First, Canada contends that the USDOC's Washington log benchmark was inappropriate for assessing the adequacy of remuneration

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<sup>928</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.158.

<sup>929</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.244.

<sup>930</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.244.

<sup>931</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.311.

<sup>932</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.311.

<sup>933</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.306.

<sup>934</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.306.

<sup>935</sup> Final determination, (Exhibit CAN-10), pp. 67-68.

<sup>936</sup> According to the United States, the USDOC used log prices from eastside Washington (and not coastal Washington), as that area of Washington is contiguous with the British Columbia interior where the mandatory respondents based their operations. (United States' first written submission, para. 403; see also, Canada's first written submission, para. 604).

<sup>937</sup> Final determination, (Exhibit CAN-10), pp. 67-68; Canada's first written submission, paras. 603-604; and United States' first written submission, para. 408.

<sup>938</sup> Final determination, (Exhibit CAN-10), p. 63.

<sup>939</sup> Canada's first written submission, para. 44.

<sup>940</sup> Canada's first written submission, para. 600; second written submission, para. 178.

under Article 14(d).<sup>941</sup> In this regard, we note that Canada focuses essentially on why the USDOC's choice of a Washington log benchmark was flawed *per se* (or did not provide an appropriate starting point for a benchmark determination).<sup>942</sup> Second, Canada contends that in failing to make four specific adjustments, the USDOC failed to adjust the WDNR prices to reflect the prevailing market conditions in British Columbia.<sup>943</sup>

### **7.7.3.1 The appropriateness of the Washington log benchmark**

7.461. Canada contends that the USDOC's Washington logs benchmark was inappropriate for assessing the adequacy of remuneration for the provision of standing timber in British Columbia under Article 14(d) of the SCM Agreement.<sup>944</sup> Canada asserts that the USDOC's premise that the conditions in Washington State and British Columbia were sufficiently comparable, and its conclusion that the value of standing timber in British Columbia can be reliably derived from Washington State log prices was factually and logically flawed.<sup>945</sup>

7.462. In support of this assertion, Canada states that, contrary to the USDOC's view, the species harvested by the Canadian respondents in the British Columbia interior differed in significant ways from the species mix in eastside Washington.<sup>946</sup> In addition, Canada states that in selecting the Washington log benchmark the USDOC relied on a false premise that log prices are constant across geographical regions.<sup>947</sup>

7.463. In response, the United States argues that the USDOC focused on the "key aspects" of comparability to ensure the prices relate to the prevailing market conditions in British Columbia. According to the United States, and as explained by the USDOC, the WDNR data is well-suited for measuring remuneration in British Columbia because the forests of eastside Washington are contiguous with those of the British Columbia interior, and feature the same species and growing conditions.<sup>948</sup> The United States argues that Article 14(d) does not require the USDOC to account for every conceivable difference within localities of Canada.<sup>949</sup> According to the United States, Canada's arguments are completely untethered to the text of the SCM Agreement and under its "implausible position", goods such as logs and stumpage are immune from a subsidy analysis because, for all practical purposes, it is unknowable whether they are provided for less than adequate remuneration.<sup>950</sup>

7.464. In our view Canada's arguments require us to address whether the USDOC's methodology to determine the adequacy of remuneration, i.e. the use of an out-of-country benchmark based on Washington log prices, was flawed *per se*. This part of Canada's claim challenges the methodology or benchmark used by the USDOC and, as presented by Canada, is separate from the part of its claims concerning the USDOC's failure to make necessary adjustments.

7.465. In resolving the "*per se*" issue raised by Canada, we recall that the relevant inquiry under Article 14(d) of the SCM Agreement is whether the benchmark used by the investigating authority to assess whether a good is provided by the government for less than adequate remuneration, relates to prevailing market conditions for the good in the country of provision. 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

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<sup>941</sup> Canada's first written submission, para. 607.

<sup>942</sup> In paragraph 630 of its first written submission, for instance, Canada argues that the USDOC's failure to make critical adjustments compounded the error of the USDOC's flawed cross-border methodology.

<sup>943</sup> Canada's first written submission, para. 630.

<sup>944</sup> Canada's first written submission, para. 607.

<sup>945</sup> Canada's first written submission, para. 608.

<sup>946</sup> Canada's first written submission, para. 612.

<sup>947</sup> Canada's first written submission, para. 614.

<sup>948</sup> United States' first written submission, para. 411 (referring to Final determination, (Exhibit CAN-10), p. 63).

<sup>949</sup> United States' first written submission, para. 418.

<sup>950</sup> United States' first written submission, para. 417.

adequacy of the government's remuneration in a manner consistent with Article 14(d) (an issue that we address when dealing with Canada's arguments concerning such type of adjustments).

7.466. 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 (as noted in paragraph 7.456 above) the benchmark is comparable to the financial contribution at issue.

7.467. We note that in the underlying investigation, the USDOC sought to use a benchmark that reflected the prevailing market conditions in British Columbia (i.e. a province in the country of provision). Considering we must make our determination based on a review of the USDOC's findings, we will examine whether the USDOC used a benchmark that reflected the prevailing market conditions in British Columbia.

7.468. Based on the legal analysis set out in paragraphs 7.455-7.457 above, we will address the specific submissions by Canada concerning (a) the differences in species mix in eastside Washington and the British Columbia interior; and (b) why in selecting the Washington logs benchmark the USDOC relied on a false premise that log prices are constant across geographical regions.

7.469. Regarding the differences in species mix in eastside Washington and the British Columbia interior, Canada's argument is that species mix in eastside Washington differs in "significant ways" from the British Columbia interior.<sup>951</sup> For instance, lodgepole pine and spruce represent 83% of log purchases of the Canadian respondents, whereas these species represent 6% of the logs entering sawmills in eastside Washington.<sup>952</sup> Canada argues that the difference in proportion is "particularly significant" in light of the impact of the mountain pine beetle (MPB) and spruce beetle on lodgepole pine and spruce populations, which had a disproportionate impact in the British Columbia interior.<sup>953</sup> The United States asserts that the same species exist in substantial quantities in both British Columbia and Washington, merely in different proportions.<sup>954</sup> In addition, the United States notes that because the USDOC used a species-specific benchmark, the relative prevalence of a given species does not detract from the suitability of the benchmark data.<sup>955</sup>

7.470. Canada appears to take the view that differences in species mix in eastside Washington and the British Columbia interior made the WDNR prices an inappropriate starting point in the USDOC's benefit analysis (irrespective of adjustments the USDOC made to ensure that the benchmark reflected the prevailing market conditions in British Columbia). We note that the USDOC concluded that the WDNR data "*properly adjusted for market conditions in British Columbia*" was representative of prices for standing timber in British Columbia.<sup>956</sup> The USDOC did not contend for instance that the underlying data, without necessary adjustments, was an appropriate benchmark. To the extent Canada contends that the benchmark ultimately used was not properly adjusted to reflect the prevailing market conditions in British Columbia, we discuss Canada's specific arguments in this regard below. Thus, we disagree with Canada's argument that the WDNR data could not be used as a benchmark because of differences in species mix between eastside Washington and the British Columbia interior.<sup>957</sup>

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<sup>951</sup> Canada's first written submission, para. 612.

<sup>952</sup> Canada's first written submission, para. 612, table 6.

<sup>953</sup> Canada's first written submission, para. 613.

<sup>954</sup> United States' first written submission, para. 412.

<sup>955</sup> United States' first written submission, para. 412.

<sup>956</sup> United States' first written submission, para. 410. (emphasis added)

<sup>957</sup> We recall our findings in paras. 7.46-7.48 above that, as a starting point in its benefit analysis, the USDOC was obligated to consider a benchmark from within the BC interior, and could have rejected using that benchmark only in very limited circumstances. In the event that the USDOC did have a valid basis for not using prices from within the BC interior as a benchmark (which we have found it did not) for that region, it could have used an external benchmark from a region that did not have the same prevailing market conditions as

7.471. Regarding Canada's argument that in selecting the Washington logs benchmark the USDOC relied on a false premise that log prices are constant across geographical regions, Canada submits that this premise was necessary to allow the USDOC to treat any difference in log prices, and consequently the derived standing timber price, as evidence of an alleged subsidy, rather than the result of differences in prevailing market conditions.<sup>958</sup> Per Canada, the record was clear that there were a number of factual reasons why log prices differ between regions, "including" variability in physical characteristics of softwood logs as well as contractual terms of sale and differences in prevailing local market conditions.<sup>959</sup> Canada asserts that instead of investigating the causes of price differences to control for them in its analysis, the USDOC ignored the data and expert evidence provided by the Canadian respondents in this regard.<sup>960</sup> In particular, Canada argues that the expert evidence submitted to the USDOC demonstrates how even logs of the same species grown under similar conditions, are unlikely to have the same price because of differences in prevailing market conditions.<sup>961</sup>

7.472. The United States contends that nothing in Article 14(d) required the USDOC to account for every conceivable difference within localities of Canada or for the range of minutia that Canada identified when it asserted that log prices differ from region to region.<sup>962</sup> The United States also submits that "tellingly" Canada does not propose a method by which the USDOC could have actually undertaken an analysis of the type suggested by Canada.<sup>963</sup>

7.473. We note that when Canada argues that in selecting the Washington log benchmark the USDOC relied on a false premise that log prices are constant across geographical regions, Canada focuses on the USDOC's alleged failure to investigate the *causes* of differences in log prices between British Columbia and eastside Washington in order to control for them.<sup>964</sup> However, we 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).<sup>965</sup> 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.<sup>966</sup>

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the BC interior, after making necessary adjustments to that benchmark. In that situation, whether that external benchmark ultimately used by the USDOC, after making the necessary adjustments, was suitable under Article 14(d) would depend on whether that benchmark reflected prevailing market conditions in the country of provision.

<sup>958</sup> Canada's first written submission, para. 614.

<sup>959</sup> Canada's first written submission, para. 621.

<sup>960</sup> Canada's first written submission, para. 622.

<sup>961</sup> Canada's first written submission, para. 614.

<sup>962</sup> United States' first written submission, para. 418.

<sup>963</sup> United States' first written submission, para. 419.

<sup>964</sup> Canada's first written submission, para. 622. See also, *ibid.* para. 620. In making its argument on the basis of a hypothetical wherein Canada uses Montana log prices to derive the value of standing timber in Idaho, Canada submits that without explaining and controlling for the factors that caused average log prices to differ between Idaho and Montana in the first instance, the use of average log prices in Montana to derive the value of standing timber in Idaho does not produce an accurate or reliable measurement of any stumpage subsidy in Idaho.

<sup>965</sup> Such an analysis would also be somewhat circular considering the purpose of the benefit analysis is to establish whether a subsidy was provided.

<sup>966</sup> Canada makes several additional arguments without properly citing record evidence or explaining the textual basis for the argument. For instance, in paragraph 622 of its first written submission, Canada contends that the "record was equally clear" that "prevailing market conditions were in fact different between the B.C. Interior and Eastside Washington". But Canada provides no citation to the evidence on the USDOC's record to support this contention. Instead, it gives one example of how such conditions differed by referring to the prevalence of the MPB and spruce beetles in British Columbia. However, we note that Canada has separately challenged the USDOC's failure to make adjustments to its benchmark for differences in

7.474. Based on the above, we disagree with Canada's argument that the Washington log benchmark was *per se* inconsistent with Article 14(d) because of the differences in market conditions between Washington and British Columbia. We next consider Canada's submissions concerning the USDOC's alleged failure to make specific adjustments to the Washington log benchmark.

### **7.7.3.2 The USDOC's adjustments to derive the Washington log benchmark**

7.475. Canada argues that the USDOC acted inconsistently with Article 14(d) by failing to adjust its out-of-country Washington log benchmark<sup>967</sup> for the following factors:

- a. accurate conversion factors<sup>968</sup>;
- b. "quality" of logs consumed by Canadian respondents<sup>969</sup>;
- c. stand-as-a-whole pricing<sup>970</sup>; and
- d. higher transportation costs incurred by Canadian respondents.<sup>971</sup>

7.476. Canada contends that if the USDOC had properly accounted for these adjustments it would have found no subsidy.<sup>972</sup>

7.477. The United States argues that the USDOC engaged with the record evidence, took into account Canada's arguments in relation to each adjustment, and explained why it rejected each adjustment. According to the United States, Canada does not demonstrate that the USDOC reached a conclusion that an objective and unbiased investigating authority could not have reached on the basis of these facts.<sup>973</sup>

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prevailing market conditions on account of the disproportionate impact of the MPB and spruce beetles on timber in British Columbia. While the USDOC's failure to make such an adjustment may result in inconsistency with Article 14(d), Canada does not explain how it supports its view that the USDOC should have investigated the causes of the price differences between logs from the British Columbia interior and eastside Washington.

Further, in paragraph 621 of its first written submission, Canada contends that the record was clear that there were a number of factual reasons why log prices differ between regions, "including" for three reasons identified in its submissions. It identifies three of these reasons in bullet points as (a) "variability in physical characteristics of softwood logs, including size, and, perhaps most significantly, log quality and defects"; (b) "differences in prevailing local market conditions, including log demand and supply, transportation and variation in governmental requirements"; and (c) "variability in contractual terms of sale, such as volume and duration" (emphasis omitted). While the reasons identified by Canada may well be relevant in assessing whether the benchmark relates to the prevailing market condition for the good, it is for Canada, as the complainant, to advance arguments showing how these factors relate to the prevailing market conditions for the good in question and why the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in failing to adjust the benchmark by taking into account those factors. Canada has not done so. In the absence of such arguments from Canada, it would be inappropriate for us to review the underlying exhibits on our own to (a) identify the "number of factual reasons" why log prices differ between the British Columbia interior and Washington; and (b) determine whether the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in failing to take such reasons into account. In addition, we note that Canada's submissions in this section with respect to the USDOC's alleged failure to take into account these reasons overlap with its arguments concerning the USDOC's alleged failure to make necessary adjustments to its Washington logs benchmark. For instance, Canada makes separate submissions concerning the USDOC's failure to make necessary adjustments to its benchmark to account for log grade and condition, which are discussed in section 7.7.3.2 below. In the absence of sufficient arguments from Canada, it is unclear how its arguments regarding those claims concerning adjustment differ from submissions made by Canada in this section.

<sup>967</sup> Canada's first written submission, para. 630.

<sup>968</sup> Canada's first written submission, paras. 632-699; second written submission, paras. 182-198.

<sup>969</sup> Canada's first written submission, paras. 700-720; second written submission, paras. 199-220.

<sup>970</sup> Canada's first written submission, paras. 721-731.

<sup>971</sup> Canada's first written submission, paras. 732-737.

<sup>972</sup> Canada's first written submission, para. 631. Canada has quantified the difference each factor makes to the subsidy margin, with the exception of an adjustment for transportation costs. (Canada's first written submission, paras. 739-740 and table 21).

<sup>973</sup> United States' first written submission, para. 424.

### 7.7.3.2.1 Conversion factors

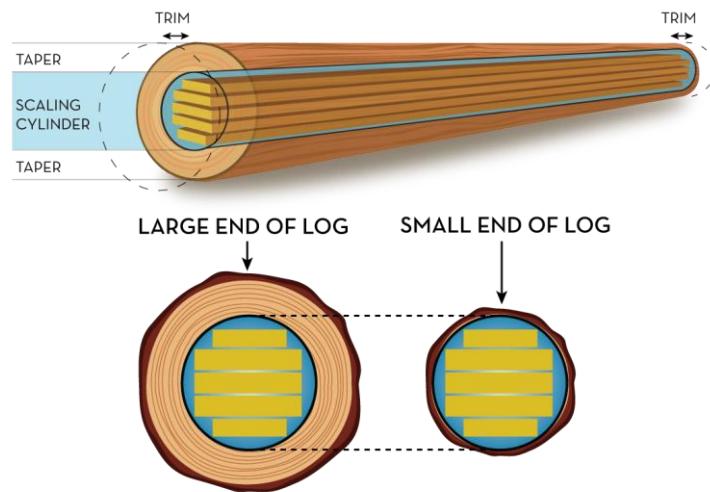
7.478. Log volume is measured differently under the scaling systems in British Columbia and the United States PNW.<sup>974</sup> In British Columbia logs are measured in cubic metres, and thus would be priced per cubic metre. In Washington, however, logs are measured in thousand board feet (MBF) and thus would be priced per MBF. To compare a benchmark based on Washington logs that was priced per MBF to prices per cubic metres (which is how British Columbia respondents reported their prices), the USDOC converted the benchmark to price in cubic metre. In making this conversion, the USDOC used a single conversion rate of 5.93 m<sup>3</sup>/MBF, which, as noted below, was based on a 1984 United States Forestry Service Study, subsequently updated in 2002 (Spelter Study). The Canadian respondents proposed a conversion based on a BC Dual-Scale Study, but the USDOC declined to use it for the reasons discussed below.

7.479. Canada challenges under Article 14(d) of the SCM Agreement the USDOC's use of the conversion factor provided in the Spelter Study and its rejection of the conversion factors provided in the BC Dual-Scale Study. The United States argues that the USDOC relied on the only viable conversion factor on the record, which was the Spelter Study.<sup>975</sup> We first set out a brief description of why a conversion factor was required in the underlying investigation, and then move on to our analysis of the issues.

#### 7.7.3.2.1.1 Conversion from MBF to cubic metres

7.480. In Washington State, logs are measured according to the Scribner Decimal C Rule (Scribner Scale).<sup>976</sup> The WDNR data, from which the Washington log benchmark was derived, was a price per MBF, based on a measurement of logs according to the Scribner Scale. The Scribner Scale estimates the total log volume based on an estimate of the amount of one-inch thick boards that could be made from within the scaling cylinder the log.<sup>977</sup> This is demonstrated in Figure 1 below. One-inch by twelve-inch board is equal to one board foot.

**Figure 1: Scribner Decimal C Rule**



Source: Canada's first written submission, para. 638, figure 57.

7.481. In British Columbia, logs are measured according to the BC Metric Scale, which measures the entire volume of usable wood fibre regardless of the fibre's potential use (e.g. lumber,

<sup>974</sup> Canada's first written submission, para. 633; United States' first written submission, para. 428.

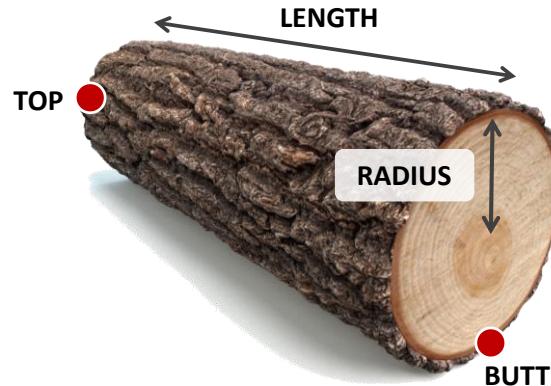
<sup>975</sup> United States' first written submission, para. 430.

<sup>976</sup> Canada's first written submission, para. 633; United States' first written submission, para. 427.

<sup>977</sup> Canada's first written submission, paras. 633, 637, and 639; United States' first written submission, para. 427. The United States explains that the Scribner Scale quantifies the amount of dimensional lumber that can be produced from a log. See also, Jendro and Hart Report, (Exhibit CAN-20 (BCI)), pp. 5 and 48; and Spelter Study, (Exhibit CAN-287), p. 4.

woodchips, or other co-products).<sup>978</sup> The volume is calculated by taking the measurements of the top (small end) and butt (large end) of the log and the length. This is demonstrated in Figure 2 below.

**Figure 2: British Columbia Metric**



Source: Jendro and Hart Report, (Exhibit CAN-20 (BCI)), p. 213.

7.482. Because the Scribner Scale measures volume by estimating the amount of one-inch thick boards that could be milled from the log, the estimated volumes of recoverable lumber will be sensitive to variations in the physical characteristics of the log, including diameter, length, shape, and defects.<sup>979</sup> In addition, these sensitivities mean that the relationship between the two scaling systems is not fixed and the ratio of cubic metres (the BC system) to MBF (Washington State system) for any given log will vary depending on those physical characteristics.<sup>980</sup> Due to differences in the way in which the two scaling systems account for factors such as diameters, length, taper, and defects, logs that have similar physical dimensions can have different estimates of volumes, and thus, different conversion factors.<sup>981</sup> The difference between the two scaling systems is demonstrated in Figure 3 below.

**Figure 3: Difference between the Scribner Scale and the British Columbia Metric Scale**



Source: Canada's first written submission, para. 639, figure 58.

7.483. Considering the USDOC used a benchmark consisting of log survey prices from the United States PNW reported in USD per MBF, a conversion factor was necessary to compare these

<sup>978</sup> Canada's first written submission, paras. 633 and 636; United States' first written submission, para. 428. The United States explains that the BC Metric Scale involves a broader measure of wood fibre than the Scribner Scale because it includes the entire sound wood volume of the log, regardless of whether the wood fibre can be made into lumber.

<sup>979</sup> Canada's first written submission, para. 639. For an explanation of how defects are relevant to scaling, see Canada's first written submission, paras. 643-644; see also, Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, p. 31, which explains that defects will affect the volume of wood under the Scribner Scale. A check defect, the most common defect occurring in beetle-killed timber, will result in volume deductions under the Scribner Scale, but these defects do not affect the volume of usable fibre under the BC Metric Scale.

<sup>980</sup> Canada's first written submission, para. 640.

<sup>981</sup> Jendro and Hart Report, (Exhibit CAN-20 (BCI)), p. 217; Canada's first written submission, paras. 639-644 and 657-665.

prices to the amounts paid (per cubic metre) by the Canadian respondents.<sup>982</sup> The USDOC used, as noted above, a single volumetric conversion factor of 5.93 m<sup>3</sup>/MBF.<sup>983</sup> This conversion factor was, as also noted above, based on a 1984 study, as updated in 2002 by Henry Spelter and the United States Department of Agriculture Forest Service, i.e. the Spelter Study.<sup>984</sup>

7.484. In the preliminary determination, the USDOC explained that it used a conversion factor of 5.93, which was the same conversion factor used in the earlier *Lumber IV* proceedings, but would continue to evaluate the most appropriate conversion factor to be used.<sup>985</sup> The Canadian respondents requested the USDOC to use the conversion factors provided in the BC Dual-Scale Study rather than the Spelter Study to convert MBF to cubic metres.<sup>986</sup>

7.485. The BC Dual-Scale Study, according to Canada, developed specific conversion factors applicable to the principle species, grades, and conditions of logs harvested in the British Columbia interior based on data collected in 2016.<sup>987</sup> Unlike the regression analysis used in the Spelter Study, which estimated a board foot to cubic foot conversion factor based on the average diameter of logs consumed by eastern Washington State sawmills in 1998, the premise of a contemporaneous dual-scale study is to record the volume of the *same log* using the BC Metric Scale (cubic metres) and Scribner Scale (board feet, or MBF) in order to ascertain accurate conversion factors for the species, grade, and conditions of logs consumed by sawmills in the BC interior during the POI. Through a representative sample of the log population, a dual-scale study seeks to develop conversion factors applicable to the wider log population.<sup>988</sup>

7.486. According to the authors of the BC Dual-Scale Study, Mr Jendro and Mr Hart, in order for the study results to be representative of the harvest in the British Columbia interior, the study data needed to represent the variability in diameter, length, taper, shape, and defect characteristics of live and dead conifer timber of the principal species harvested in the region, including beetle-killed timber.<sup>989</sup> To achieve this the study team selected sample sites that covered the range of the British Columbia interior forest types, handled the principle species, and accounted for large volumes of the British Columbia interior harvest. This was checked against British Columbia interior Harvest Billing System (HBS) data for 2014 and 2015.<sup>990</sup> The study then selected random loads at each site through computer generated random sampling<sup>991</sup>; 33 log loads were selected, and all logs in each load were sampled.<sup>992</sup> The scaling took place in February to March 2016.<sup>993</sup> Separate personnel were used to scale logs using the Scribner Scale and metric system.<sup>994</sup> Field personnel submitted data to Jendro and Hart as it was collected to ensure that they obtained a sufficient representation of the British Columbia harvest.<sup>995</sup>

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<sup>982</sup> United States' first written submission, para. 427; USDOC memorandum to the WDNR on delivered log price information, (Exhibit CAN-284), p. 2.

<sup>983</sup> United States' first written submission, para. 428; Canada's first written submission, para. 666. See also, USDOC memorandum to the WDNR on delivered log price information, (Exhibit CAN-284), p. 2. The USDOC divided the average log price per MBF for each species in the WDNR data set by 5.93 to convert it to a price per cubic metres.

<sup>984</sup> United States' first written submission, para. 428; Spelter Study, (Exhibit CAN-287).

<sup>985</sup> Preliminary determination, (Exhibit CAN-8), p. 53.

<sup>986</sup> Canada's first written submission, para. 651; Final determination, (Exhibit CAN-10), pp. 58-59. The BC Dual-Scale Study was commissioned by the British Columbia Ministry of Forests, Lands, and Natural Resource Operations (MFLNRO). (Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, p. 3).

<sup>987</sup> Canada's first written submission, para. 651; Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, table 8.

<sup>988</sup> We note that the representativeness of the BC Dual-Scale Study is disputed among the parties.

<sup>989</sup> Canada's first written submission, para. 682; Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, p. 8.

<sup>990</sup> Canada's first written submission, para. 682; Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, pp. 8-9.

<sup>991</sup> Canada's first written submission, para. 684; Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, p. 10.

<sup>992</sup> Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, p. 14.

<sup>993</sup> Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, p. 14.

<sup>994</sup> Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, pp. 10-11.

<sup>995</sup> Canada's first written submission, para. 689; Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, p. 14.

7.487. The USDOC declined to rely on the conversion rates provided in the BC Dual-Scale Study because:

- a. there was no evidence that the study used statistically valid sampling methodologies in selecting the 13 scaling sites and therefore the USDOC could not determine whether the information provided a representative sample<sup>996</sup>;
- b. the lack of evidence about a valid sampling methodology was "particularly concerning" because the study was prepared for the purpose of litigation and therefore has diminished weight because it is at risk of litigation-inspired fabrication or exaggeration<sup>997</sup>; and
- c. the BC Dual-Scale Study would not be a more accurate conversion factor because it was based only on trees in British Columbia, whereas the benchmark is the price of a log in Washington State, and the Spelter Study is based on trees in Washington State.<sup>998</sup> Because the USDOC needed to convert a Washington State-priced benchmark, measured in board feet, to cubic metres, "[t]he Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not BC".<sup>999</sup>

#### **7.7.3.2.1.2 Evaluation**

7.488. The issue that we must resolve is whether the USDOC acted inconsistently with Article 14(d) of the SCM Agreement when it converted the Washington log benchmark, which is reported in price per MBF to price per cubic metre using a single conversion rate of 5.93 based on the Spelter Study. In resolving this issue, as discussed in paragraph 7.457 above, we must examine whether the USDOC's conclusions were reasoned and adequate. Our examination in this regard must be critical, based on the information contained on the USDOC's record and its explanations. We note in this regard that, as stated above, the USDOC had two sets of information on its record with respect to conversion rates: first, the Spelter Study; second, the BC Dual-Scale Study provided by the Canadian respondents.

7.489. Canada contends that the single conversion factor of 5.93 that the USDOC used in the underlying investigation, and sourced from the Spelter Study was, in contrast to the BC Dual-Scale study, outdated and imprecise.<sup>1000</sup> It, per Canada, also failed to reflect the prevailing characteristics of logs consumed by mills in the interior of British Columbia.<sup>1001</sup> In support of its view, Canada refers to submissions made by the Canadian respondents and the Government of British Columbia before the USDOC, specifically, comments in the Jendro and Hart Report highlighting the demerits of the Spelter Study compared to the BC Dual-Scale Study.<sup>1002</sup>

7.490. For instance, as Canada also observes, Jendro and Hart submitted to the USDOC that the conversion factor of 5.93 sourced from the Spelter Study was not based on up-to-date data, did not include major species prevalent in British Columbia or account for the impact of beetle-killed logs (which, as Canada notes, is relevant because conversion rates vary species-to-species and is also different for beetle-killed logs). The United States does not dispute these assertions.<sup>1003</sup> However, the USDOC stated that it would not address the parties' specific arguments regarding the relative merits of the BC Dual-Scale Study compared to the Spelter Study because of its concerns regarding:

- a. the lack of a valid sampling methodology used to produce the data in the BC Dual-Scale Study; and

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<sup>996</sup> Final determination, (Exhibit CAN-10), p. 60.

<sup>997</sup> Final determination, (Exhibit CAN-10), p. 60.

<sup>998</sup> Final determination, (Exhibit CAN-10), pp. 60-61.

<sup>999</sup> Final determination, (Exhibit CAN-10), p. 60.

<sup>1000</sup> Canada's first written submission, para. 666. Canada notes that a conversion factor that is "low" will tend to overstate the volume of logs that are actually entering sawmills and therefore understate the amount actually paid on a per unit basis by dividing the same price by a larger volume, thereby artificially inflating any alleged benefit. (Canada's first written submission, paras. 634 and 646).

<sup>1001</sup> Canada's first written submission, para. 666.

<sup>1002</sup> Jendro and Hart Report, (Exhibit CAN-20 (BCI)), pp. 239-241; Canada's first written submission, para. 677.

<sup>1003</sup> See, e.g. United States' response to Panel question No. 109, para. 333; second written submission, paras. 228-289.

- b. the use of a conversion factor based on BC trees (as is the case with the BC Dual-Scale Study) in respect of Washington trees that were used in determination of the USDOC's out-of-country Washington log benchmark.<sup>1004</sup>

7.491. We note that the USDOC did not engage with specific arguments raised by the Canadian respondents as to why it would be appropriate to use the conversion factors set out in the BC Dual-Scale Study because it rejected this study based on the grounds set out in paragraphs 7.490a-7.490b. We thus commence our analysis by examining whether an unbiased and objective investigating authority could have rejected the BC Dual-Scale Study on the grounds set out in paragraphs 7.490a-7.490b.

7.492. Regarding the lack of a valid sampling methodology in the BC Dual-Scale Study, the USDOC took the view that because this study was prepared for the purpose of the underlying investigation before the USDOC, it was at risk of litigation-inspired fabrication or exaggeration, which diminished its weight.<sup>1005</sup> However, as the United States notes, the USDOC did not reject the BC Dual-Scale Study on this basis alone, noting in this regard that the USDOC only concluded that it could not confirm the study's conversion factors after reviewing the study's sampling methodology.<sup>1006</sup>

7.493. With regard to the USDOC's rejection of the BC Dual-Scale Study because it failed to provide a statistically valid sampling methodology, the USDOC provided the following reasons in its determination:

While we do not question the qualifications of Mr. Jendro and Mr. Hart, or the scaling professionals used by Jendro & Hart LLC, we have serious concerns about the methodology used to identify the selected scaling sites. Given the volume of lumber products being produced by the BC respondents, it is unclear why only 13 scaling sites were selected by Mr. Jendro and Mr. Hart for purposes of the BC Dual Scale Study. Further, although these sites were purportedly selected based upon the historic knowledge of the trees that are harvested and scaled at these 13 sites, there is no evidence that either the GBC or Mr. Jendro and Mr. Hart selected these sites using any statistically valid sampling methodology. While the data in the BC Dual Scale Study may be "valid" in the sense that they are based upon the actual measurement of trees in BC, our concern arises when this data is subsequently characterized to be representative of all interior BC trees. We find that this concern may be alleviated if the BC Dual Scale Study was conducted using a statistically valid sampling methodology, which could then better represent the large area of BC interior trees or possibly all trees in BC. The BC Dual Scale Study does not explain how and whether different types of sampling were considered, or even selected: random, stratified, or composite, etc. The structure of a sampling methodology is a key decision point of any sound sampling methodology because how a sample is conducted can minimize bias, maximize the representativeness of the sample result, and inform the statistical relevance to the population. Instead, the researchers of the BC Dual Scale Study note that in order to have study results relatable to the BC Interior harvest, "the study team distributed study samples among the forest types represented by the BC interior harvest." Therefore, because there is no evidence that the study used statistically valid sampling methodologies in selecting these 13 sites, the Department cannot determine that the information in the study provides a representative sample.<sup>1007</sup>

7.494. However, we note, as Canada observes, that Jendro and Hart in their report set out the methodology and procedures used in their BC Dual-Scale Study, in which they noted that they selected the scaling sites based on (a) their coverage of the major British Columbia interior forest types; and (b) whether the sites handled the principal species and accounted for the large volume of the British Columbia interior harvest.<sup>1008</sup> In this regard, Jendro and Hart also explained that they

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<sup>1004</sup> Final determination, (Exhibit CAN-10), p. 61.

<sup>1005</sup> Final determination, (Exhibit CAN-10), p. 60.

<sup>1006</sup> United States' first written submission, para. 438. We also note in this regard that just because a respondent submits evidence created for the purpose of an investigation, does not mean that the investigating authority is relieved of its duty to review that evidence. (Appellate Body Report, *US – Washing Machines*, paras. 5.281-5.283). We agree with the Appellate Body in this regard.

<sup>1007</sup> Final determination, (Exhibit CAN-10), pp. 59-60. (fns omitted)

<sup>1008</sup> Canada's first written submission, para. 682 (referring to Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, pp. 8-9).

selected the sampling sites by reviewing the BC Interior HBS scale data for years 2014 and 2015 with a map of British Columbia interior timber types.<sup>1009</sup> We consider that presented with explanations in the report as to how Jendro and Hart had selected the scaling sites, 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. Yet, as the United States does not dispute, the USDOC sought no such clarification from the Canadian respondents or British Columbia. For these reasons, we consider that an objective and unbiased investigating authority would not have, as the USDOC did, rejected the BC Dual-Scale Study without seeking additional clarifications on this regard.

7.495. Regarding the second reason provided by the USDOC for rejecting the BC Dual-Scale Study, i.e. this study set out the conversion factor for BC trees, and thus could not be used to convert the Washington log benchmark, which was based on Washington trees, not British Columbia trees, from MBF to cubic metres, we note that the Canadian respondents reported their log prices in price per cubic metre. The benchmark based on Washington logs was in price per MBF. To compare benchmark prices with prices reported by the Canadian respondents the USDOC would have had to either (a) convert the benchmark prices, reported in price per MBF, to price per cubic metre or (b) convert the log prices of the Canadian respondents, reported in price per cubic metre, to price per MBF. We note Canada's submission, which the United States does not dispute, that the results obtained through either of these two methods would be mathematically equivalent.<sup>1010</sup> In the underlying investigation, as we noted above, the USDOC converted the benchmark prices reported in price per MBF to price per cubic metre.

7.496. In converting the benchmark price, the USDOC stated that the "Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not [British Columbia]" and therefore it would not be more accurate to use a conversion factor derived from trees in British Columbia when it had a conversion factor based on Washington trees on the record (i.e. the Spelter Study).<sup>1011</sup> We note, however, that while the USDOC stated that it would not be more accurate to use a conversion factor derived from trees in British Columbia (on which the BC Dual-Scale Study was based) when converting benchmark prices based on Washington trees, the United States clarifies that the USDOC never asserted that the BC Dual-Scale Study measured the "wrong logs" (because they were based on BC logs, not Washington logs) nor that this study was unreliable because it measured the "wrong logs".<sup>1012</sup> We consider the United States' clarification in this regard to be consistent with its submission that the USDOC concluded based on the record evidence that logs in British Columbia and Washington were not incomparable and that the similarity of trees in the interior of British Columbia and Washington reinforced the appropriateness of the conversion factor in the Spelter Study (which was based on Washington logs).<sup>1013</sup> Indeed, we do not consider that an unbiased and objective investigating authority would have, on one hand, considered the use of a conversion factor based on Washington logs to be appropriate because of similarities of trees in the interior of British Columbia and Washington, and on the other hand, considered the BC Dual-Scale Study to be unreliable because it was based on logs in British Columbia and not Washington (which the USDOC considered to be comparable). Instead, we agree with Canada that there is an inherent tension between these two positions.<sup>1014</sup> Thus, to the extent the USDOC rejected the BC Dual-Scale Study because it was based on logs in British Columbia, not Washington, we do not consider this to be a proper basis to reject this study.

7.497. Based on the above, we do not consider that the USDOC had a proper basis to reject the BC Dual-Scale Study on the grounds set out in paragraphs 7.490a-7.490b. In this regard, and as we noted above, the Canadian respondents made specific arguments before the USDOC as to why it should use the conversion factors set out in the BC Dual-Scale Study rather than the Spelter Study. The USDOC declined to do so on the grounds set out in paragraphs 7.490a-7.490b. Considering the USDOC did not have proper basis to reject the BC Dual-Scale Study on these grounds, we are of the view that the USDOC failed to provide a reasoned and adequate explanation for not using the

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<sup>1009</sup> Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, pp. 8-9.

<sup>1010</sup> Canada's first written submission, fn 1140; comments on the United States' response to Panel question No. 285(a), para. 12.

<sup>1011</sup> United States' response to Panel question No. 254, para. 352 (referring to Final determination, (Exhibit CAN-10), pp. 60-61).

<sup>1012</sup> United States' comments on Canada's response to Panel question No. 285(b), para. 20.

<sup>1013</sup> United States' response to Panel question No. 285(a), paras. 15-16; comments on Canada's response to Panel question No. 285(b), para. 25.

<sup>1014</sup> Canada's comments on the United States' response to Panel question No. 285(a), para. 9.

conversion factors set out in this study while adjusting the Washington log benchmark to reflect the prevailing market conditions in British Columbia.

7.498. Therefore, we consider that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement because it failed to provide a reasoned and adequate explanation for not adjusting the Washington log benchmark on account of the relevant conversion factors to reflect the prevailing market conditions in British Columbia.

7.499. Based on the above, we conclude that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in failing to adjust, without providing a reasoned and adequate explanation, the Washington log benchmark, to reflect the prevailing market conditions in British Columbia.

#### **7.7.3.2.2 Adjustments for quality of logs**

7.500. Canada argues that the USDOC acted inconsistently with the obligation in Article 14(d) to ensure the benchmark reflects prevailing market conditions in the country of provision when it failed to account for the portion of the Canadian respondents' "log diet" that would have been lower valued in Washington. These lower-valued logs are:

- a. utility-grade logs; and
- b. beetle-killed logs.<sup>1015</sup>

#### **7.7.3.2.2.1 Adjustments for log grade**

7.501. Log grading systems are used to classify logs according to their quality. However, the grading systems used in Washington and British Columbia differ.<sup>1016</sup> For instance, the WDNR data utilized by the USDOC to determine the benchmark reflected prices of two sawlog grades (Camprun and Chip-N-Saw) and one non-sawlog grade, i.e. utility grade.<sup>1017</sup> But in British Columbia, unlike Washington, logs are classified in the following grades: (a) premium, (b) sawlog, (c) lumber reject, and (d) undersized log.<sup>1018</sup> In the underlying investigation, the USDOC found that the WDNR data contained prices for various grades within each species category, which did not correspond to the grades contained in the British Columbia stumpage data provided by the Canadian respondents.<sup>1019</sup>

7.502. In order to estimate how much of the harvest in the British Columbia stumpage data would have qualified as sawlogs and utility under the grading system in Washington (note that the British Columbia stumpage data was reported per the British Columbia grading system), the Canadian respondents and Government of British Columbia provided the BC Dual-Scale Study. In particular, the Canadian respondents and Government of British Columbia argued that the USDOC should account for the differences in the grading systems by applying ratios calculated in the BC Dual-Scale Study to account for the percentage of sawlog and utility-grade logs in the harvest of the respondent companies.<sup>1020</sup> However, the USDOC rejected the BC Dual-Scale Study for the reasons set out in paragraphs 7.490a-7.490b above. Having rejected this study, the USDOC declined to make an adjustment to the WDNR data to account for the volume of logs consumed by the Canadian respondents that would have been graded as utility.<sup>1021</sup> The USDOC concluded that due to the inability to match by grade the WDNR data and data provided by Canadian respondents it was relying on the overall unit price listed for each species, which it found to be reflective of prices of all grades of logs contained in the WDNR survey (i.e. utility and sawlogs).<sup>1022</sup> Thus, the USDOC compared the benchmark based on Washington log prices to the reported prices of the Canadian respondents, at a species-specific level, not a grade-specific level.<sup>1023</sup>

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<sup>1015</sup> Canada's first written submission, para. 702.

<sup>1016</sup> Canada's first written submission, para. 701; United States' response to Panel question No. 101, para. 307; and Preliminary determination, (Exhibit CAN-8), p. 53.

<sup>1017</sup> United States' first written submission, para. 443.

<sup>1018</sup> Jendro and Hart Report, (Exhibit CAN-20 (BCI)), appendix A, p. 19, and attachment A, pp. 175-179.

<sup>1019</sup> United States' response to Panel question No. 101, para. 307.

<sup>1020</sup> Final determination, (Exhibit CAN-10), p. 75.

<sup>1021</sup> Preliminary determination, (Exhibit CAN-8), p. 53; Final determination, (Exhibit CAN-10), p. 64.

<sup>1022</sup> United States' response to Panel question No. 101, para. 307.

<sup>1023</sup> United States' response to Panel question No. 101, para. 308.

7.503. Canada contends that the USDOC was under an obligation pursuant to Article 14(d) to utilize a benchmark that reflected the prevailing market conditions, including the quality of the good in the country of provision.<sup>1024</sup> Therefore, the USDOC was required to adjust its benchmark based on WDNR data to account for the portion of the harvest reported by the Canadian respondents that would be graded as utility under the Scribner Scale.<sup>1025</sup> Canada notes in this regard that the United States agrees that the prices of utility-grade logs reported in WDNR were significantly lower than prices of other grades.<sup>1026</sup> Canada states that because the quality of a log affects its price, differences between grading systems complicate any price comparison.<sup>1027</sup>

7.504. In response to the United States' reliance on the USDOC statement that there was no reliable basis on the record to make such an adjustment to the benchmark based on grades, Canada notes that Canadian respondents and the Government of British Columbia provided the USDOC with the BC Dual-Scale Study that set out a ratio of each of the Canadian respondents' harvest that would be graded as utility in Washington.<sup>1028</sup> However, noting that the USDOC rejected the BC Dual-Scale Study, Canada asserts that the USDOC's justification for rejecting this study was unfounded and invalid.<sup>1029</sup> In addition, Canada submits that even if the USDOC was not prepared to accept the sawlog-to-utility ratio provided in the BC Dual-Scale Study, considering the Canadian respondents' log harvest included utility-grade logs, it was incumbent on the USDOC to seek alternative methods to determine what quantity or ratio of utility-grade prices it should include in its benchmark.<sup>1030</sup> Instead, Canada notes the USDOC chose not to make any adjustment to properly account for utility log prices in its benchmark, thereby artificially inflating its benchmark price.<sup>1031</sup>

7.505. The United States does not dispute that the prices for utility-grade logs in the WDNR data are significantly lower than other grades.<sup>1032</sup> The United States also acknowledges that some logs consumed by the Canadian respondents would have been graded as "utility" in Washington.<sup>1033</sup> However, the United States contends that the USDOC acted consistently with Article 14(d) of the SCM Agreement because (a) the species-specific benchmark determined based on WDNR data included utility-grade price quotes<sup>1034</sup>; and (b) there was no reliable evidence on the record that would warrant an adjustment for utility-grade logs that Canadian respondents requested.<sup>1035</sup> The United States acknowledges that the Canadian respondents submitted the BC Dual-Scale Study to the USDOC as a basis for making such adjustments. But the United States notes that the USDOC rejected that study, thereby leaving no reliable evidence on the record that could be used to make the requested adjustments.

7.506. We note that the United States agrees that:

- a. British Columbia and Washington have different grading systems for logs;
- b. prices for utility-grade logs in the WDNR data were significantly lower than WDNR prices for other sawlog grades<sup>1036</sup>; and
- c. some logs consumed by the Canadian respondents would have been graded utility under Washington grade rules.<sup>1037</sup>

7.507. Based on the above, the issue we must resolve is whether the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in using a species-specific benchmark, which, per Canada,

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<sup>1024</sup> Canada's first written submission, para. 700.

<sup>1025</sup> Canada's first written submission, para. 706.

<sup>1026</sup> Canada's second written submission, para. 202; United States' response to Panel question No. 101, para. 311.

<sup>1027</sup> Canada's first written submission, para. 701.

<sup>1028</sup> Canada's opening statement at the first meeting of the Panel (27 February 2019), para. 44.

<sup>1029</sup> Canada's first written submission, para. 708.

<sup>1030</sup> Canada's first written submission, para. 709.

<sup>1031</sup> Canada's first written submission, para. 710.

<sup>1032</sup> Canada's first written submission, para. 705; United States' response to Panel question No. 101, para. 311.

<sup>1033</sup> United States' response to Panel question No. 101, para. 309.

<sup>1034</sup> United States' second written submission, para. 295.

<sup>1035</sup> United States' opening statement at the first meeting of the Panel (27 February 2019), para. 21.

<sup>1036</sup> United States' response to Panel question No. 101, para. 311.

<sup>1037</sup> United States' response to Panel question No. 101, para. 309.

was not sufficiently adjusted to reflect the prevailing market conditions in British Columbia, specifically, the utility grades consumed in the British Columbia harvest.

7.508. 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, as noted in paragraph 7.456 above, 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.

7.509. We note in this regard that in adjusting a benchmark to reflect prevailing market conditions in the country of provision in light of the factors listed in Article 14(d) would require an investigating authority to make necessary adjustments for differences in quality and price. The parties agree that the grading systems in Washington and British Columbia are different, that utility-grade logs command significantly lower prices than other grades, and some portion of the harvest consumed by the Canadian respondents included utility-grade logs. We consider that an out-of-country benchmark, here, a benchmark based on Washington log prices, must adequately reflect the grades and associated prices in British Columbia in order to be consistent with Article 14(d).

7.510. The United States does not disagree that, as a legal matter, the benchmark needs to be adjusted to reflect grades sold in the country of provision. However, the United States justifies the choice of the species-specific benchmark based on WDNR data that the USDOC selected on the ground that this data "was the most appropriate benchmark when selecting among the options on the record".<sup>1038</sup>

7.511. The question thus is whether the USDOC adequately adjusted the out-of-country data to reflect the grades and associated prices in British Columbia. In resolving this question, as noted in paragraph 7.457 above, we must critically examine the USDOC's determination based on the information on the USDOC's record as well as the explanations that it provided and assess whether the conclusions reached are reasoned and adequate.

7.512. We note that the parties do not disagree as such that the WDNR data used as the basis of the benchmark included some utility-grade prices. However, Canada contends that the WDNR prices reflected utility-log prices in nothing but a *de minimis* fashion, noting in this regard that of the four species that made up 99% of the harvest consumed by the Canadian respondents, only two of the twelve months contained a single utility-log price quote.<sup>1039</sup> Canada asserts therefore that the species-specific "all grades" benchmark based on WDNR data was manifestly higher than it would have been had the prices reflected appropriate proportions of utility-grade logs consistent with the prevailing market conditions in British Columbia.<sup>1040</sup> The United States submits that the USDOC was unable to account for the volume of utility-grade logs because the WDNR data it used did not include volumetric information.<sup>1041</sup> Thus, per the United States there was no reliable basis on the record to weight-average the WDNR data to correspond to the grades of the respondents' log inputs.<sup>1042</sup> Instead, because the WDNR data included monthly unit prices of sawlogs and utility-grade logs but no volume, the USDOC calculated annual prices by simple-averaging the monthly unit prices of all grades.<sup>1043</sup> In this regard, the United States notes that the prices in WDNR data was based on a survey that "included a limited number" of utility-grade log quotes.<sup>1044</sup>

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<sup>1038</sup> United States' response to Panel question No. 258, para. 362.

<sup>1039</sup> Canada's second written submission, para. 207.

<sup>1040</sup> Canada's second written submission, para. 207.

<sup>1041</sup> United States' response to Panel question No. 261, para. 366.

<sup>1042</sup> United States' response to Panel question No. 261, para. 370.

<sup>1043</sup> United States' response to Panel question No. 261, para. 369.

<sup>1044</sup> United States' response to Panel question No. 261, para. 369.

7.513. In these panel proceedings, Canada presented data based on information before the USDOC, stating that the benchmark prices were manifestly higher than what they would have been if the prices appropriately reflected proportions of the British Columbia interior logs that were of lower quality.<sup>1045</sup> The United States does not disagree with this statement of Canada. Indeed, the United States acknowledges that the benchmark price was based on a low number of utility-grade quotes. But it attributes this to the "limitations of the record data", not to the USDOC's decision to exclude utility-grade prices from the benchmark.<sup>1046</sup>

7.514. To the extent the United States justifies the USDOC's decision to not make an adjustment for utility-grades based on the "limitations of the record data", we disagree with the United States. Canada contends that the BC Dual-Scale Study provided the USDOC the appropriate basis to make such adjustments. Because the USDOC rejected the BC Dual-Scale Study on the grounds set out in paragraphs 7.490a-7.490b above, it did not assess whether, as a substantive matter, the BC Dual-Scale Study could be used to make this adjustment. In paragraph 7.497 above, we concluded that the USDOC did not have a proper basis to reject the BC Dual-Scale Study on these grounds. Thus, we disagree with the USDOC's reasons for concluding that the record evidence did not allow it to adjust for utility-grades. Instead, we consider that the USDOC was required to engage with the BC Dual-Scale Study to assess whether it provided an adequate basis to make such adjustments.

7.515. In any case, we consider that having selected out-of-country prices for the purpose of determining a benchmark, it was incumbent on the USDOC to ensure that it acted consistently with Article 14(d) of the SCM Agreement by adjusting the benchmark to reflect prevailing market conditions in the country of provision. 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 (here WDNR data) has limitations (in the form of information necessary to make volumetric adjustments for utility grades) 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.

#### **7.7.3.2.2.2 Adjustments for beetle-killed timber**

7.516. In the underlying investigation, the Canadian respondents and the Government of British Columbia requested the USDOC to adjust a benchmark based on Washington log prices (which was based on WDNR data) to account for the prevailing market conditions in British Columbia, specifically, the portion of beetle-killed timber that is prevalent in British Columbia.<sup>1047</sup> To make this adjustment, they asked the USDOC to use the prices for beetle-killed logs in Washington obtained by their experts Jendro and Hart.<sup>1048</sup> Jendro and Hart got these prices through a survey of sawmills in PNW.<sup>1049</sup> In their report, Jendro and Hart attached prices lists from sawmills, and records of conversations where sawmills provided them with prices.<sup>1050</sup>

7.517. However, the USDOC declined to make this adjustment because:

- a. First, per the USDOC the Canadian respondents did not provide evidence that beetle-killed log prices were not already included in the WDNR data.<sup>1051</sup>

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<sup>1045</sup> Canada's opening statement at the first meeting of the Panel (27 February 2019), paras. 40-42; comments on United States' responses to Panel question No. 258, para. 316, and No. 261, para. 318.

<sup>1046</sup> United States' responses to Panel question No. 102, para. 313, and No. 258, para. 362.

<sup>1047</sup> Final determination, (Exhibit CAN-10), p. 75. See also, British Columbia case brief, (Exhibit CAN-295), p. V-73; Canfor case brief, (Exhibit CAN-137 (BCI)), p. 29; and West Fraser case brief, (Exhibit CAN-139 (BCI)), p. 4.

<sup>1048</sup> Final determination, (Exhibit CAN-10), p. 76.

<sup>1049</sup> Final determination, (Exhibit CAN-10), p. 76; Canada's first written submission, para. 718.

<sup>1050</sup> Canada's first written submission, para. 718.

<sup>1051</sup> Final determination, (Exhibit CAN-10), p. 76.

b. Second, according to the USDOC the prices reported in the Jendro and Hart Report were obtained for the purpose of the investigation and therefore not reliable.<sup>1052</sup>

7.518. Canada contends that the USDOC's decision to not adjust its out-of-country benchmark based on WDNR data to include prices for beetle-killed logs was inconsistent with Article 14(d) of the SCM Agreement. In particular, Canada argues that Article 14(d) of the SCM Agreement required the USDOC to adjust this out-of-country benchmark to account for the difference in the prevailing market conditions in British Columbia and Washington because of the disproportionate impact of beetle infestations on logs in British Columbia as opposed to Washington. In this regard, Canada states that the evidence before the USDOC demonstrated that beetle infestations negatively impacted the British Columbia interior more severely than eastside Washington; beetle-killed lodgepole pine and spruce represented a significantly larger proportion of the Canadian respondents' harvest than that of eastside Washington mills; and beetle-killed logs are less valuable than green logs harvested from live trees.<sup>1053</sup>

7.519. In response to the United States' reliance on the USDOC's statement that there were no reliable prices on the record for beetle-killed timber, Canada explains that the price quotes for beetle-killed logs provided in the Jendro and Hart Report were provided in response to actual sales inquiries.<sup>1054</sup> Having rejected the evidence supplied by the Canadian respondents (i.e. the prices presented in the Jendro and Hart Report) on which to base the requested adjustments, Canada argues that the USDOC had an obligation to seek out information required to make accurate calculations of any alleged benefit.<sup>1055</sup> Canada asserts that it was incumbent on the USDOC to solicit relevant facts, including alternative methods to calculate prices for beetle-killed timber to include in the benchmark.<sup>1056</sup>

7.520. The United States contends that the USDOC had proper basis to reject the request of Canadian respondents and the Government of British Columbia to adjust the benchmark to account for prices of beetle-killed timber. Regarding the USDOC's conclusion that the Canadian respondents did not provide evidence that beetle-killed timber was not already included in WDNR data, the United States asserts that Canada's contention that the WDNR data does not include beetle-killed prices is not just speculative, but also contrary to record evidence, considering (a) the beetle infestation affected two species lodgepole pine and spruce, and there is evidence that beetle infestation exists among these species in Washington (just as they exist in British Columbia), although the species themselves are less prevalent in Washington; and (b) Jendro and Hart themselves provided price quotes for beetle-killed timber from several mills in the United States.<sup>1057</sup> The United States submits that because the Canadian respondents were the proponents of a "counterintuitive proposition" that the WDNR data contained no prices for beetle-killed lodgepole pine or spruce (which are the two species affected by beetle infestation) they had the burden of providing supporting evidence for that proposition.<sup>1058</sup> With respect to the USDOC's conclusion that the prices reported by Jendro and Hart were unreliable, the United States submits that the record evidence supported the USDOC's conclusion in this regard.<sup>1059</sup>

7.521. In light of the above, the issue that we must resolve is whether the USDOC acted inconsistently with its obligation under Article 14(d) to ensure that the benchmark reflects prevailing market conditions by appropriately adjusting it to include beetle-killed timber prices. In this regard, we must examine whether the USDOC provided a reasoned and adequate basis in its determination for its refusal to make such an adjustment to its benchmark. We recall, as mentioned in paragraph 7.456 above, that the second sentence of Article 14(d) sets out a list of factors, which includes the quality of the good in question, that may affect the comparability of the financial contribution at issue with the benchmark. If a proposed benchmark does not reflect prevailing market conditions, adjustments in the light of these listed factors would be necessary to ensure comparability, and by extension a meaningful benefit comparison.

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<sup>1052</sup> Final determination, (Exhibit CAN-10), p. 76.

<sup>1053</sup> Canada's first written submission, para. 711; opening statement at the first meeting of the Panel (27 February 2019), para. 48.

<sup>1054</sup> Canada's first written submission, para. 718.

<sup>1055</sup> Canada's first written submission, para. 720.

<sup>1056</sup> Canada's first written submission, para. 710.

<sup>1057</sup> United States' response to Panel question No. 105, para. 321.

<sup>1058</sup> United States' response to Panel question No. 105, para. 322.

<sup>1059</sup> United States' response to Panel question No. 104, paras. 318-320.

7.522. We note the difference between the USDOC's benchmark based on Washington logs and the financial contribution at issue based on prices of logs in British Columbia, resulting from what Canada considers the disproportionate impact of beetle-killed logs in British Columbia (as opposed to Washington), pertains to a difference in quality between the good used for the benchmark determination and that concerning the financial contribution at issue. In accordance with Article 14(d), such difference in quality would affect the relevant prevailing market conditions, and would therefore necessitate an adjustment to ensure that the proposed Washington benchmark reflects the prevailing market conditions in British Columbia, specifically, the disproportionate presence of beetle-killed logs in British Columbia.

7.523. In the underlying investigation, the USDOC denied the Canadian respondents' request to adjust the benchmark to account for the impact of beetle-killed disease on logs in British Columbia on the ground that these respondents did not provide evidence that beetle-killed logs were not already included in the WDNR data, that formed the basis of the out-of-country benchmark. Canada asserts in this regard that the USDOC assumed that its benchmark included prices for beetle-killed logs instead of investigating whether it did, such as through an enquiry to WDNR.<sup>1060</sup> In addition, Canada contends, relying on evidence on the USDOC's record, that the WDNR data could not have included any non-*de minimis* volume of beetle-killed logs.<sup>1061</sup> The United States, as noted above, submits that the Canadian respondents had the burden of showing that the WDNR data did not include prices of beetle-killed timber and that the USDOC's findings were consistent with the record evidence. The United States also submits that because the WDNR data is species-specific (setting out prices separately for lodgepole pine, spruce and other species), the WDNR data would capture log quality issues that were unique to a given species.<sup>1062</sup>

7.524. We note that Canada presents evidence that was before the USDOC showing that the petitioner (domestic industry) agreed that beetle-killed timber had lower value and price than timber that was not affected.<sup>1063</sup> Neither the USDOC in the underlying investigation, nor the United States disputed this view.<sup>1064</sup> Canada also notes that lodgepole pine, spruce, and white fir/hemlock sell for similar average prices in the United States PNW and alludes to record evidence before the USDOC showing that lodgepole pine, spruce, and white fir/hemlock species in the WDNR data tracked close to one another.<sup>1065</sup> Considering only lodgepole pine and spruce were affected by the beetle outbreak and not white fir/hemlock, Canada reasons that if the WDNR data had included any non-*de-minimis* volume of beetle-killed log prices, the average prices for lodgepole pine and spruce would have been significantly lower than the average price for white firm/hemlock.<sup>1066</sup>

7.525. In our view, having selected the WDNR data as the basis for its benchmark, it was incumbent on the USDOC to ensure it reflected the prevailing market conditions in British Columbia, specifically the existence of beetle-killed logs. 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.<sup>1067</sup> 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.<sup>1068</sup> 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

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<sup>1060</sup> Canada's opening statement at the first meeting of the Panel (27 February 2019), paras. 49 and 54.

<sup>1061</sup> Canada's second written submission, para. 217.

<sup>1062</sup> United States' first written submission, para. 454.

<sup>1063</sup> Canada's response to Panel question No. 105, para. 300.

<sup>1064</sup> However, the parties disagree on whether beetle-killed logs are of higher quality and price than utility-grade logs.

<sup>1065</sup> Canada's second written submission, para. 217.

<sup>1066</sup> Canada's second written submission, para. 217.

<sup>1067</sup> See, e.g. Canada's response to Panel question No. 105, para. 300 (referring to Jendro and Hart Report, (Exhibit CAN-20 (BCI)), pp. 37-48).

<sup>1068</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.190.

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.

7.526. Therefore, based on above, we find that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in failing to adjust its benchmark to account for the impact of beetle-killed timber in British Columbia.

#### **7.7.3.2.3 Stand-as-a-whole pricing**

7.527. In British Columbia, a given "stand" in a forest may contain multiple species of trees. Canada notes that such stands are identified by a unique timbermark, which identifies the specific cutting authority or geographic location where the timber is harvested.<sup>1069</sup> However, Canada submits that British Columbia sets the price for the "stand" as a whole (hence the term stand-as-a-whole pricing), and not for each species within that stand.

7.528. In the underlying investigation, the USDOC used species-specific benchmarks and compared them to respondents' purchases of Crown-origin standing timber aggregated by timbermark *and species*.<sup>1070</sup> In order to make this comparison at the species level, the USDOC requested the Government of British Columbia to report average stumpage charges on a species-specific basis as part of its questionnaire response.<sup>1071</sup> However, these charges were a statistical construct. To obtain these amounts, the Government of British Columbia added, for each species separately, the values for that species on every invoice. The Government of British Columbia then weight-averaged the stumpage charge by stand proportionate to the volume of each species in each stand, to report the constructed species-stumpage charge in the response.<sup>1072</sup>

7.529. The USDOC disagreed with the Canadian respondents and the Government of British Columbia's argument that it must consider stand-as-a-whole pricing as a prevailing market condition.<sup>1073</sup> The Canadian respondents proposed two methods for the USDOC to account for stand-as-a-whole pricing. First, compare a single weighted average all-species benchmark price to a single weighted average all-species stumpage price.<sup>1074</sup> Second, (and alternatively), the Canadian respondents argued that if using a species-specific benchmark, the USDOC must include any negative comparison results for each species-specific line item.<sup>1075</sup>

7.530. The USDOC declined to use either of these two methods. Instead, the USDOC determined the annual average price for Crown timber purchased by the 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 eastside Washington. 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 removed any timbermark/species aggregations where the stumpage purchase volume or value was negative.<sup>1076</sup> The USDOC then added together all

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<sup>1069</sup> Canada's first written submission, fn 1220.

<sup>1070</sup> Final determination, (Exhibit CAN-10), p. 66.

<sup>1071</sup> Canada's first written submission, para. 723; British Columbia case brief, (Exhibit CAN-295), p. V-74 and fn 181.

<sup>1072</sup> British Columbia case brief, (Exhibit CAN-295), p. V-74 and fn 181. Canada notes in this regard that British Columbia issues invoices that reflect the single stumpage rate for the stand, which applies to all species. The species-specific rates are identical in the invoice. Canada explains, by pointing to the evidence before the USDOC, that while the invoices included line items for each species with both volume and value figures, British Columbia explained to the USDOC that there were no unique, species-specific prices reported at the stand level for any sale in British Columbia. (Canada's comments on the United States' responses to panel question Nos. 271 and 273(a), para. 331; United States' response to Panel question No. 273(a), para. 397).

<sup>1073</sup> Final determination, (Exhibit CAN-10), p. 68.

<sup>1074</sup> Canada's first written submission, para. 727; Final determination, (Exhibit CAN-10), p. 67.

<sup>1075</sup> Canada's first written submission, para. 727; Final determination, (Exhibit CAN-10), p. 67.

<sup>1076</sup> USDOC calculation memo, Tolko, (Exhibit CAN-381 (BCI)), p. 7; USDOC calculation memo, West Fraser, (Exhibit CAN-382 (BCI)), p. 4; and USDOC calculation memo, Canfor, (Exhibit CAN-380 (BCI)), p. 4.

timbermark/species-specific benefits for each investigated producer to calculate the overall benefit.<sup>1077</sup> The parties refer to this as the transaction-specific approach for assessing benefit.

7.531. Canada argues that stand-as-a-whole pricing is a condition of sale of the British Columbia stumpage system within the meaning of Article 14(d) that the USDOC was required to take into account.<sup>1078</sup> By failing to account for this condition, Canada argues that the USDOC calculated an inflated countervailing duty rate.<sup>1079</sup>

7.532. The United States contends that the USDOC disagreed with the Canadian respondents that stand-as-a-whole pricing was a prevailing market condition because selling timber by the stand may in itself be inconsistent with market principles.<sup>1080</sup> In particular, the United States submits that if the USDOC were to accept the Government of British Columbia's pricing unit as a prevailing market condition, it would ignore the very differences that the USDOC was seeking to measure.<sup>1081</sup> In addition, according to the United States, nothing in the SCM Agreement (or other covered Agreements) precludes the transaction-specific analysis that the USDOC undertook in the underlying investigation.<sup>1082</sup>

7.533. We note that the parties' arguments regarding this aspect of Canada's claim raise a two-part issue: First, whether "stand-as-a-whole pricing" was a prevailing market condition within the meaning of Article 14(d). Second, whether the USDOC acted inconsistently with Article 14(d) by conducting a transaction-specific analysis for assessing benefit where it set to zero the negative transaction results based on a comparison of the benchmark with the reported cost.

7.534. In addressing these issues, and specifically the first part, we 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) of the SCM Agreement, necessarily involves an analysis of the market generally, rather than isolated transactions in that market.<sup>1083</sup> 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.<sup>1084</sup> "[O]ther conditions of purchase or sale" is a factor included in the illustrative list of prevailing market conditions in Article 14(d).

7.535. In the underlying investigation, while the Canadian respondents contended that "stand-as-a-whole" pricing is part of the prevailing market condition in British Columbia, the USDOC disagreed with that view. The USDOC provided the following reason for its disagreement:

Although the [Canadian respondents] argue the [USDOC] must consider pricing on a "stand as a whole" basis as a prevailing market condition, we disagree. Under our tier-three benchmark methodology we find that a main condition for determining stumpage is the demand of the logs from that tree. As such, the [USDOC] would not accurately assess the adequacy of remuneration for stumpage from a weighted-average combined species benchmark, considering how its value is evaluated according to market principles. Moreover, not calculating a weighted average combined species benchmark is consistent with our practice. In utilizing a timbermark-based approach and further disaggregating by species, the [USDOC] is conducting the calculation on the basis that is as close to a transaction-specific analysis as possible; a transaction-specific analysis is the [USDOC's] long-standing preference. And by not offsetting its

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<sup>1077</sup> USDOC calculation memo, Tolko, (Exhibit CAN-381 (BCI)), pp. 5-7; USDOC calculation memo, West Fraser, (Exhibit CAN-382 (BCI)), p. 4; and USDOC calculation memo, Canfor, (Exhibit CAN-380 (BCI)), p. 3.

<sup>1078</sup> Canada's first written submission, para. 722.

<sup>1079</sup> Canada's first written submission, para. 722.

<sup>1080</sup> United States' first written submission, para. 461.

<sup>1081</sup> United States' first written submission, para. 461.

<sup>1082</sup> United States' first written submission, para. 459.

<sup>1083</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.245.

<sup>1084</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.245.

comparisons for negative benefits, the [USDOC] is acting consistently with the fact that a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked or otherwise offset by "negative benefits" from other transactions. Because a benefit is either conferred or not conferred, the manner in which the GBC prices its stumpage is irrelevant to our analysis. If a government chooses to set a price for a whole stand, rather than differentiating by species within a particular stand, that does not change the amount of the benefit conferred for purposes of our analysis.<sup>1085</sup>

7.536. We note from this explanation that in disagreeing with the Canadian respondents' submission that the USDOC treat stand-as-a-whole pricing as a prevailing market condition, the USDOC concluded that it could not accurately assess the adequacy of remuneration for stumpage from a weighted-average combined species benchmark, considering how its value is evaluated according to market principles. Relying on this explanation of the USDOC, the United States submits that the USDOC disagreed with the Canadian respondents that stand-as-a-whole pricing was a prevailing market condition because selling timber by the stand may itself be inconsistent with market principles.<sup>1086</sup> The United States explains in this regard that the USDOC's approach to measuring the adequacy of remuneration hinged upon a recognition that the species of a tree is an integral part of the value of the tree.<sup>1087</sup> Noting that the price of timber varies significantly by species, the United States asserts that under the guise of accounting for stand-as-a-whole pricing as a prevailing market condition, Canada is requiring the USDOC to overlook this key product characteristic.<sup>1088</sup>

7.537. In addition to contending that the United States' submission that stand-as-a-whole pricing was not a prevailing market condition because selling timber by the stand may in itself be inconsistent with market principles is *ex post* rationalization, Canada contends that the United States is incorrect in contending that stands of timber in British Columbia are sold without any consideration of the value of species in them.<sup>1089</sup> Canada explains that British Columbia's MPS expressly takes into account the volume and relative value of each species in the stand at issue when it sets stumpage rates on non-auctioned stands.<sup>1090</sup> To support its explanations, Canada refers to submissions that the Government of British Columbia presented before the USDOC showing how the stumpage rate for a stand purchased by the Canadian respondents Canfor, West Fraser, and Tolko was determined.<sup>1091</sup> Canada relies on them to contend that British Columbia took into account the volume and relative value of each species in the stand at issue while setting the stumpage rates.<sup>1092</sup>

7.538. Regarding the first part of the issue, we note the USDOC's conclusion that it could not accurately assess the adequacy of remuneration for stumpage from a weighted-average combined species benchmark, considering how its value is evaluated according to market principles. The United States, as noted above, explains that this means that the USDOC disagreed with the Canadian respondents that stand-as-a-whole pricing was a prevailing market condition because selling timber by the stand may itself be inconsistent with market principles.

7.539. However, in our view an unbiased and objective investigating authority would not have concluded that stand-as-a-whole pricing was not a prevailing market condition because selling timber by the stand may itself be inconsistent with market principles without examining evidence on how British Columbia took into account the volume and relative value of each species in the stand at issue while setting the stumpage rates. This evidence was directly relevant to the question on whether stand-as-a-whole pricing is consistent with market principles, and thus the USDOC would have been expected to explain in its determination why, notwithstanding such evidence, it was of the view that stand-as-a-whole pricing was inconsistent with market principles. The USDOC's determination, however, provides no such explanation.

7.540. Therefore, without such an explanation in the USDOC's determination, we are of the view that the USDOC did not have proper basis to conclude that stand-as-a-whole pricing was inconsistent

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<sup>1085</sup> Final determination, (Exhibit CAN-10), p. 68. (fns omitted)

<sup>1086</sup> United States' first written submission, para. 461.

<sup>1087</sup> United States' first written submission, para. 461.

<sup>1088</sup> United States' first written submission, para. 462.

<sup>1089</sup> Canada's response to Panel question No. 107, para. 302.

<sup>1090</sup> Canada's response to Panel question No. 107, para. 303.

<sup>1091</sup> Canada's response to Panel question No. 107, para. 304.

<sup>1092</sup> Canada's response to Panel question No. 107, para. 303.

with market principles. Because the USDOC disagreed with the Canadian respondents that stand-as-a-whole pricing was not a prevailing market condition based on this conclusion, it follows that the USDOC did not have proper basis to reject the Canadian respondents' submission that stand-as-a-whole pricing was a prevailing market condition.

7.541. With respect to the second aspect of the issue, i.e. whether the USDOC acted inconsistently with Article 14(d) by conducting a transaction-specific analysis for assessing benefit where it set to zero negative transaction results based on a comparison of the benchmark with reported cost, we note that the USDOC used this methodology based on its view that stand-as-a-whole pricing was not a prevailing market condition. In particular, based on its view that stand-as-a-whole pricing was not a prevailing market condition, the USDOC declined to use the two methodologies for benefit assessment that the Canadian respondents proposed, which were (a) to compare a single-weighted average benchmark with the stumpage rate reported by the Canadian respondents (which was determined on a stand-as-a-whole basis); or (b) use a transaction-specific analysis wherein the USDOC compared benchmark price of each species with the species-specific price reported by the Canadian respondents, but did not aggregate all comparison results, positive as well as negative.

7.542. Considering we are of the view that the USDOC did not have proper basis to reach its view that stand-as-a-whole pricing was not a prevailing market condition, we conclude that the USDOC did not have proper basis to reject the two methodologies proposed by the Canadian respondents (which were rejected based on this erroneous view).<sup>1093</sup>

7.543. Based on the above, we conclude that the USDOC did not have proper basis to conclude that stand-as-a-whole pricing was not a prevailing market condition in British Columbia, and thus had no basis to not take into account this condition when adjusting its benchmark to reflect the prevailing market conditions in British Columbia. Therefore, we consider that the USDOC failed to provide a reasoned and adequate explanation of why it could not account for stand-as-a-whole pricing as a prevailing market condition, as required by Article 14(d) of the SCM Agreement.

#### **7.7.3.2.4 Transportation costs**

7.544. The parties do not disagree that in comparing its benchmark based on log prices in eastside Washington to the stumpage prices reported by Canadian respondents, the USDOC did not take into account the higher transportation costs paid by the Canadian respondents to bring their finished lumber products to major lumber-consuming markets relative to producers in eastside Washington. However, the parties disagree on whether Article 14(d) of the SCM Agreement required the USDOC to take such higher transportation costs into account and adjust for such costs.

7.545. Canada acknowledges that Article 14(d) refers to determination of the adequacy of remuneration in relation to the prevailing market conditions for the "good", and that the "good" provided by the government in this case was "standing timber" and not lumber.<sup>1094</sup> However, Canada contends that the higher cost of transporting lumber from the British Columbia interior to major lumber-consuming markets compared to the relatively lower costs incurred by lumber producers in eastside Washington reduces the residual value of standing timber in British Columbia relative to eastside Washington.<sup>1095</sup> In particular, Canada submits that the need to make this type of adjustment arises from the USDOC's choice to use a derived demand methodology wherein it derived the demand for standing timber from the value of downstream products.<sup>1096</sup> In support of its view, Canada refers to submissions made by the Government of British Columbia before the USDOC, including the statement by Jendro and Hart that average freight costs for BC lumber tend to be higher than average freight costs for lumber produced in the United States PNW, and that the freight cost differential lowers the value of British Columbia logs in relation to US logs.<sup>1097</sup>

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<sup>1093</sup> In addition, we have also concluded in paragraph 7.585 below that a transaction-specific analysis wherein the USDOC compared the benchmark price of each species with the species-specific price reported by the Canadian respondents but did not aggregate all comparison results, positive as well as negative, is not consistent with Article 14(d) of the SCM Agreement.

<sup>1094</sup> Canada's response to Panel question No. 108, para. 306.

<sup>1095</sup> Canada's response to Panel question No. 108, para. 306.

<sup>1096</sup> Canada's response to Panel question No. 108, para. 309.

<sup>1097</sup> Canada's first written submission, para. 733 (referring to Jendro and Hart Report, (Exhibit CAN-20 (BCI)), section V.3.2, p. 33).

7.546. The United States notes that Article 14(d) provides that the adequacy of remuneration will be determined in relation to prevailing marketing conditions for the good in the country of provision. The United States argues that this shows that Article 14(d) unambiguously refers to the government-provided input, which in this case is standing timber and not lumber.<sup>1098</sup> The United States submits that Canada does not present any basis to adjust transportation costs for a downstream good (i.e. lumber), which is different from the government-provided input (i.e. standing timber).<sup>1099</sup> According to the United States, the relevant transportation cost is that of moving a timber input to the respondent's sawmill, not the respondent's cost for shipping lumber to a purchaser in the United States.<sup>1100</sup>

7.547. The issue before us is whether the USDOC acted inconsistently with Article 14(d) of the SCM Agreement in not taking into account the higher transportation costs paid by the Canadian respondents to bring their lumber products to major lumber-consuming markets relative to producers in eastside Washington.

7.548. We note that Article 14(d) provides that investigating authorities shall determine the adequacy of remuneration in relation to the prevailing market conditions for the *good* in the country of provision. The good in question is standing timber, as the parties agree.<sup>1101</sup> To be consumed, standing timber must move from the stand to the roadside and the roadside to the mill in the form of harvested logs resulting in transportation costs. In other words, the good in question, i.e. standing timber, simply cannot be accessed or used by a sawmill without transportation of harvested logs from a timber stand to the sawmill. We also note that the parties agree that transportation costs for logs were adjusted by the USDOC.<sup>1102</sup> Instead, the 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) of the SCM Agreement. 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.

7.549. While it may well be undisputed that, as Canada submits, the value of logs and stumps 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 stumps. 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.

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

7.551. Based on the above, we consider that Canada has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not taking into account the higher

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<sup>1098</sup> United States' first written submission, para. 467.

<sup>1099</sup> United States' first written submission, para. 467.

<sup>1100</sup> United States' first written submission, para. 469.

<sup>1101</sup> Canada, as noted above, does not dispute that the relevant "good" here is standing timber and not downstream products. (Canada's response to Panel question No. 108, para. 306).

<sup>1102</sup> In the underlying investigation, the USDOC used a derived demand methodology wherein it derived prices of standing timber from Washington *log* prices, to determine the adequacy of remuneration with respect to standing timber (i.e. the good). The United States submits (and Canada does not dispute) that the USDOC accounted for the cost of transporting a harvested log from the stand to the roadside and the roadside to the mill. (United States' first written submission, para. 469).

transportation cost to bring their lumber products to major lumber-consuming markets than producers in eastside Washington.

#### **7.7.4 Conclusion**

7.552. Based on the above, we find as follows:

- a. Canada has not established that the Washington log benchmark was *per se* inconsistent with Article 14(d) because of the differences in market conditions between Washington and British Columbia.
- b. Canada has not established that the USDOC acted inconsistently with Article 14(d) by failing to make an adjustment for the higher cost incurred by the BC respondents for transporting lumber to major lumber markets.
- c. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to make adjustments for the following factors to ensure that the Washington log benchmark was comparable with the financial contribution at issue:
  - i. conversion factors;
  - ii. portion of utility-grade logs in the harvest of Canadian respondents that would have been graded as utility; and
  - iii. beetle-killed timber prices in the Washington log benchmark.

7.553. The USDOC did not have proper basis to conclude that stand-as-a-whole pricing was not a prevailing market condition in British Columbia, and thus had no basis to not take into account this condition when adjusting its benchmark to reflect the prevailing market conditions in British Columbia.

#### **7.8 Whether the USDOC improperly set certain results of comparisons between the prices of the examined transactions and the corresponding benchmark prices to zero in determining the adequacy of remuneration**

7.554. Canada claims that the USDOC acted inconsistently with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 in calculating the amount of benefit conferred on investigated producers in New Brunswick and British Columbia by setting-to-zero all negative results obtained on comparing an examined transaction with the corresponding benchmark price.<sup>1103</sup> Canada contends that this method of benefit calculation led to results that were not related to the prevailing market conditions for the good in question and to imposition of countervailing duties in inappropriate amounts. The United States asks the Panel to reject Canada's claims arguing that nothing in the SCM Agreement or the GATT 1994 prevented the USDOC from applying the methodology that it had used to calculate the amount of benefit conferred on investigated producers in New Brunswick and British Columbia.<sup>1104</sup>

##### **7.8.1 Factual aspects**

7.555. 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.<sup>1105</sup>

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<sup>1103</sup> Canada's first written submission, paras. 919-920.

<sup>1104</sup> United States' first written submission, para. 473.

<sup>1105</sup> Irving final calculation, (Exhibit CAN-264 (BCI)), pp. 4-6.

7.556. 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<sup>1106</sup> 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.<sup>1107</sup>

## 7.8.2 Evaluation

7.557. Canada claims that the benefit calculation methodology that the USDOC applied in relation to the government provision of timber in New Brunswick and British Columbia was inconsistent with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, because this methodology made the benefit calculation less accurate and less related to prevailing market conditions.<sup>1108</sup>

7.558. Canada argues that Article 14(d) of the SCM Agreement requires an investigating authority to ensure that its method for calculating the benefit conferred relates to the prevailing market conditions in the country of provision.<sup>1109</sup> Canada contends that the USDOC's benefit calculation methodologies in respect of New Brunswick and British Columbia did not satisfy this requirement. The United States argues that the SCM Agreement does not require an investigating authority to "provide a credit" for instances in which other financial contributions do not confer a benefit.<sup>1110</sup> Relying on the findings of the panel in *US – Anti-Dumping and Countervailing Duties (China)*, the United States asserts that Article 14(d) of the SCM Agreement contains no reference to any notion of offsetting "negative benefits" or of averaging comparison results across the POI.<sup>1111</sup>

### 7.8.2.1 Legal basis for Canada's claims

7.559. Canada claims that by setting certain comparison results to zero, the USDOC acted inconsistently with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.<sup>1112</sup> In response to a question from the Panel regarding whether Canada's claims under other provisions of the SCM Agreement and the GATT 1994 were consequential to Canada's claims under Article 14(d) of the SCM Agreement, Canada explained that it has made the following three independent claims regarding the USDOC's decision to set certain comparison results to zero:

- a. the USDOC failed to assess the adequacy of remuneration in relation to prevailing market conditions as required under Article 14(d) of the SCM Agreement;
- b. the USDOC imposed countervailing duties in excess of the amount of subsidy found to exist inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994; and
- c. the USDOC acted inconsistently with Article 19.3 of the SCM Agreement as it imposed countervailing duties in amounts that are not "appropriate".

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<sup>1106</sup> A timbermark is used to identify the specific cutting authority or geographic area where the timber is harvested. (Canada's first written submission, fn 1577).

<sup>1107</sup> USDOC calculation memo, Tolko, (Exhibit CAN-381 (BCI)), pp. 5-7; USDOC calculation memo, West Fraser, (Exhibit CAN-382 (BCI)), p. 4; and USDOC calculation memo, Canfor, (Exhibit CAN-380 (BCI)), pp. 3-4.

<sup>1108</sup> Canada's first written submission, paras. 919-920.

<sup>1109</sup> Canada's first written submission, para. 924 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 96).

<sup>1110</sup> United States' first written submission, para. 473.

<sup>1111</sup> United States' first written submission, para. 480 (referring to Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.47).

<sup>1112</sup> Canada's first written submission, para. 920.

Canada also specified that its claim under Article 1.1(b) of the SCM Agreement is consequential to these claims.<sup>1113</sup>

7.560. We note that even though Canada asserts that it has made independent claims under provisions other than Article 14(d) of the SCM Agreement, its substantive arguments explaining how the USDOC erred by setting certain comparison results to zero overwhelmingly rely on language used in Article 14(d) of the SCM Agreement. Canada's arguments are principally based on its view that the benefit calculation method used by the USDOC yielded a result that was not related to the prevailing *market conditions* in the Canadian provinces in question. We also note that, while Canada has identified language in Article 14(d) of the SCM Agreement in light of which, in Canada's view, an investigating authority may be required to aggregate all comparison results, positive as well as negative, in certain circumstances, it has not identified any basis in the text of other provisions from which the existence of such an obligation could independently be inferred. We therefore consider that Canada's claim that the setting of certain comparison results to zero by the USDOC violated Articles 19.3 and 19.4 of the SCM Agreement because it resulted in imposition of countervailing duties in amounts that were not "appropriate" and were "in excess of the amount of subsidy found to exist" respectively, depends on the existence of an obligation under Article 14(d) that the USDOC violated in this case. 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).<sup>1114</sup> 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.

7.561. We therefore consider Canada's claim under Article 14(d) of the SCM Agreement to be its principal claim in respect of the USDOC's decision to set certain comparison results to zero, and deem Canada's claims under other provisions of the SCM Agreement and the GATT 1994 to be dependent on the outcome of Canada's principal claim. We thus begin our analysis by examining whether Canada has established that Article 14(d) required the USDOC to aggregate all comparison results, positive as well as negative.

7.562. 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.<sup>1115</sup> 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). This interpretation of Article 14(d) of the SCM Agreement 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) of the SCM Agreement 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.<sup>1116</sup> 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

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<sup>1113</sup> Canada's response to Panel question No. 116, paras. 317-320; second written submission, para. 283.

<sup>1114</sup> United States' second written submission, para. 330.

<sup>1115</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.55; Appellate Body Reports, *US – Softwood Lumber IV*, paras. 91-92; *Japan – DRAMs (Korea)*, para. 191.

<sup>1116</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.56.

exist in respect of the government-provided good – a requirement that circumscribes the methodological flexibility afforded to investigating authorities.<sup>1117</sup> 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.<sup>1118</sup>

7.563. 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 Canada has only sought to establish violations of the SCM Agreement and the GATT 1994 by the USDOC "on these specific facts".<sup>1119</sup>

#### **7.8.2.2 Whether the USDOC's determination was consistent with Article 14(d) of the SCM Agreement**

7.564. Considering that there is no general requirement in Article 14(d) of the SCM Agreement for investigating authorities to aggregate all comparison results, but that doing so may be necessary for the investigating authority in certain circumstances for fulfilling the requirements of Article 14(d), we proceed to examine whether Canada has shown that the facts of this particular case were such that the USDOC ought to have aggregated all comparison results. We note that Canada has advanced claims concerning this aspect of the USDOC's benefit calculation methodology as applied to two provinces – New Brunswick and British Columbia. We will analyse arguments put forth by Canada in the context of New Brunswick first, and then consider the case of British Columbia. However, before examining Canada's arguments concerning the two provinces individually, we analyse certain issues pertinent to our assessment of Canada's claims in respect of both provinces.

##### **7.8.2.2.1 Issues common to Canada's claims concerning New Brunswick as well as British Columbia**

7.565. In this section, we examine the parties' submissions on two issues that cut across Canada's claims in respect of both New Brunswick and British Columbia. First, we examine whether Canada has shown that the obligation under Article 14(d) of the SCM Agreement for an investigating authority to determine the adequacy of remuneration in relation to prevailing market conditions for the good in question applies not just to the selection of a benchmark, but also to all other aspects of the authority's benefit calculation methodology. Second, we examine whether the USDOC, in this case, conducted the subsidy investigation on a transaction-specific basis, or a programme-wide basis. We also explain in our analysis below how these issues are pertinent to Canada's claims.

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<sup>1117</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.56.

<sup>1118</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.66.

<sup>1119</sup> Canada's second written submission, paras. 283 and 293. The United States points to certain statements made by Canada in its submissions that, in the United States' view, reveal that Canada has adopted two contradictory positions. (United States' second written submission, paras. 305-307 (quoting Canada's opening statement at the first meeting with the Panel (28 February 2019), para. 90; and first written submission, para. 940)). The United States highlights that on the one hand, Canada has asserted that it is not "arguing that subsidies may be offset by transactions that are not subsidized" but has on the other hand effectively argued that the USDOC was required to provide offsets for negative comparison results in the benefit calculation by asserting that "[o]nly by aggregating the results of its comparisons, without first zeroing negative comparison results" could the USDOC have reached an accurate benefit determination. We consider Canada's position to be that, while aggregation of all comparison results is not required under the SCM Agreement as a general rule in all circumstances, such aggregation was required in context of the specific facts at hand, in order to make a benefit determination consistent with the SCM Agreement.

#### **7.8.2.2.1.1 Whether the obligation to assess adequacy of remuneration "in relation to prevailing market conditions" applies to all aspects of the benefit calculation method**

7.566. Responding to Canada's reliance on the term "prevailing market conditions" in support of its claim, the United States argues that the issue of whether an investigating authority is required to "provide offsets" for instances where no benefit was conferred is "totally unrelated to prevailing market conditions", as that step takes place after the prevailing market conditions have been taken into account in the selection and matching of transactions and benchmarks, and after "transactions and benchmarks have been compared".<sup>1120</sup> In other words, the United States contends that the concept of "prevailing market conditions" is not relevant for the process of determining the adequacy of remuneration after a benchmark has been selected and comparisons have been made. In its subsequent submissions, however, the United States stated that it "does not disagree" with Canada's argument that "all steps of the benefit calculation that an investigating authority uses" must conform to the requirements of Article 14(d) of the SCM Agreement.<sup>1121</sup> In this regard, Canada has contended that the benchmark selected, as well as the method for comparison of the benchmark to the examined transactions, have to relate to prevailing market conditions.<sup>1122</sup> We recall that Canada claims that the USDOC failed to determine the adequacy of remuneration *in relation to prevailing market conditions* by setting-to-zero negative comparison results between an examined transaction and the benchmark price, i.e. an aspect of benefit calculation methodology other than selection of the benchmark price. We must therefore determine if Canada has shown a basis in the text of the SCM Agreement in support of its view that as a matter of law, the requirement to determine the adequacy of remuneration in relation to prevailing market conditions applies not only to the selection of a benchmark, but to all aspects of an investigating authority's methodology.

7.567. We note that Canada relies on the phrase "any such method" in the *chapeau* of Article 14 of the SCM Agreement in support of its view that the requirement to determine the adequacy of remuneration in relation to prevailing market conditions applies to all aspects of the investigating authority's benefit calculation methodology. The *chapeau* of Article 14(d), in relevant part, provides:

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[.]

Canada argues that "any such method" in the second sentence of the *chapeau* refers to the method used by the investigating authority to calculate the benefit to the recipient pursuant to paragraph 1 of Article 1 of the SCM Agreement. Canada further argues that the method used to calculate benefit conferred in the form of government provision of goods must be consistent with the guidelines set out in Article 14(d) of the SCM Agreement, which oblige an investigating authority to assess the adequacy of remuneration in relation to the prevailing market conditions for the good in question. As neither the text of the *chapeau* of Article 14 nor of Article 14(d) restrict the meaning of "method used" to the selection of a benchmark, all aspects of the methodology applied by an investigating authority must relate to the prevailing market conditions for the good in question.<sup>1123</sup> We agree with Canada's reading of Article 14 of the SCM Agreement, and, as noted above, the United States does not disagree. 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.

7.568. 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.<sup>1124</sup> As Canada points out and we agree, the Appellate Body in that

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<sup>1120</sup> United States' second written submission, paras. 317 and 328.

<sup>1121</sup> United States' comments on Canada's response to Panel question No. 266, para. 252; Canada's response to Panel question No. 266, paras. 392-393.

<sup>1122</sup> Canada's first written submission, para. 924.

<sup>1123</sup> Canada's response to Panel question No. 266, paras. 391-393.

<sup>1124</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 190.

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".<sup>1125</sup> 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.

#### **7.8.2.2.1.2 Whether the USDOC conducted the subsidy investigation on a transaction-specific basis or a programme-wide basis**

7.569. We note that refuting Canada's claim, the United States also argues that the SCM Agreement permits investigating authorities to analyse the existence of a subsidy on a transaction-by-transaction basis, as Article 1.1(a) of the SCM Agreement provides that *a* subsidy shall be deemed to exist if there is *a* financial contribution and *a* benefit is thereby conferred, using the terms "subsidy", "financial contribution", and "benefit" in the singular form.<sup>1126</sup> According to the United States, each time British Columbia and New Brunswick provided standing timber to one of the respondents for less than adequate remuneration, a benefit was conferred and a subsidy was deemed to exist.<sup>1127</sup> The United States contends that as the SCM Agreement does not require an investigating authority to diminish the amount of benefit conferred by one subsidy if other financial contributions do not confer a benefit, those instances where Canadian provinces provided timber for adequate remuneration were irrelevant.<sup>1128</sup> Thus, in the United States' view, the USDOC was not obligated to provide a credit for instances where the Canadian provinces did not provide a subsidy in an examined transaction.<sup>1129</sup>

7.570. Responding to this argument from the United States, Canada argues that the USDOC did not actually analyse each transaction as a separate financial contribution and a separate subsidy, but rather conducted its investigation on a programme-wide basis and calculated subsidy rates for programmes as a whole.<sup>1130</sup> Canada points to the following elements of the USDOC's investigation and the determination as the basis for its argument that the USDOC examined the existence of subsidy on a programme-wide basis: (a) the initiation checklist, which stated that "[f]or each program, Petitioner alleged the elements of a subsidy" and described the programmes at issue as "Government of British Columbia Provision of Stumpage for [Less than Adequate Remuneration]" and "Government of New Brunswick Provision of Stumpage for [Less than Adequate Remuneration]";<sup>1131</sup> (b) the USDOC's findings in the preliminary and the final determinations that "the provincial stumpage programs constitute a financial contribution in the form of a good, and that

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<sup>1125</sup> Canada's response to Panel question No. 266, para. 393 (referring to Appellate Body Report, *Japan – DRAMs (Korea)*, para. 195). We note that in support of its view that an investigating authority's method for comparing the benchmark to the examined transaction must relate to the prevailing market conditions, Canada also cites to the observation of the Appellate Body in *US – Softwood Lumber IV* that Article 14(d) of the SCM Agreement "requires that *the method selected* for calculating the benefit must relate or refer to, or be connected with, the prevailing market conditions in the country of provision". (Canada's first written submission, para. 924 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 96 (emphasis added by Canada))). We note that while the Appellate Body did refer to "the method selected for calculating benefit" in the quote cited to by Canada, the Appellate Body was not explicitly examining the issue of whether the term "prevailing market conditions" pertains only to the selection of the benchmark or applies also to the benefit calculation method as a whole. Rather, when making that observation, the Appellate Body was examining the question of whether the benchmark has to be a private price in the country of provision of the good in question in all circumstances.

<sup>1126</sup> United States' first written submission, para. 491; second written submission, para. 323.

<sup>1127</sup> United States' opening statement at the first meeting of the Panel (28 February 2019), para. 16.

<sup>1128</sup> United States' opening statement at the first meeting of the Panel (28 February 2019), para. 16.

<sup>1129</sup> United States' first written submission, para. 491.

<sup>1130</sup> Canada's response to Panel question No. 265, para. 384. Canada also argues that the United States' argument that each transaction could constitute a separate subsidy would require an investigating authority to select a benchmark that corresponds to the particular transaction being examined, which the USDOC did not do. (Canada's second written submission, para. 292). We note that Canada's claims being examined in this section do not concern whether the USDOC's selection of a benchmark was consistent with the requirements of Article 14(d) of the SCM Agreement. Therefore, we will not examine the merits of this particular argument offered by Canada.

<sup>1131</sup> USDOC initiation checklist, (Exhibit CAN-384), pp. 8 and 19.

the provinces are providing the good, *i.e.*, standing timber, to lumber producers"<sup>1132</sup>; (c) the USDOC's findings with respect to specificity that "the stumpage programs at issue are specific within the meaning of section 771(5A)(D)(iii)(I) of the Act"<sup>1133</sup>; (d) the USDOC's selection of a single benchmark for each of the investigated programmes; (e) USDOC's calculation of a single "net subsidy rate" for each programme, using as the numerator the respondents' softwood sawmill purchases of Crown timber during the POI and as the denominator the respondents' total softwood lumber and softwood co-product sales; and (f) the fact that USDOC's analysis concerning whether the subsidy amount was *de minimis* was conducted on a programme-wide basis.<sup>1134</sup>

7.571. The United States contends that the USDOC established the existence of both transaction-specific benefits, as well as the total benefit of the stumpage programmes, for each examined producer.<sup>1135</sup> The United States, pointing to the record, explains that the USDOC summed the transaction-specific benefits to calculate the total benefit for the programme with respect to each respondent.<sup>1136</sup> We consider that, even though the USDOC may have calculated the benefit amount on a transaction-specific as well as a programme-wide basis, the elements of the USDOC's determination that Canada has pointed to clearly suggest that the USDOC was examining the existence of a countervailable subsidy on a programme-wide basis and not on a transaction-specific basis. In particular, the fact that the USDOC calculated the subsidy rate for each programme using as the numerator respondents' total softwood sawmill purchases of Crown-origin standing timber during the POI, and not only the sawmill purchases made via transactions that yielded a positive result when compared to the benchmark price, shows that the USDOC was making a subsidy determination in respect of the programme as a whole. We therefore reject the United States' argument that the USDOC was not required to aggregate all comparison results because each transaction was an independent financial contribution, and hence potentially an independent countervailable subsidy. We consider that the USDOC did not in fact treat individual transactions as freestanding countervailable subsidies in this case, as the underlying determinations indicate that the USDOC was examining the existence of a countervailable subsidy over the POI on a programme-wide basis.

#### **7.8.2.2.2 Whether the USDOC violated Article 14(d) by setting certain comparison results to zero in its benefit determination for New Brunswick's provision of stumpage**

7.572. Canada notes that the USDOC compared *individual purchases* of Crown-origin standing timber in New Brunswick to a monthly average of certain private transactions in Nova Scotia to calculate the benefit. According to Canada, the outcome of a comparison of a particular individual transaction to a benchmark comprising an average of multiple transactions would capture the difference in the "wide range of price, quality, harvesting, geographic and other market conditions" that pertained to Nova Scotia transactions from which the benchmark was derived on the one hand, and those pertaining to the time and place of the particular transaction under consideration on the other.<sup>1137</sup> In Canada's view, such a methodology would yield an accurate and reasonable benefit calculation only if all individual comparison results are aggregated, because such aggregation carefully matches average transaction conditions to average benchmark conditions.<sup>1138</sup> Canada asserts that the USDOC erred by setting-to-zero any comparison results where the transaction price was below the benchmark price, as this compromised the averaging effect of the aggregation of individual results, thereby making the benefit assessment less related to the prevailing market conditions.<sup>1139</sup> The United States contends that Canada has failed to establish that anything about the factual situation in New Brunswick supports the conclusion that the USDOC ought to have "provided offsets" for individual financial contributions that did not confer a benefit when it aggregated benefit amounts for individual financial contributions that did confer a benefit.<sup>1140</sup>

7.573. Having found that as a matter of law, Article 14 of the SCM Agreement requires the method applied by an investigating authority to determine the adequacy of remuneration in relation to the

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<sup>1132</sup> Preliminary determination, (Exhibit CAN-8), p. 25; Final determination, (Exhibit CAN-10), p. 38.

<sup>1133</sup> Preliminary determination, (Exhibit CAN-8), pp. 25-26.

<sup>1134</sup> Preliminary determination, (Exhibit CAN-8), p. 51; Canada's response to Panel question No. 265, paras. 385-388; and second written submission, fn 479.

<sup>1135</sup> United States' response to Panel question No. 265, para. 375.

<sup>1136</sup> United States' response to Panel question No. 265, paras. 376-379.

<sup>1137</sup> Canada's first written submission, para. 929; second written submission, paras. 288-289.

<sup>1138</sup> Canada's first written submission, para. 930; second written submission, para. 290.

<sup>1139</sup> Canada's first written submission, para. 931.

<sup>1140</sup> United States' comments on Canada's response to Panel question No. 268, para. 257.

prevailing market conditions for the good in question, we proceed to examine whether Canada has established that in the case at hand, the USDOC failed to satisfy this obligation by setting-to-zero the negative comparison results between examined transactions and the benchmark price. We agree with Canada that in the facts of this particular case, the USDOC's setting-to-zero of comparison results where the transaction price was lower than the benchmark price (negative comparison results) was inconsistent with Article 14(d) of the SCM Agreement. This is because, as Canada explained, by 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.

7.574. 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).<sup>1141</sup>

7.575. 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.

#### **7.8.2.2.3 Whether the USDOC violated Article 14(d) by setting certain comparison results to zero in its benefit determination for British Columbia's provision of stumpage**

7.576. We now consider Canada's claim that the USDOC erred by setting-to-zero comparison results when the timbermark/species-specific transaction prices of Crown timber in British Columbia were higher than the benchmark price (negative comparison results). Canada claims that by setting-to-zero such comparison results, the USDOC acted inconsistently with the obligation in Article 14(d) of the SCM Agreement to determine the adequacy of remuneration in relation to the prevailing market conditions for the good in question for the following two reasons:

- a. while the annual average benchmark used by the USDOC reflected a range of local supply and demand conditions spanning Washington interior, the respondent

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<sup>1141</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.56.

companies' purchases of species from specific timbermarks reflected only the local supply and demand conditions, and transportation distances<sup>1142</sup>; and

- b. additionally, the USDOC's deconstruction of the stand-as-a-whole price in British Columbia into artificial species-specific prices followed by setting-to-zero of negative comparison results caused the USDOC to arrive at inflated benefit determinations.<sup>1143</sup>

7.577. We note that the parties' arguments regarding the first reason based on which Canada claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by setting negative comparison results to zero when calculating the benefit conferred, are conceptually the same as those made in context of the claim concerning New Brunswick. Therefore, for reasons explained in section 7.8.2.2.2 above, we find that the USDOC erred by setting negative comparison results to zero in its benefit determination for provision of stumpage by British Columbia. By so doing, the USDOC's benefit determination captured the difference between the prevailing market conditions related to the specific place and time of a particular examined transaction on the one hand, and the average of a variety of the prevailing market conditions related to the multiple transactions from which the average benchmark price was derived on the other. Hence, the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to determine the adequacy of remuneration in relation to the prevailing market conditions for stumpage provided to the investigated producers by British Columbia.

7.578. We will now separately analyse the merits of the additional reason offered by Canada as a basis of its claim in respect of British Columbia. We recall that Canada claims that the USDOC, by setting negative comparison results to zero when determining the benefit conferred by British Columbia, failed to determine the benefit amount "based on how, in practice, the specific good in question is sold".<sup>1144</sup> Canada asserts that stumpage is sold in British Columbia by the stand, and not by species, whereas the USDOC artificially constructed species-specific annual average transaction prices for any given timbermark.<sup>1145</sup> Therefore, while the benchmark price reflected the annual average price for only one species, the purchase price for a stand reflected the average value of all of the species in that stand.<sup>1146</sup> Canada contends that because the USDOC set-to-zero comparison results where the artificial species-specific transaction price exceeded the benchmark price, the USDOC's benefit calculation methodology failed to relate to the prevailing market condition that British Columbia prices and sells stumpage on the basis of the stand, and thus produced an inaccurate measure of the existence and the amount of any benefit conferred.<sup>1147</sup>

7.579. The United States refutes Canada's contention that the USDOC artificially constructed species-specific transaction prices and that British Columbia sold stumpage on a stand-as-a-whole basis.<sup>1148</sup> Rather, the United States contends that stumpage invoices issued by British Columbia are issued on a timbermark-specific basis with separate transaction lines for each species and grade combination.<sup>1149</sup> Further, the United States asserts that under the derived demand methodology it

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<sup>1142</sup> Canada's first written submission, para. 939. We note in this regard that the transactions that the USDOC examined were annual average prices for the provision of stumpage in a particular timbermark, i.e. a stumpage stand in a particular geographic area. On the other hand, the USDOC's benchmark price was an annual average of log prices from all over Washington interior. (Preliminary determination, (Exhibit CAN-8), pp. 52-53).

<sup>1143</sup> Canada's first written submission, paras. 940-942.

<sup>1144</sup> Canada's response to Panel question No. 267, para. 395 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11-53).

<sup>1145</sup> We note in this regard that while British Columbia sold stumpage on a stand-as-a-whole basis, the USDOC constructed species-specific stumpage rates for each species in the stand, by notionally assuming the common stumpage rate for the whole stand to be the species-specific stumpage rate for each individual species in that stand. As an example, Canada points to a particular stumpage stand purchased by Canfor for which the stumpage rate was [[\*\*\*]]. Canada shows that the USDOC notionally assumed the stumpage rate for each species to have been [[\*\*\*]], and then compared the annual average stumpage price for each species calculated on this basis to an annual average species-specific benchmark price from Washington interior. (Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 86 (referring to Canada presentation at first meeting (28 February 2019), (Exhibit CAN-528 (BCI)), p. 56)). See also, below, para. 7.580.

<sup>1146</sup> Canada's first written submission, para. 938.

<sup>1147</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), paras. 87-88.

<sup>1148</sup> United States' response to Panel question No. 273, para. 397.

<sup>1149</sup> United States' response to Panel question No. 273, para. 399.

employed to determine a benchmark, the species of a tree is integral to the value of that tree.<sup>1150</sup> The United States posits that British Columbia itself uses the derived demand analysis in the MPS equation used to determine the selling price of a stand.<sup>1151</sup>

7.580. We first note that elsewhere in our Report, we have reached the view that the USDOC did not provide a proper basis to not consider stand-as-a-whole pricing as a prevailing market condition in British Columbia.<sup>1152</sup> While the United States contends that stumpage invoices issued by British Columbia contain separate line items for each individual species in a stand, we agree with Canada that this does not mean that the invoices contain prices determined on a species-specific basis.<sup>1153</sup> Canada has established that the stumpage rate for each individual line item in the invoices referred to by the United States is the same for all species in a stand.<sup>1154</sup> In our view, it is abundantly clear that the formal reproduction of the same stumpage rate in different line items for different species was not a sign that British Columbia sold Crown timber at species-specific prices. Rather, it indicates that British Columbia applied the same stumpage rate to the whole stand. As we noted earlier in our report, British Columbia had explained to the USDOC that while the invoices included line items for each species with both volume and value figures, there were no unique, species-specific prices reported at the stand level for any sale in British Columbia.<sup>1155</sup> We also note that, even though the MPS equation does take into consideration the values and amounts of different species in each stand when fixing the price for that stand, British Columbia eventually sells the stand at a single stumpage rate. Thus, we reject the United States' argument that the USDOC properly considered that British Columbia sells stumpage at species-specific prices. We consider that the USDOC notionally assumed that British Columbia sold timber of different species in a stand at species-specific prices.<sup>1156</sup>

7.581. We also note the United States' argument that a species-specific benchmark would measure the adequacy of remuneration accurately, while a weighted-average combined species benchmark would not.<sup>1157</sup> In this respect, we consider that Canada has not challenged in this claim the appropriateness of a species-specific benchmark. Rather, Canada contends that when comparing the benchmark that the USDOC chose to use to (notionally-assumed) species-specific stumpage transaction prices in British Columbia, the USDOC should not have set negative comparison results to zero. By so doing, Canada claims, the USDOC failed to assess the adequacy of remuneration in relation to the prevailing market conditions for Crown stumpage provided by British Columbia. This is the question we next examine.

7.582. Canada asserts, and we agree, that the benchmark price reflected an average price for a single species, but the purchase price reflected an average price for several species.<sup>1158</sup> We also agree with Canada that 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

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<sup>1150</sup> United States' response to Panel question No. 273, para. 399.

<sup>1151</sup> United States' response to Panel question No. 273, para. 400.

<sup>1152</sup> See, above, para. 7.540.

<sup>1153</sup> Canada's comments on the United States' response to Panel question No. 273, para. 328.

<sup>1154</sup> Canada's comments on the United States' response to Panel question No. 273, paras. 328 and 330 (referring to British Columbia initial questionnaire response, (Exhibit CAN-18 (BCI)), pp. BC-I-175 and BC-I-186; and Exhibit BC-S-124 of British Columbia initial questionnaire response, (Exhibit USA-84), p. 4).

<sup>1155</sup> Canada's comments on the United States' responses to panel question Nos. 271 and 273(a), para. 331; United States' response to Panel question No. 273(a), para. 397. See also, fn 1072 to para. 7.528.

<sup>1156</sup> We also consider that the following observations of the panel in para. 11.63 of the Panel Report in *US – Anti-Dumping and Countervailing Duties (China)*, made in context of the panel's rejection of China's proposed need for aggregation of all input prices approach, support our view:

We note first that China does not contend that all of the different types of rubber were sold for a single, undifferentiated price. Nor does the record evidence indicate that this was the case. To the contrary, the record evidence shows that each type of rubber was sold as a specific, separate product with its own pricing, and that the tire producers maintained their purchase records separately for each type.

We note that the panel in that case reached its conclusion on this issue based on its observation that China had not contended that "different types of rubber were sold for a single, undifferentiated price". This suggests that had the types of rubber in question been sold for a single, undifferentiated price, as was the case with standing timber of different species in a particular timbermark in British Columbia, the panel may have reached a different conclusion.

<sup>1157</sup> United States' response to Panel question No. 273, para. 399.

<sup>1158</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 86.

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.<sup>1159</sup> 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. As Canada rightly argues, the benefit amount calculated on this basis will not reflect whether the stand-as-a-whole was purchased for less than adequate remuneration.<sup>1160</sup> 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.

7.583. 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.<sup>1161</sup>

### 7.8.3 Conclusion

7.584. We reaffirm 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. We find that by setting the negative comparison results to zero, 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. This is because by so doing, the USDOC calculated a benefit amount that included price differences that arose 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.

7.585. For the same reason, the USDOC also acted inconsistently with Article 14(d) of the SCM Agreement by setting-to-zero comparison results where the timbermark/species-specific transaction prices were found to be more than the corresponding benchmark price in its benefit determination for provision of stumpage by British Columbia. Further, as explained above, by setting-to-zero such comparison results, the USDOC also violated Article 14(d) of the SCM Agreement because by so doing it failed to make a benefit assessment in relation to a particular prevailing market condition in British Columbia, i.e. sale of stumpage by British Columbia on a stand-as-a-whole basis.

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<sup>1159</sup> Canada's second written submission, para. 296.

<sup>1160</sup> Canada's second written submission, para. 297. We note that Canada has supported its arguments with an example from record evidence where the USDOC found benefit to exist, even though the respondent company had paid a total amount for the stand that was more than what the total value of the stand would come out to be if the USDOC's species-specific benchmark price was used to calculate the value of the stand. However, because the USDOC calculated the benefit based on notionally-assumed species-specific prices in the stand in question and set negative comparison results to zero, the USDOC found a benefit to exist. (Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 86 (referring to Attachment IV to USDOC calculation memo, Canfor, (Exhibit CAN-383 (BCI))); second written submission, para. 298 (referring to Canada presentation at first meeting (28 February 2019), (Exhibit CAN-528 (BCI)), pp. 49-56)).

<sup>1161</sup> In resolving Canada's claim, we take no view as to whether the USDOC's use of notionally-assumed species-specific transaction prices for stumpage provided by British Columbia was in itself problematic. We note that Canada has not challenged as part of its claims that manner in which the USDOC identified or grouped transactions under consideration. Rather, Canada's claim and our findings pursuant to that claim are limited to whether or not the USDOC should have set negative comparison results between prices of the examined transactions and corresponding benchmark prices to zero.

7.586. Having found that by setting-to-zero negative comparison results in the context of this particular case, the USDOC acted inconsistently with Article 14(d) of the SCM Agreement, we consider that we need not make findings concerning Canada's claims under other provisions of the SCM Agreement and the GATT 1994. We therefore exercise judicial economy in respect of Canada's claims under Articles 1.1(b), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

## **7.9 Canada's claims concerning the export-permitting process for British Columbia logs**

7.587. In the underlying investigation, the USDOC investigated certain restrictions on the export of logs from British Columbia. In particular, the Governments of British Columbia and Canada prohibit the export of logs from British Columbia without an export permit. The BC Forest Act and Canada's Federal Notice to Exporters No. 102 provide for an export-permitting process that authorizes the export of logs in accordance with specified criteria.<sup>1162</sup> We refer to this process as the LEP process. The USDOC found that the LEP process in British Columbia results in a policy where the Governments of Canada and British Columbia provide a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement by entrusting or directing private log suppliers to provide logs to consumers in British Columbia.<sup>1163</sup>

7.588. Canada makes the following two claims with respect to the USDOC's finding:

- a. First, Canada claims that the USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement, because it improperly determined that, through the LEP process in British Columbia, the Governments of British Columbia and Canada allegedly entrusted or directed private log suppliers to provide logs to consumers in British Columbia.
- b. Second, Canada claims that the USDOC acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement, by improperly initiating a countervailing investigation regarding the LEP process.<sup>1164</sup>

### **7.9.1 Provisions at issue**

7.589. Article 1.1(a)(1) of the SCM Agreement reads, in relevant part, as follows:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

...

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments[.]

7.590. Articles 11.2 and 11.3 of the SCM Agreement read, in relevant part, as follows:

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount[.] ... Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

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<sup>1162</sup> Final determination, (Exhibit CAN-10), pp. 149-150.

<sup>1163</sup> Final determination, (Exhibit CAN-10), pp. 152 and 155.

<sup>1164</sup> Canada's panel request, p. 2; response to Panel question No. 118, para. 332.

...

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

...

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

### **7.9.2 Whether the LEP process constitutes a financial contribution within the meaning of Article 1.1(a)(1)(iv)**

7.591. Pursuant to Article 1.1(a)(1)(iii) of the SCM Agreement, a government or public body provides a financial contribution when it provides goods or services other than general infrastructure. Pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement, a government or public body provides a financial contribution when it "entrusts or directs" a private body to carry out certain functions listed in Articles 1.1(a)(1)(i) to (iii), including entrusting or directing such a body to provide goods (as covered under Article 1.1(a)(1)(iii) of the SCM Agreement).

7.592. In the underlying investigation, as noted in paragraph 7.587 above, the USDOC found that the Governments of Canada and British Columbia entrusted or directed private log suppliers (i.e. a private body) to provide logs (i.e. goods) to producers in British Columbia. We first set out the USDOC's findings and the record evidence on which those findings were based. Then we turn to our evaluation of the claims put forth by Canada.

#### **7.9.2.1 The USDOC's finding of entrustment and direction**

7.593. In the underlying investigation, the USDOC concluded that through certain restrictions imposed on the export of logs, the Governments of British Columbia and Canada entrusted or directed private log suppliers to provide logs to Canadian producers. The USDOC noted in this regard that logs harvested in British Columbia are either subject to provincial jurisdiction, under British Columbia's Forest Act, or federal jurisdiction, under Canada's Federal Notice to Exporters No. 102.<sup>1165</sup> Both laws require that logs be used or provided to timber processing facilities in British Columbia unless an exception applies.<sup>1166</sup>

7.594. Under the British Columbia Forest Act, timber harvested in British Columbia may only be used in British Columbia or manufactured within British Columbia into a wood product, unless one of the following three possible exceptions applies:

- a. logs are surplus to the requirements of timber processing facilities in British Columbia (surplus criterion);
- b. timber processing facilities cannot economically use them (economic criterion); or
- c. logs would otherwise be wasted (utilization criterion).<sup>1167</sup>

7.595. The USDOC noted that the surplus criterion was used most frequently during the POI.<sup>1168</sup> The USDOC observed that to qualify for the surplus criterion:

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<sup>1165</sup> United States' first written submission, para. 534.

<sup>1166</sup> United States' first written submission, para. 534. The BC Forest Act and Canada's Federal Notice to Exporters No. 102 provide for an almost identical process for log exports. (Final determination, (Exhibit CAN-10), pp. 149-151; Forest Act, (Exhibit CAN-39); and Federal Notice to Exporters No. 102, (Exhibit CAN-69)).

<sup>1167</sup> Final determination, (Exhibit CAN-10), p. 150.

<sup>1168</sup> In the final determination, the USDOC indicated that "all but two of the approved applications for export were made under the surplus test". (Final determination, (Exhibit CAN-10), p. 150).

- a. The applicant must advertise its logs to mill operators in British Columbia, who have an opportunity to place a written offer on the logs advertised in the bi-weekly advertising list.<sup>1169</sup>
- b. If no offer is received from mill operators for the advertised logs, then such logs are considered surplus, and automatically authorized for export.<sup>1170</sup>
- c. If, however, mill operators submit an offer:
  - i. The offer is evaluated by an advisory panel to determine whether it represents a fair market value.<sup>1171</sup>
  - ii. The advisory panel then provides a recommendation to the responsible federal or provincial minister on whether the logs should be authorized for export.
  - iii. If the offer is considered unfair, i.e. below the market price, the logs will be authorized for export.
  - iv. If the offer is deemed to be fair, i.e. at or above the market price, the application for an export exemption will be rejected.<sup>1172</sup>

7.596. The USDOC also noted that the export of logs under provincial jurisdiction is subject to a fee, which "can be significant, and can substantially increase the final price a potential customer would have to pay for the logs".<sup>1173</sup> In addition, the export of logs, including logs harvested under the provincial and federal jurisdictions in British Columbia, without a permit is subject to penalties under the Export and Import Permits Act (EIPA) of Canada.<sup>1174</sup>

7.597. The USDOC found that the requirements of the BC Forest Act and Canada's Federal Notice to Exporters No. 102 combined with a lengthy process for obtaining an authorization for exports, the surplus test, fees charged by British Columbia upon exports, and legal penalties for exporting logs without a permit, compel harvesters to provide logs to consumers within the province and divert to domestic consumers logs that could otherwise be exported.<sup>1175</sup> The USDOC considered that "[t]he lengthy and burdensome export prohibition exemption process discourages log suppliers from considering the opportunities that may exist in the export market by significantly encumbering their ability to export, especially where there may be uncertainty about whether their logs will be found to be surplus to the requirements of mills in BC. Moreover, this process restricts the ability of log suppliers to enter into long-term supply contracts with foreign purchasers".<sup>1176</sup> The USDOC also stated that "timber harvesters in British Columbia must ensure that demand for logs in British Columbia is met before seeking a purchaser overseas and, therefore, they are forced to receive a lower price for their timber in British Columbia than they would if they were able to export free of the ... export restrictions".<sup>1177</sup>

### **7.9.2.2 Evaluation**

7.598. In the underlying investigation, the USDOC determined, based on the record evidence set out in paragraphs 7.593-7.597 above, that the Governments of British Columbia and Canada provided a financial contribution to mill operators by entrusting or directing private log suppliers to provide logs to mill operators (i.e. provide goods), stating in this regard as follows:

[The] legal requirement[] that logs remain in British Columbia combined with the process for obtaining an exception from those requirements to export, result in a policy

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<sup>1169</sup> Preliminary determination, (Exhibit CAN-8), p. 59; Final determination, (Exhibit CAN-10), p. 150.

<sup>1170</sup> Final determination, (Exhibit CAN-10), p. 150; Canada's first written submission, paras. 203

and 963.

<sup>1171</sup> Final determination, (Exhibit CAN-10), pp. 150-151.

<sup>1172</sup> Canada's first written submission, para. 129.

<sup>1173</sup> Final determination, (Exhibit CAN-10), p. 142.

<sup>1174</sup> Final determination, (Exhibit CAN-10), p. 151.

<sup>1175</sup> Final determination, (Exhibit CAN-10), p. 155.

<sup>1176</sup> Final determination, (Exhibit CAN-10), p. 154.

<sup>1177</sup> Final determination, (Exhibit CAN-10), pp. 154-155.

where the GOC and GBC have entrusted or directed timber harvesters to provide logs to producers in British Columbia. Specifically, with respect to the GBC, we continue to find that the legal requirements, combined with both the lengthy process for obtaining an exception, and the fees charged by the GBC upon export, result in a policy where the GBC has entrusted or directed private log suppliers to provide logs to mill operators within the meaning of section 771(5)(B)(iii) of the Act. With respect to the GOC, we continue to find that the GOC has also entrusted and directed private log suppliers to provide logs to mill operators, within the meaning of 771(5)(B)(iii) of the Act, insofar as the surplus test and the legal penalties for exporting logs without an export permit compel such suppliers to divert to mill operators some volume of logs that could otherwise be exported.

7.599. The question that we must resolve is whether an unbiased and objective investigating authority could have found, based on the record evidence set out above, that the Governments of Canada and British Columbia entrusted or directed private log suppliers in British Columbia to provide logs to Canadian producers. In making this determination, we are not permitted to conduct a *de novo* review of the facts of the case or substitute our judgement for that of the investigating authority, here, the USDOC.<sup>1178</sup> Instead, we must examine whether, in the light of the evidence on the USDOC's record, its conclusions were reasoned and adequate.<sup>1179</sup> Our examination in this regard would be based on the definition of subsidy set out in Article 1.1 of the SCM Agreement, specifically the rules regarding entrustment and direction, as well as government provision of goods set out in Articles 1.1(a)(1)(iv) and 1.1(a)(1)(iii) of the SCM Agreement respectively.

7.600. With respect to the definition of subsidy set out in Article 1.1 of the SCM Agreement, we recall that in past cases the term "entrust" has been understood to cover situations where a government "gives responsibility to" a private body, and the term "direct" has been understood to cover situations where a government "exercises its authority over" a private body to carry out one of the types of functions listed in paragraphs (i) through (iii) of Article 1.1(a)(1).<sup>1180</sup> Thus, a finding of entrustment or direction requires that the government give responsibility to a private body, or exercise its authority over a private body, in order to effectuate a financial contribution covered by Articles 1.1(a)(1)(i)-(iii).<sup>1181</sup> Government measures that confer a benefit but are not financial contributions covered by Articles 1.1(a)(i)-(iv) are not subsidies under Article 1.1 of the SCM Agreement. Therefore, entrustment or direction cannot be found to exist based on the economic effects of a government measure, including a government measure that is in the form of an export restraint.<sup>1182</sup> This means that when examining whether a government entrusts or directs a private body, we need to examine the government's actions, and not a private party's reactions to a government measure, which would essentially be the effect of a government measure rather than necessarily a case of entrustment or direction.

7.601. We note that in past cases WTO panels have examined whether restraints on export of a good could lead to direction or entrustment to provide such a good. In *US – Countervailing Measures (China)* the underlying government measure at issue was the limitations imposed on the ability of the domestic suppliers to export certain products. The panel in that case was of the view that in limiting the ability of domestic suppliers to export certain products, the government did not entrust or direct those suppliers to provide those goods to Chinese producers. In particular, the panel took the view that the government in question (a) did not *direct* the suppliers to provide those goods because it did not give them responsibility to do anything (through such a limitation); and (b) did not *exercise its authority* over them to provide those goods to the Chinese producers.<sup>1183</sup> Instead, the government exercised its authority over those producers only in relation to exports of those products (as opposed to providing those products to Chinese producers).<sup>1184</sup>

7.602. In *US – Export Restraints* the panel found that the export restraints at issue did not meet the criteria set out in Article 1.1(a)(1)(iv) of the SCM Agreement.<sup>1185</sup> The export restraints at issue

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<sup>1178</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 379.

<sup>1179</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>1180</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, paras. 110-111 and 113; Panel Report, *US – Countervailing Measures (China)*, para. 7.399.

<sup>1181</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.

<sup>1182</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.401.

<sup>1183</sup> Panel Report, *US – Countervailing Measures (China)*, paras. 7.400-7.401.

<sup>1184</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.401.

<sup>1185</sup> Panel Report, *US – Export Restraints*, paras. 8.29-8.44.

were a border measure that took the form of a government law or regulation that expressly *limited the quantity of exports, or placed explicit conditions on the circumstances under which exports are permitted, or took the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports*. We note that this panel's determination was in part based on its view that entrustment and direction occur where there is an explicit and affirmative delegation or command, which was a view not shared by the Appellate Body in *US – Countervailing Duty Investigation on DRAMs* (which considered instead, as noted above, that entrustment or direction occurs where a government gives responsibility to, or exercises authority over, a private body to effectuate a financial contribution).<sup>1186</sup>

7.603. However, the Appellate Body agreed with this panel's view that Article 1.1(a)(iv) does not cover situations in which the government intervenes in the market in some way (including through export restraints), which may or may not have a particular result simply based on the given factual circumstances and the reaction of actors in the market.<sup>1187</sup> It also agreed with this panel that entrustment or direction cannot be inadvertent or a mere by-product of government regulation.<sup>1188</sup> Instead, the Appellate Body was of the view that there must be a demonstrable link between the government and the conduct of the private body.<sup>1189</sup> We share this understanding of past panels and the Appellate Body.<sup>1190</sup>

7.604. Having reviewed the USDOC's findings based on the record evidence, in light of this understanding of the disciplines set out in Article 1.1(a)(1)(iv) of the SCM Agreement, we do not consider that an unbiased and objective investigating authority could have found, consistent with Article 1.1(a)(1)(iv) of the SCM Agreement, that the Governments of British Columbia and Canada gave responsibility to, or exercised their authority over, private log suppliers to provide logs to mill operators. In particular, consistent with the view, set out in paragraphs 7.600-7.603 above, Article 1.1(a)(1)(iv) of the SCM Agreement covers situations where the government must give responsibility to, or exercise authority over, a private body *to provide goods* (i.e. effectuate a financial contribution under Article 1.1(a)(1)(iii) of the SCM Agreement), we do not consider that the USDOC had proper basis to conclude that the Governments of British Columbia and Canada entrusted or directed private log suppliers to provide logs to mill operators.

7.605. In reaching this conclusion, we note that the underlying policy that in the USDOC's view resulted in a direction or entrustment to provide goods comprises restrictions imposed by the Governments of British Columbia and Canada on export of logs. In particular, export of logs is permitted only if certain specific criteria set out in paragraphs 7.594-7.595 above are met. In addition, as noted in paragraph 7.596 above, the Government of British Columbia charges a fee on such exports, and legal penalties are imposed if logs are exported without a permit. Further, the USDOC also noted the "potentially lengthy nature" of the export permission process. The USDOC concluded that official government action compels suppliers of British Columbia logs to supply to British Columbia consumers, including mill operators. The United States submits that in reaching these conclusions as part of its entrustment or direction analysis, the USDOC did not adopt an effects-based approach. Instead, per the United States, the USDOC explicitly identified the link between the government action and the specific conduct of private bodies (in terms of providing goods), by noting that timber harvesters and processors in British Columbia are limited by the provincial and federal restrictions on whom they can sell their logs to.<sup>1191</sup> The United States also rejects Canada's assertion that the LEP process did not, in practice, impact the ability of the log sellers to export. In this regard, the United States notes the USDOC's statement that information on the record indicated that a blocking system operated in British Columbia, which created an environment in which log sellers were forced into informal agreements that lowered export volumes and domestic prices.<sup>1192</sup> In addition, noting that in *US – Countervailing Duty Investigation on DRAMs* the Appellate Body had considered that in most cases one would expect entrustment or direction of a private body to involve some form of threat or inducement, which, in turn, could serve as evidence

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<sup>1186</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, paras. 109-111 and 113.

<sup>1187</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114; Panel Reports, *US – Export Restraints*, para. 8.31; *US – Countervailing Measures (China)*, para. 7.397.

<sup>1188</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114.

<sup>1189</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112.

<sup>1190</sup> We, like the Appellate Body, disagree with the panel in *US – Export Restraints* that entrustment and direction occur only when there is an explicit and affirmative delegation or command from the government to a private body.

<sup>1191</sup> See, e.g. United States' second written submission, para. 342.

<sup>1192</sup> United States' first written submission, para. 593.

of entrustment or direction, the United States submits that legal penalty for exporting logs without authorization is such a type of threat or inducement.<sup>1193</sup> We are not persuaded by these submissions by the United States.

7.606. In this regard, we agree with Canada that there is no evidence that the Governments of British Columbia and Canada require log suppliers to provide their logs to anyone, or direct them to sell those logs at any particular price. We acknowledge, of course, that restrictions on exports of logs could affect private-party behaviour of log suppliers. But entrustment or direction cannot be a mere by-product of government regulation. Indeed, government regulations of different types could affect private-party behaviour. However, just because a governmental regulation has such an effect does not mean that the *government gives responsibility to, or the government exercises authority over, a private body to provide goods*. In particular, we do not consider that a government entrusts or directs a private party to provide goods, or provide them at a particular price, just because that private party's behaviour, in terms of sale and pricing of its goods, is affected by the regulatory framework in which it operates. Therefore, the USDOC's considerations that the LEP process "discourages log suppliers from considering the opportunities that may exist in the export market", "restricts the ability of log suppliers to enter into long-term supply contracts with foreign purchasers" and leads to a lower price of timber in British Columbia, pertain in our view to the effects of the export regulation for logs and do not indicate the existence of entrustment and direction.

7.607. In this regard, we disagree with the United States' view that a penalty for exporting logs without a permit is a "form of threat or inducement" by the government to ensure that private log suppliers comply with the law requiring that they supply logs to consumers in British Columbia, unless granted an exemption and export authorization.<sup>1194</sup> We note that if a government enacts a regulation, it may also enact measures to enforce it, including through penalties. That may be a threat or inducement to comply with the relevant regulation. However, it does not follow that it is a threat or inducement to effectuate a financial contribution in the form of provision of goods, which is what is required under Article 1.1(a)(1)(iv) of the SCM Agreement. With regard to the United States' reliance on the USDOC's statement regarding a "blocking system" that "creates an environment in which log sellers are forced into informal Agreements that lower export volumes and domestic prices" (which Canada denies<sup>1195</sup>), we do not consider that such an arrangement (if any) suggests that it is the government that entrusted or directed the log suppliers to provide goods. In addition, while we note that when mill operators make an offer to purchase advertised logs, the offer is reviewed by the relevant advisory committee to determine whether such offer represents a fair market value (with the authorization to export denied if it is), we also note Canada's explanation that there is no requirement on the log seller to accept those offers.<sup>1196</sup> Instead, it could choose to sell to someone else, use the logs themselves or (if in the southern interior of British Columbia) hold off harvesting them in the first place.<sup>1197</sup> Therefore, we do not consider that the USDOC had proper basis to conclude that the Governments of British Columbia and Canada gave responsibility to, or exercised their authority over, private log suppliers to provide logs to mill operators.

7.608. Based on the above, we conclude that the USDOC acted inconsistently with Article 1.1(a)(1) (iv) of the SCM Agreement in determining that the Governments of Canada and British Columbia directed or entrusted log sellers to provide goods to Canadian producers.

### **7.9.3 Whether the USDOC acted inconsistently with Articles 11.2 and 11.3 in initiating an investigation regarding the LEP process**

7.609. Canada claims that the United States acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement by improperly initiating an investigation regarding the LEP process without sufficient evidence on the existence of a subsidy. Canada submits that the investigation was initiated based on the petitioner's allegations regarding the existence of a financial contribution in the form of provision of goods, and these allegations were predicated solely on the existence of the LEP process and its alleged price suppressing impact on logs in British Columbia.<sup>1198</sup> Relying essentially on the same type of legal arguments that it does while making its claim under Article 1.1(a)(1)(iv) of the

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<sup>1193</sup> United States' second written submission, para. 346.

<sup>1194</sup> United States' second written submission, para. 346.

<sup>1195</sup> Canada's second written submission, para. 325.

<sup>1196</sup> Canada's response to Panel question No. 123, para. 341.

<sup>1197</sup> Canada's first written submission, para. 129.

<sup>1198</sup> Canada's first written submission, para. 971.

SCM Agreement, Canada argues that there was no evidence of a financial contribution or of entrustment or direction that could have been provided in the application that would meet the "sufficient evidence" standard in Articles 11.2 and 11.3.<sup>1199</sup> Canada's submission is based on its view that export restraints of the type at issue in the underlying investigation cannot, as a matter of law, be a financial contribution under Article 1.1.(a)(iv) of the SCM Agreement. In response to our questions, Canada clarified that if we agree with its main argument that the LEP process cannot constitute a financial contribution under Article 1.1(a)(iv) as a matter of law, then Canada's claims under Articles 11.2 and 11.3 are consequential.<sup>1200</sup>

7.610. The United States asserts that the obligations under Articles 11.2 and 11.3 of the SCM Agreement are distinct from the obligations under Article 1.1(a)(1) of this Agreement. Therefore, just because an investigating authority acts inconsistently with Article 1.1(a)(1) of the SCM Agreement does not mean that this investigating authority also acts inconsistently with Articles 11.2 and 11.3 of the SCM Agreement.<sup>1201</sup> The United States argues that Canada's Articles 11.2 and 11.3 claims fail for the same reasons that its claim under Article 1.1(a)(1)(iv) fails.<sup>1202</sup>

7.611. We note that Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement are premised on its view that export restraints of the type at issue here cannot be a subsidy under Article 1.1 of the SCM Agreement because there is no direction or entrustment from the government to provide goods. We have upheld Canada's claim under Article 1.1(a)(iv) of the SCM Agreement challenging the USDOC's determination that the Governments of Canada and British Columbia directed or entrusted log sellers to provide goods to Canadian producers. Having made this finding, we do not consider that additional findings under Articles 11.2 and 11.3 of the SCM Agreement are necessary to resolve this dispute. Therefore, we exercise judicial economy on Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement.<sup>1203</sup>

7.612. Based on the above, we exercise judicial economy on Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement.

#### **7.9.4 Conclusion**

7.613. In light of the foregoing, we find that the USDOC's determination that Canada and British Columbia entrusted or directed private log suppliers to provide logs to consumers in British Columbia is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement. We exercise judicial economy on Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement.

#### **7.10 Canada's claims concerning certain reimbursements made to harvesters by Québec and New Brunswick for silviculture and forest management activities**

7.614. Canada claims that the USDOC erred by finding certain reimbursements that Québec and New Brunswick made to harvesters to be financial contributions in the form of grants.<sup>1204</sup> Canada further claims that the USDOC improperly found the reimbursements to confer a benefit on the relevant harvesters in the total amount of the reimbursement received.<sup>1205</sup> The United States asserts that the USDOC's finding that the reimbursements in question were financial contributions in the form of grants under Article 1.1(a)(1)(i) of the SCM Agreement was supported by record evidence and was reasonably and adequately explained.<sup>1206</sup> The United States also contends that Canada wrongly claims that the reimbursements did not confer a benefit on the recipients.<sup>1207</sup>

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<sup>1199</sup> Canada's first written submission, paras. 969-973.

<sup>1200</sup> Canada's response to Panel question No. 128, para. 363.

<sup>1201</sup> United States' second written submission, para. 400.

<sup>1202</sup> United States' first written submission, paras. 608 and 611.

<sup>1203</sup> WTO panels are not required to address each and every claim. Instead, they are only required to address those claims that are necessary to resolve a dispute. (*Appellate Body Reports, Argentina – Import Measures*, para. 5.190).

<sup>1204</sup> Canada's first written submission, para. 974.

<sup>1205</sup> Canada's first written submission, para. 974.

<sup>1206</sup> United States' first written submission, para. 613.

<sup>1207</sup> United States' first written submission, paras. 650-651.

### **7.10.1 Factual aspects**

7.615. In the underlying investigation, the USDOC examined the Partial Cut Investment programme (PCIP) in Québec, whereby Québec provides reimbursements for partial cutting activities that certain harvest areas are subject to. Pursuant to the partial cutting requirements, harvesters are allocated the right to harvest timber from certain designated harvest areas upon the condition that they must remove less than 50% of the volume of a harvest stand, in order to encourage natural regeneration of forest areas without the need to replant. The partial cuts method, which is more expensive than the clear-cutting method, increases harvesting costs. Under the PCIP, harvesters are reimbursed for up to 90% of their increased costs attributable to partial cutting requirements. The USDOC found that the reimbursement received by Resolute under the PCIP was a financial contribution in the form of a grant, which confers a benefit in the amount of reimbursement received by Resolute.<sup>1208</sup>

7.616. The USDOC also observed that J.D. Irving, Ltd. (JDIL) has been a long-term leaseholder of provincial lands in New Brunswick from which it sources part of its input supply. Under the Crown Lands and Forests Act (CLFA), JDIL has to perform basic silviculture and forest management obligations. New Brunswick provides reimbursements for silviculture and licence management expenses to JDIL. The USDOC found that these reimbursement payments constitute financial contributions in the form of a grant, which conferred a benefit in the amount of reimbursement received by JDIL.<sup>1209</sup>

7.617. Canada challenges the USDOC's conclusion that the reimbursement payments for silviculture and forest management to JDIL and Resolute were grants, since these payments were made to reimburse JDIL and Resolute for services provided to New Brunswick and Québec respectively. Canada also argues that even if the reimbursements were found to constitute a grant, the reimbursements did not confer a benefit on either Resolute or JDIL.<sup>1210</sup>

### **7.10.2 Legal standard**

7.618. Article 1.1 of the SCM Agreement stipulates that a subsidy shall be deemed to exist if there is a financial contribution by a government whereby a benefit is conferred on the recipient of the financial contribution. Article 1.1(a)(1)(i) provides that a financial contribution could be made in the form of a direct transfer of funds and includes grants as an example of a direct transfer of funds. The Appellate Body has found that a grant normally exists when money or money's worth is given to a recipient without an obligation or expectation that anything will be provided to the grantor in return.<sup>1211</sup> We agree with this finding of the Appellate Body. We further note that the United States and Canada both agree that a grant exists for purposes of Article 1.1(a)(1)(i) when the government confers something on a recipient without getting anything in return.<sup>1212</sup>

### **7.10.3 Evaluation**

7.619. Canada's primary contention is that the reimbursements in question do not constitute financial contributions at all, while Canada contends in the alternative that the reimbursements did not confer a benefit.<sup>1213</sup> Accordingly, we first examine the parties' arguments concerning whether the USDOC properly found the reimbursements to be financial contributions in the form of grants, before examining the parties' arguments concerning whether the reimbursements in question conferred a benefit on the recipients. We will examine Canada's claims concerning reimbursements provided by New Brunswick and Québec separately, considering that the relevant facts are different for the two provinces.

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<sup>1208</sup> Final determination, (Exhibit CAN-10), pp. 188-189.

<sup>1209</sup> Final determination, (Exhibit CAN-10), p. 186.

<sup>1210</sup> Canada's first written submission, para. 975.

<sup>1211</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 616-617.

<sup>1212</sup> United States' first written submission, para. 619; Canada's first written submission, para. 978.

<sup>1213</sup> Canada's first written submission, para. 975.

### **7.10.3.1 Whether the USDOC properly found silviculture reimbursements to be grants**

#### **7.10.3.1.1 New Brunswick**

7.620. Canada contends that the USDOC improperly characterized the silviculture and forest management reimbursements that New Brunswick made to JDIL as grants.<sup>1214</sup> According to Canada, the silviculture and forest management obligations performed by JDIL and the reimbursement payments from New Brunswick constituted a reciprocal exchange of rights and obligations, and the reimbursement was therefore not a grant.<sup>1215</sup>

7.621. The United States argues that Canada's claim in respect of silviculture reimbursements provided to JDIL by New Brunswick lacks merit because the USDOC properly found that JDIL was legally obligated to pay all expenses for silviculture and forest management.<sup>1216</sup> In support of this argument, the United States points to provisions of New Brunswick's CLFA and JDIL's Forest Management Agreement (FMA) with New Brunswick wherein the relevant silviculture and forest management obligations are set out.<sup>1217</sup> We reject this argument of the United States. We note that even though the CLFA and the FMA contain provisions that oblige JDIL to undertake certain silviculture and forest management obligations, the same legal instruments also provide that New Brunswick shall reimburse JDIL for the performance of such obligations.<sup>1218</sup> We consider that the fact that the relevant obligations as well as the reimbursement for the performance of those obligations are foreseen in the same legal instruments undermines the USDOC's characterization of the reimbursement as a grant. This is because the obligations and the reimbursement are both parts of the set of terms based on which New Brunswick provided Crown timber to JDIL. We agree with Canada's argument that the USDOC's approach of characterizing reimbursement by a government to an entity for performance of certain obligations as a grant will effectively mean that the government cannot delegate any responsibility to that entity without any compensation provided in exchange for that delegation being considered a subsidy.<sup>1219</sup>

7.622. The United States also argues that the reimbursements in question constituted a transaction that was separate and distinct from the stumpage transaction.<sup>1220</sup> The United States contends that the obligation to undertake silviculture was imposed on JDIL as part of the stumpage transaction, whereas the reimbursements were provided through a different transaction. According to the United States, the distinct nature of the two transactions shows that there was no exchange of rights and obligations in respect of the reimbursement provided by New Brunswick to JDIL.<sup>1221</sup> We reject this argument of the United States. As noted above, both the legislation and the FMA, which impose on JDIL the obligation to perform silviculture and forest management as a condition to access timber, also impose the obligation on New Brunswick to reimburse JDIL for the performance of those obligations. We consider this to indicate that, notwithstanding the temporal separation between the imposition of the relevant silviculture and forest management obligations and the application for and receipt of the reimbursement by JDIL, the two were reciprocal considerations made in the same transaction.<sup>1222</sup> We note that even though the reciprocal obligations agreed to between JDIL and

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<sup>1214</sup> Canada's first written submission, para. 990.

<sup>1215</sup> Canada's first written submission, para. 990.

<sup>1216</sup> United States' first written submission, para. 624.

<sup>1217</sup> United States' first written submission, paras. 621-623.

<sup>1218</sup> New Brunswick CFLA, (Exhibit CAN-242), Section 38(2) (that stipulates, in relevant part, that New Brunswick shall reimburse "the licensee for such expenses of forest management as are approved in and carried out in accordance with the operating plan" and "for other expenses of forest management in accordance with the regulations"); JDIL Forest Management Agreement, (Exhibit CAN-250 (BCI)), p. 26 (that stipulates, in relevant part, that "[t]he Minister shall reimburse the Company for basic silvicultural treatments at rates authorized by the Minister".)

<sup>1219</sup> Canada's second written submission, para. 341.

<sup>1220</sup> United States' first written submission, para. 638.

<sup>1221</sup> United States' first written submission, para. 638.

<sup>1222</sup> We note that Canada also challenges the correctness of the USDOC's reasoning that "it is JDIL, and not the [Government of New Brunswick], that has the mandate and ultimate responsibility to carry out basic silviculture and license management activities". (Final determination, (Exhibit CAN-10), pp. 185-186). According to Canada, as the owner of the Crown forests, New Brunswick is responsible for managing and caring for Crown forests. (Canada's first written submission, para. 992). We consider that by making access to stumpage legally conditional upon performance of silviculture, New Brunswick had shifted the responsibility for performing silviculture to licence holders (albeit with the reciprocal consideration in form of reimbursements). The USDOC could, however, not have found that the reimbursements in question constituted a grant based on

New Brunswick were implemented at different points of time, they were agreed to at the same time, and as part of the same transaction.

7.623. The United States also argues that the USDOC properly characterized the silviculture reimbursements provided by New Brunswick to JDIL as a grant because the reimbursements were provided for obligations "which JDIL would undertake even in the absence of the reimbursements".<sup>1223</sup> In respect of this argument of the United States, we agree with Canada that the USDOC did not adequately explain its assertion that JDIL would have undertaken the silviculture and forest management activities for which it was reimbursed by New Brunswick, even in the absence of reimbursements.<sup>1224</sup> Canada argues that the USDOC did not explain why JDIL would perform silviculture and forest management activities in the absence of reimbursements, considering that productivity improvements that arise due to JDIL's performance of silviculture and forest management "[do] not necessarily mean that JDIL will be allocated the resulting timber, and even if it does, it would still have to pay Crown stumpage for it".<sup>1225</sup> We note in this regard that JDIL's FMA with New Brunswick indicates that JDIL could be allocated additional timber generated due to silviculture activities.<sup>1226</sup> We consider that having an additional supply of timber, even upon payment of stumpage charges, could be commercially beneficial for a company. Thus, JDIL could potentially benefit from productivity increases resulting from its silviculture and forest management activities in the form of having access to increased supply of timber, and hence has an incentive to carry out silviculture even without reimbursements from New Brunswick. While the USDOC did refer to one of the provisions in JDIL's FMA that indicate that JDIL could be allocated rights to any additional timber that is produced due to silviculture<sup>1227</sup>, we consider that the USDOC's assertion was nevertheless inadequately reasoned. This is because the USDOC did not engage with the possibility that the costs that JDIL would incur in performing silviculture and forest management activities without any reimbursement from New Brunswick may exceed any commercial advantage in the form of increased supply that may result from silviculture and forest management, due to which it may not be commercially logical for JDIL to undertake silviculture and forest management without reimbursement.

7.624. We consider that the USDOC did not reasonably and adequately explain why the reimbursements in question constituted grants, when the legal instruments that set out JDIL's silviculture and forest management obligations and the corresponding reimbursements payable to JDIL indicated that the conveyances of funds from New Brunswick to JDIL in the form of reimbursements involved a reciprocal obligation on part of JDIL to assume the responsibility for performing silviculture and forest management in Crown forests.<sup>1228</sup> While the USDOC asserted that

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this reasoning alone, because the legal obligation that fell on JDIL to undertake silviculture was conditional upon the receipt of reimbursement from New Brunswick.

<sup>1223</sup> United States' first written submission, para. 626 (quoting Final determination, (Exhibit CAN-10), p. 185).

<sup>1224</sup> Canada's first written submission, para. 995; response to Panel question No. 132, para. 382.

<sup>1225</sup> Canada's response to Panel question No. 132, para. 383. In this regard, Canada also argues that it is commercially illogical that JDIL should incur silviculture expenses for harvest area covered under licence No. 7 on its own when other purchasers also purchased Crown timber from that harvest area. (Canada's first written submission, para. 996). This argument assumes that the other purchasers of Crown timber from that harvest area only pay the stumpage rates and do not share forest management expenses with JDIL. This assumption is at odds with certain terms of JDIL's FMA with New Brunswick which stipulate that sub-licencees will pay JDIL a "reasonable and fair share of the costs and charges" incurred by JDIL in forest management. (JDIL Forest Management Agreement, (Exhibit CAN-250 (BCI)), p. 17). Thus, we reject this argument put forth by Canada.

<sup>1226</sup> JDIL Forest Management Agreement, (Exhibit CAN-250 (BCI)), Sections 13.4-13.5.

<sup>1227</sup> Final determination, (Exhibit CAN-10), fn 1117.

<sup>1228</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 617. We note that in support of its claim that the USDOC wrongly considered the reimbursement provided to JDIL by New Brunswick as a grant, Canada also argues that the fact that JDIL charged a "harmonized sales tax" to New Brunswick for forest management and basic silviculture activities shows that the reimbursement was not a grant, as this tax is applicable only to purchase of goods and services, and not grants, in Canada. (Canada's first written submission, paras. 1002-1005; opening statement at the first meeting of the Panel (27 February 2019), para. 102). We reject this argument on the ground that the levy of a certain tax on a transaction between the government and a private entity is not necessarily determinative of the proper characterization of that transaction under Article 1 of the SCM Agreement. This is because how a transaction is characterized under domestic law is not determinative of its characterization under WTO law. (Appellate Body Reports, *Canada – Renewable Energy / Canada – feed-in Tariff Program*, para. 5.127). Thus, the fact that levy of a certain tax would make a certain transfer of funds from the government to a company a purchase of a good or service

JDIL would have performed silviculture and forest management activities even in the absence of reimbursements, it did not adequately explain this assertion. Thus, we conclude that USDOC did not reasonably and adequately explain its finding that the reimbursements provided by New Brunswick to JDIL were grants.<sup>1229</sup>

#### 7.10.3.1.2 Québec

7.625. Canada claims that the USDOC improperly found that the reimbursement payments made by Québec to Resolute under the PCIP constituted a financial contribution in the form of a grant.<sup>1230</sup> Canada contends that by treating the PCIP payments as grants, the USDOC failed to take into account the exchange of rights and obligations and consideration reflected in the transactions.<sup>1231</sup> In Canada's view, a challenged measure can constitute a "grant" when there is an "absence of an exchange of rights and obligations and consideration within the transaction".<sup>1232</sup> According to Canada, the PCIP payments reimburse the harvesters for increased costs associated with mandatory partial cutting activities that the harvesters are obliged to undertake in certain harvest areas.<sup>1233</sup> Canada asserts that PCIP payments are made as consideration for mandatory partial cutting activities, and can hence not be regarded as a "grant".<sup>1234</sup>

7.626. The United States contends that the USDOC properly found the PCIP payments to be a financial contribution because Resolute was legally responsible for performing partial cutting activities, and thus the payment was made without an obligation or expectation that anything would be provided to Québec in return.<sup>1235</sup> We reject this argument by the United States. We agree with Canada that the PCIP reimbursement are part of the bundle of rights and obligations that are exchanged when Resolute harvests non-auction Crown timber.<sup>1236</sup> In other words, we consider that Canada has demonstrated that Resolute's obligation to perform partial cuts and Québec's obligation to provide reimbursements for partial cuts, constitute a reciprocal exchange of rights and obligations that are stipulated simultaneously, through the same legal instrument. We note that Canada has established through record evidence that Resolute's obligation to perform partial cuts on certain blocks flows from Resolute's Harvest Agreements with Québec that, *inter alia*, incorporate the silviculture obligations on each harvest block specified in Québec's Annual Operating Plan.<sup>1237</sup> We

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instead of a grant under Canadian law, does not necessarily mean that the same would be the case under WTO law as well.

<sup>1229</sup> We note that Canada has also argued that the silviculture and forest management reimbursements made to JDIL by New Brunswick were a purchase of services, and not grants, due to which the reimbursements were not financial contributions covered under Article 1 of the SCM Agreement. (Canada's first written submission, paras. 974 and 980). We consider that because we have found that the USDOC did not reasonably and adequately explain its finding that the reimbursements in question were grants, we need not rule on whether the reimbursements should properly have been characterized as a purchase of services. Also, we note that we are not precluding the USDOC from finding in a WTO-consistent manner that the reimbursements were grants but are upholding Canada's claims only because the USDOC's findings were not adequately reasoned or were not supported by record evidence. For example, we may potentially have reached a different conclusion had the USDOC reasonably and adequately explained its view that JDIL would have undertaken silviculture and forest management activities even in the absence of reimbursements.

<sup>1230</sup> Canada's first written submission, para. 981.

<sup>1231</sup> Canada's first written submission, para. 984.

<sup>1232</sup> Canada's first written submission, para. 984 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.131 (emphasis original)).

<sup>1233</sup> Canada's first written submission, para. 983.

<sup>1234</sup> Canada's first written submission, para. 987.

<sup>1235</sup> United States' first written submission, paras. 632 and 634; second written submission, para. 417.

<sup>1236</sup> Canada's response to Panel question No. 283, para. 8.

<sup>1237</sup> Canada's response to Panel question No. 282, paras. 1 and 3 (referring to Harvest Agreement, (Exhibit CAN-623 (BCI)), pp. 8.9-8.11 and 11-14). We note that the United States' asserts that the SFDA is the overarching law that governs a timber supply holders' access to and right to harvest Crown timber in Québec. The United States points to Section 38 of the SFDA, which provides that Québec "may, by regulation, prescribe sustainable forest development standards for anyone carrying on a forest development activity in a forest in the domain of the State" and to Section 89 of regulation respecting standards of forest management for forests in the domain of the State which prohibit "any cutting without regeneration and soil protection". According to the United States, these provisions of Québec law require harvesters to use more costly partial cutting techniques in certain harvest areas and makes them responsible for harvesting costs.

(United States' comments on Canada's response to Panel question No. 282, para. 3; first written submission, paras. 628-629; and second written submission, para. 416 (referring to SFDA, (Exhibit CAN-169); and Québec questionnaire response, (Exhibit USA-75))). We consider that while the SFDA may be the overarching, general legislation pursuant to which several aspects of the sale and purchase of, and access to, Crown timber are

further note that the Treasury Board Note that established the PCIP sets out Québec's obligation to provide reimbursements for performance of partial cuts by a harvester *as well as* the harvester's obligation to abide by the terms of the Harvest Agreement, from which the requirement to perform partial cuts arises.<sup>1238</sup> Specifically, Section 8.3 of the Treasury Board Note describes the "Obligations of the Minister" as "[paying] the agent an amount that takes into account the execution control of silvicultural treatment carried out and the analysis of the activity report submitted to the regional branch concerned", and Section 9.1 obliges the agent to "comply with the ... harvest Agreement".<sup>1239</sup> We also note that the Treasury Board Note predates Resolute's Harvest Agreements. While the PCIP was established by the Treasury Board Note on 26 March 2013, Resolute's Harvest Agreement that Canada has identified from the record is dated to 2014.<sup>1240</sup> We also note that Canada has pointed to record evidence that states that pursuant to the coming into force of Québec's SFDA on 1 April 2013, all forest tenures that existed under the preceding legislation were cancelled and a new system for sale and pricing of standing timber was introduced.<sup>1241</sup> We consider that these facts pre-empt the possibility that Resolute's partial cutting obligations were already in existence before the PCIP was established. Therefore, we agree with Canada that Resolute's agreement to harvest blocks subject to the partial cutting requirement, will be informed by the knowledge that Québec will reimburse it for the additional expenses that this requirement entails.<sup>1242</sup> Therefore, because Resolute's obligation to abide by its Harvest Agreements and Québec's obligation to reimburse Resolute for abiding by the partial cutting requirements foreseen in the Harvest Agreement are both stipulated in the Treasury Board Note, and because the Treasury Board Note predates Resolute's Harvest Agreements, an objective and impartial investigating authority would not have found that PCIP payments were separate from the mandatory partial cutting obligation.

7.627. Refuting Canada's argument that Resolute performed partial cutting activities in exchange for PCIP payments from Québec, the United States also contends that provision of stumpage by Québec and the provision of PCIP payments to Resolute constituted two distinct transactions.<sup>1243</sup> The United States asserts that in the first transaction, Resolute purchased standing timber from Québec and was legally required to perform partial cutting as a condition to access and harvest Crown timber, while in the second transaction, Québec provided Resolute the opportunity to apply for PCIP payments. On this basis, the United States argues that there was no exchange of rights and obligations in respect of PCIP payments provided by Québec to Resolute.<sup>1244</sup> The United States supports its argument that the provision of PCIP payments and the imposition of the partial cutting requirement as a condition to harvest stumpage were two distinct transactions, by pointing to the fact that harvesters must apply to Québec's Ministry of Forests for receiving reimbursements.<sup>1245</sup> We reject these arguments of the United States. As noted above, the Treasury Board Note that established the PCIP also obliged Resolute to abide by its Harvest Agreement, which required Resolute to perform partial cutting. In our view, this indicates that, notwithstanding the temporal separation between the imposition of the relevant silviculture obligations and the application for and receipt of PCIP payments by Resolute, the two were reciprocal considerations foreseen in the Treasury Board Note establishing the PCIP. We also consider that the fact that Resolute must apply to Québec's Ministry of Forests for receiving the reimbursement does not alter that reciprocal character of performance of partial cutting obligation and the provision of reimbursements therefor. As Canada has explained, the submission of such an application is a part of the mechanism through which Québec verifies Resolute's compliance with the partial cutting obligation before providing the

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regulated, the Harvest Agreements are the specific legal instrument through which a particular harvester is tied to the partial cutting obligation with respect to a particular block. This understanding is confirmed by Section 103 of the SFDA, which provides that "[t]he harvest Agreement specifies the forest operations zones where the timber is to be harvested and sets out the conditions for harvesting and for the other forest development activities related to this responsibility".

<sup>1238</sup> Treasury Board Note, (Exhibit CAN-208).

<sup>1239</sup> Treasury Board Note, (Exhibit CAN-208), Sections 8.3 and 9.1. We note that Section 5 of the Treasury Board Note provides that eligible "agents" include "beneficiaries of timber supply guarantees".

<sup>1240</sup> Canada's response to Panel question No. 283, fn 21; Harvest Agreement, (Exhibit CAN-623 (BCI)), p. 8.2.

<sup>1241</sup> Québec initial questionnaire response, (Exhibit CAN-170), pp. QC-S-1-QC-S-2. We note that this questionnaire response indicates that the SFDA was adopted in 2010, and went into force on 1 April 2013.

<sup>1242</sup> Canada's response to Panel question No. 283, para. 8.

<sup>1243</sup> United States' first written submission, para. 645.

<sup>1244</sup> United States' first written submission, para. 646.

<sup>1245</sup> United States' first written submission, para. 646.

reimbursement.<sup>1246</sup> We consider that the mechanism through which Québec ensures the fulfilment of the partial cutting obligations by the recipient of the PCIP payments does not imply that the PCIP payment is a transaction distinct from the imposition of the partial cutting obligation as a condition to harvest stumping, such that the PCIP payments become a grant.

7.628. We therefore consider that the USDOC improperly found that the PCIP payments made by Québec to Resolute were a grant.<sup>1247</sup>

#### **7.10.3.2 USDOC's benefit determination**

7.629. In the final determination, after characterizing the relevant reimbursements provided by Québec and New Brunswick as grants, the USDOC proceeded to find the total amount of reimbursements to be the amount of benefit conferred on the recipients.<sup>1248</sup> As we have found that the USDOC did not provide a reasoned and adequate explanation for its finding that the silviculture and forest management reimbursements made by New Brunswick to JDIL, and the PCIP payments made by Québec to Resolute, were grants, we conclude that the USDOC's benefit finding was consequentially flawed. This is because the USDOC's benefit finding was premised on its view that the reimbursements in question constituted grants. We concur with the finding of the panel in *EC and certain member States – Large Civil Aircraft* that the amount of financial contribution and the amount of the benefit are the same in cases where a government provides a grant to a recipient.<sup>1249</sup> We, however, consider that the USDOC could not have found the entire amounts of the relevant reimbursements to represent the amount of benefit conferred in the absence of a reasonably and adequately explained finding that the reimbursements were grants in the first place.

#### **7.10.3.3 Conclusion**

7.630. Based on the foregoing, we find that the USDOC did not provide a reasoned and adequate explanation for characterizing the reimbursements provided by New Brunswick to JDIL, and by Québec to Resolute, as financial contributions in the form of grants under Article 1.1(a)(1)(i) of the SCM Agreement. We also find that, consequently, the USDOC's benefit findings in respect of the reimbursements provided by New Brunswick to JDIL, and Québec to Resolute, were also tainted and hence inconsistent with Article 1.1(b) of the SCM Agreement.<sup>1250</sup>

### **7.11 Canada's claims concerning provincial electricity programmes**

7.631. The USDOC investigated whether provincial electricity programmes in British Columbia, Québec, and New Brunswick conferred a benefit on West Fraser, Tolko, Resolute, and Irving. In British Columbia, the USDOC found that BC Hydro provided a financial contribution in the form of a purchase of goods, i.e. electricity, to West Fraser and Tolko that conferred a benefit, because the purchase was made for more than adequate remuneration.<sup>1251</sup> Similarly, in Québec, the USDOC

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<sup>1246</sup> Canada's response to Panel question No. 283, para. 9. We also note that Section 9.2 of the Treasury Board Note that established the PCIP requires the recipient of PCIP payments to submit an "activity report".

<sup>1247</sup> We note that Canada has also argued that PCIP payments made by Québec to Resolute were a purchase of services, and not grants, due to which the reimbursements were not financial contributions covered under Article 1 of the SCM Agreement. (Canada's first written submission, paras. 974 and 980). We consider that because we have found that the USDOC improperly found that the reimbursements in question were grants, we need not rule on whether the reimbursements should properly have been characterized as a purchase of services.

<sup>1248</sup> Final determination, (Exhibit CAN-10), pp. 186 and 189.

<sup>1249</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, fn 5724.

<sup>1250</sup> We note that in response to a Panel question, Canada stated that it is making a consequential claim of violation of Articles 19.3 and 19.4 of the SCM Agreement. (Canada's response to Panel question No. 134, para. 385). We note, however, that Canada did not refer to Articles 19.3 and 19.4 of the SCM Agreement in the context of its claims concerning silviculture reimbursements in its first written submission. We therefore consider that we cannot make findings under those provisions of the SCM Agreement, in light of paragraph 3.1 of the working procedures which provides that "[b]efore the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments". This approach is consistent with the Appellate Body's finding in *EC – Fasteners (China)* "that assertions made ... only in response to questioning by the Panel, [cannot] comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law". (Appellate Body Report, *EC – Fasteners (China)*, para. 574). We note that rule 4 of the Working Procedures of the panel in that case is equivalent to paragraph 3.1 of the Panel's Working Procedures in this case.

<sup>1251</sup> Final determination, (Exhibit CAN-10), p. 166.

found that Hydro-Québec purchased electricity from Resolute for more than adequate remuneration, and thus provided a financial contribution to Resolute in the form of a purchase of goods that conferred a benefit.<sup>1252</sup> In New Brunswick, the USDOC found that New Brunswick Power Corporation (NB Power) provided a financial contribution that conferred a benefit to Irving in the form of revenue foregone under the LIREPP because it reduced Irving's electricity bills.<sup>1253</sup>

7.632. Canada claims that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement because the USDOC incorrectly determined that provincial electricity programmes conferred a benefit.<sup>1254</sup> Specifically, Canada submits that the USDOC incorrectly found that:

- a. BC Hydro purchased electricity from West Fraser and Tolko for more than adequate remuneration;
- b. Hydro-Québec purchased electricity from Resolute for more than adequate remuneration; and
- c. the LIREPP constituted revenue foregone by New Brunswick in favour of Irving.

7.633. Canada also challenges the USDOC's finding that these purchases of electricity (in the case of New Brunswick, revenue foregone) were attributed to the product under investigation, i.e. softwood lumber.

### **7.11.1 British Columbia provincial electricity programme**

#### **7.11.1.1 Introduction**

7.634. We will first consider Canada's claim that the USDOC incorrectly determined that the purchase of electricity by BC Hydro from West Fraser and Tolko was made for more than adequate remuneration and, therefore, was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. Canada's main argument concerns the USDOC's approach to conduct its benefit analysis on the basis of a single market for electricity in British Columbia. Canada argues that the USDOC erred by finding that the relevant market was a single market for electricity generated from all sources in British Columbia.<sup>1255</sup> For Canada, the relevant market for assessing the adequacy of remuneration was the wholesale market for biomass electricity produced and sold in British Columbia.<sup>1256</sup> Canada argues that the USDOC conflated distinct markets: the wholesale market where BC Hydro purchases and generates electricity from a variety of sources at a variety of prices; and the retail market, where BC Hydro sells electricity to consumers at tariff rates that reflect the blend of generation sources and their costs.<sup>1257</sup> After failing to identify the relevant market, Canada argues that the USDOC selected a benchmark that did not reflect "prevailing market conditions" when it compared BC Hydro's retail electricity rates with the rates at which BC Hydro purchased electricity.<sup>1258</sup>

7.635. The United States submits that the USDOC defined the relevant market in the investigation as the market where BC Hydro both bought electricity from Tolko and West Fraser and sold electricity to Tolko and West Fraser.<sup>1259</sup> The United States contends that BC Hydro's retail electricity tariff is the best benchmark for determining the benefit to the recipient, considering that BC Hydro both purchased electricity from, and sold electricity to, West Fraser and Tolko.<sup>1260</sup>

7.636. We begin our assessment of Canada's allegations by setting out the relevant legal standard applicable to benefit determinations under Articles 1.1(b) and 14(d). We then consider it useful to

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<sup>1252</sup> Final determination, (Exhibit CAN-10), pp. 162-167 and 170-173.

<sup>1253</sup> Final determination, (Exhibit CAN-10), p. 213.

<sup>1254</sup> Canada's panel request, p. 3.

<sup>1255</sup> Canada's first written submission, para. 1049.

<sup>1256</sup> Canada's first written submission, para. 1054.

<sup>1257</sup> Canada's opening statement at the first meeting of the Panel (27 February 2019), para. 133; first written submission, para. 1048.

<sup>1258</sup> Canada's first written submission, paras. 1055-1062.

<sup>1259</sup> United States' first written submission, para. 681.

<sup>1260</sup> United States' first written submission, paras. 683-684.

set out, in some detail, the regulatory regime in British Columbia in which BC Hydro operated and the relevant purchases of electricity were made.

#### **7.11.1.2 Legal standard**

7.637. We recall that Article 1.1(b) of the SCM Agreement provides that "a subsidy shall be deemed to exist if ... a benefit is thereby conferred." A financial contribution will confer a benefit upon a recipient within the meaning of Article 1.1(b) when it provides an advantage to the recipient. The Appellate Body has indicated that "the marketplace provides an appropriate basis for comparison" in determining whether a benefit has been conferred.<sup>1261</sup> A financial contribution will only confer a benefit, "if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market".<sup>1262</sup> Article 14 sets out the guidelines for calculating a benefit to the recipient pursuant to Article 1.1(b).

7.638. 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.<sup>1263</sup> 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).<sup>1264</sup>

#### **7.11.1.3 The British Columbia Energy Plan**

7.639. In 2007, the Government of British Columbia issued a new policy plan called "The BC Energy Plan: A Vision for Clean Energy Leadership" (BC Energy Plan). The BC Energy Plan sets out numerous "policy actions".<sup>1265</sup> Relevant to the current dispute, the BC Energy Plan contains policy actions to ensure that (a) clean or renewable electricity<sup>1266</sup> generation continues to account for at least 90% of total generation<sup>1267</sup>; (b) British Columbia is to achieve energy self-sufficiency by 2016<sup>1268</sup>; and (c) greenhouse gas emissions from new and existing generation projects will be reduced to zero.<sup>1269</sup> Certain policy actions contained in the BC Energy Plan were subsequently enacted in the *Clean Energy Act* in 2010.<sup>1270</sup>

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<sup>1261</sup> Appellate Body Report, *Canada – Aircraft*, para. 157. The parties agree that the marketplace provides the appropriate basis for comparison. Canada argues that, "[t]he actual comparison required in a specific benefit analysis is to be conducted by comparing the terms of a government's 'financial contribution' to terms available in the relevant market for a comparable transaction". (Canada's first written submission, para. 1019). The United States argues that this comparison is accomplished by considering the "market [as] the appropriate benchmark in determining benefit within the meaning of Article 1.1(b)". (United States' first written submission, para. 670 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 976)).

<sup>1262</sup> Panel Report, *Canada – Aircraft*, para. 9.112. See also, Appellate Body Report, *Canada – Aircraft*, para. 157.

<sup>1263</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.306.

<sup>1264</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 190-191.

<sup>1265</sup> BC Energy Plan, (Exhibit CAN-402), pp. 3-4.

<sup>1266</sup> The BC Energy Plan states that clean or renewable resources include sources of energy that are constantly renewed by natural processes, such as water power, solar energy, wind energy, tidal energy, geothermal energy, wood residue energy, and energy from organic municipal waste. (BC Energy Plan, (Exhibit CAN-402), p. 13).

<sup>1267</sup> BC Energy Plan, (Exhibit CAN-402), pp. 3 and 39, policy action No. 21.

<sup>1268</sup> BC Energy Plan, (Exhibit CAN-402), pp. 3 and 39, policy action No. 10.

<sup>1269</sup> BC Energy Plan, (Exhibit CAN-402), pp. 3 and 39, policy action Nos. 18 and 19.

<sup>1270</sup> Clean Energy Act, (Exhibit CAN-403), pp. 4-5. The *Clean Energy Act* states that British Columbia's energy objectives comprise, among other things, to achieve electricity self-sufficiency, to generate at least 93% of electricity in British Columbia from clean or renewable resources, to reduce British Columbia greenhouse gas emissions by 2020 and for each subsequent calendar year to at least 33% less than the level of those emission in 2007, and to reduce waste by encouraging the use of waste heat, biogas, and biomass.

7.640. BC Hydro is a provincial Crown corporation with a mandate to generate, manufacture, conserve, supply, acquire, and dispose of power in British Columbia.<sup>1271</sup> It generates electricity through its own facilities and purchases energy through electricity purchase agreements (EPAs).<sup>1272</sup> The BC Energy Plan includes specific policy actions concerning BC Hydro's acquisition of electricity through EPAs, including the promotion of new sources of energy.<sup>1273</sup> The BC Energy Plan states:

Through the BC Energy Plan, BC Hydro will issue a call for proposals for electricity from sawmill residues, logging debris and beetle-killed timber to help mitigate impact from the provincial mountain pine beetle infestation.<sup>1274</sup>

BC Hydro issued Bioenergy Call Phases I and II in 2008 and 2010 respectively.<sup>1275</sup> Bioenergy Call Phases I and II were "competitive calls", aimed at yielding a pre-established target of electricity generation with certain eligibility criteria.<sup>1276</sup>

7.641. Separate to the Bioenergy Call Phases, the BC Energy Plan established a Standing Offer programme to encourage production of clean electricity by small producers.<sup>1277</sup> Under this programme, BC Hydro purchased directly from eligible suppliers at a set price.<sup>1278</sup> The Standing Offer programme is not limited to biomass energy producers. BC Hydro also enters into bilateral negotiations to procure energy.<sup>1279</sup>

7.642. In the retail market, the rates that BC Hydro charges for the provision of electricity are subject to approval by the British Columbia Utilities Commission and determined by relevant provisions of the *Utilities Commission Act*, *Clean Energy Act*, and regulations.<sup>1280</sup> When BC Hydro sells electricity to customers, it does not distinguish between energy supply sources or ownership, i.e. whether electricity was generated using biomass or hydro (for example), or whether it was purchased by BC Hydro or generated by BC Hydro's own facilities.<sup>1281</sup>

#### **7.11.1.4 The USDOC's determination regarding the benefit conferred on West Fraser and Tolko**

7.643. The USDOC found that BC Hydro had EPAs with 105 independent power producers, including West Fraser and Tolko.<sup>1282</sup> West Fraser reported two EPAs to the USDOC for its sawmills at Chetwynd and Fraser Lake.<sup>1283</sup> Tolko similarly reported two EPAs to the USDOC.<sup>1284</sup> First, a bilateral EPA with respect to Tolko's Armstrong facility, negotiated following Tolko's unsuccessful participation in

<sup>1271</sup> British Columbia initial questionnaire response, (Exhibit CAN-395), p. BC-II-30; Hydro and Power Authority Act, (Exhibit CAN-397), p. 5.

<sup>1272</sup> British Columbia initial questionnaire response, (Exhibit CAN-395), p. BC-II-33.

<sup>1273</sup> The relevant policy actions include taking advantage of the large volume of beetle-killed timber in British Columbia following the "unprecedented mountain pine beetle infestation". (BC Energy Plan, (Exhibit CAN-402), pp. 17-18).

<sup>1274</sup> BC Energy Plan, (Exhibit CAN-402), pp. 17-18 and 39, policy action No. 31. The Panel notes that this is one of 55 policy actions under the BC Energy Plan.

<sup>1275</sup> BCUC application for BioPhase 1, (Exhibit CAN-404 (BCI)); Report on the RFP process, (Exhibit CAN-405).

<sup>1276</sup> British Columbia initial questionnaire response, (Exhibit CAN-395), p. BC-II-34. Prices in EPAs resulting from the Bioenergy Call Phases were determined by the successful proponent's bid into the call process. (British Columbia initial questionnaire response, (Exhibit CAN-395), p. BC-II-43).

<sup>1277</sup> BC Energy Plan, (Exhibit CAN-402), pp. 10 and 39, policy action No. 11.

<sup>1278</sup> British Columbia initial questionnaire response, (Exhibit CAN-395), pp. BC-II-40 and BC-II-45-BC-II-46. Eligible projects must be less than 10 MW in size and be clean electricity or high efficiency electricity cogeneration. The price offered in the standing offer contract would be based on the prices paid in the most recent BC Hydro energy call. (BC Energy Plan, (Exhibit CAN-402), p. 10). See also, Standing Offer programme rules, (Exhibit CAN-407).

<sup>1279</sup> British Columbia initial questionnaire response, (Exhibit CAN-395), p. BC-II-35. For example, BC Hydro uses bilateral negotiations to renew pre-existing EPAs.

<sup>1280</sup> British Columbia initial questionnaire response, (Exhibit CAN-395), pp. BC-II-47 and BC-II-50-52; Utilities Commission Act, (Exhibit CAN-398); and Clean Energy Act, (Exhibit CAN-403), pp. 9-10.

<sup>1281</sup> British Columbia initial questionnaire response, (Exhibit CAN-395), pp. BC-II-47 and BC-II-49.

<sup>1282</sup> Preliminary determination, (Exhibit CAN-8), p. 84.

<sup>1283</sup> Preliminary determination, (Exhibit CAN-8), p. 84. BC Hydro and West Fraser negotiated these EPAs as part of Bioenergy Call Phase II. (British Columbia initial questionnaire response, (Exhibit CAN-395), BC Hydro Narrative, p. BC-II-37). See also, Fraser Lake EPA, (Exhibit CAN-411 (BCI)); and Chetwynd EPA, (Exhibit CAN-412 (BCI)).

<sup>1284</sup> Preliminary determination, (Exhibit CAN-8), p. 84.

Bioenergy Call Phase I.<sup>1285</sup> Second, an EPA as a result of the Standing Offer programme between BC Hydro and Tolko's Kelowna sawmill and cogeneration facility.<sup>1286</sup>

7.644. To determine the benefit conferred on West Fraser and Tolko, the USDOC selected a comparator by which it could compare whether the remuneration that BC Hydro paid West Fraser and Tolko for electricity pursuant to their respective EPAs was adequate. The USDOC selected the price at which BC Hydro *sold* electricity to West Fraser and Tolko.<sup>1287</sup> As a result of this comparison, the USDOC determined that BC Hydro's purchases of electricity were made for more than adequate remuneration and therefore, conferred a benefit.<sup>1288</sup> The USDOC's rationale was that the best measure of the benefit to the recipient is the difference between the price at which a government provided the good and the price at which the government purchased that same good.<sup>1289</sup> The USDOC explained that it considers a benefit to be conferred in relation to the purchase of a good when a firm receives more revenues than it otherwise would earn in the absence of the government programme.<sup>1290</sup>

7.645. Before the USDOC, West Fraser and the Government of British Columbia argued that the EPAs were the result of a competitive bidding process and, in that sense, market based. In these circumstances, West Fraser and the Government of British Columbia argued the prices were adequate and no benchmark analysis is required.<sup>1291</sup> The USDOC found that the prices paid under EPAs could not be considered market based because they resulted from the Government of British Columbia's policy framework, i.e. the BC Energy Plan, which limited the sources from which BC Hydro could source electricity, namely from within the province and from renewable sources.<sup>1292</sup> In addition, the USDOC found that the adequacy of remuneration does not exist in a vacuum and to determine whether remuneration is "adequate", a comparison source is needed. Accordingly, the USDOC determined that it was necessary to select a benchmark to calculate the benefit.<sup>1293</sup>

7.646. The USDOC rejected the argument of Tolko, West Fraser, and the Government of British Columbia to use successful bid prices under the Bioenergy Call Phase I as a benchmark, on the basis that the benchmark used to measure the benefit from an investigated programme should not be taken from that same programme.<sup>1294</sup> To do so would not capture the difference between the price at which the government sold electricity and purchased electricity. In response to the argument that the EPAs reflect the market-based prices for the specific electricity product (i.e. biomass electricity), and that there are different types of electricity, the USDOC found that while electricity can be generated using various sources (including hydro, coal, gas, oil, solar, nuclear, biomass), there was no information on the record to demonstrate that the method used to generate electricity changes the "physical characteristics of electricity or the fungibility of electricity".<sup>1295</sup> In support of this assertion, the USDOC observed that BC Hydro does not track the sources of electricity that it sells to its customers.<sup>1296</sup>

#### **7.11.1.5 Whether the USDOC improperly determined that BC Hydro's purchases of electricity were made for more than adequate remuneration**

##### **7.11.1.5.1 The benchmark selected by the USDOC**

7.647. Canada argues that in assessing whether a government has purchased electricity for more than adequate remuneration, the Appellate Body has indicated that the first analytical step is to

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<sup>1285</sup> Preliminary determination, (Exhibit CAN-8), p. 84; British Columbia initial questionnaire response, (Exhibit CAN-395), pp. BC-II-40-BC II-41. See also, Armstrong EPA, (Exhibit CAN-414 (BCI)).

<sup>1286</sup> Preliminary determination, (Exhibit CAN-8), p. 84; British Columbia initial questionnaire response, (Exhibit CAN-395), p. BC-II-40. See also, Kelowna Standing Offer programme EPA, (Exhibit CAN-416 (BCI)).

<sup>1287</sup> Final determination, (Exhibit CAN-10), p. 166.

<sup>1288</sup> Final determination, (Exhibit CAN-10), p. 166.

<sup>1289</sup> Final determination, (Exhibit CAN-10), p. 166.

<sup>1290</sup> Final determination, (Exhibit CAN-10), p. 165.

<sup>1291</sup> Final determination, (Exhibit CAN-10), p. 163.

<sup>1292</sup> Final determination, (Exhibit CAN-10), p. 164.

<sup>1293</sup> Final determination, (Exhibit CAN-10), pp. 164-165.

<sup>1294</sup> Final determination, (Exhibit CAN-10), p. 167.

<sup>1295</sup> Final determination, (Exhibit CAN-10), p. 167.

<sup>1296</sup> Final determination, (Exhibit CAN-10), p. 167.

define the relevant market from which to select an appropriate benchmark.<sup>1297</sup> Canada's claim of inconsistency with Articles 1.1(b) and 14(b) is based on the USDOC's use of a benchmark from the allegedly incorrect market.<sup>1298</sup> According to Canada, the USDOC erred by finding that the relevant market was a single market for all electricity in British Columbia.<sup>1299</sup>

7.648. The United States argues that the USDOC defined the relevant marketplace correctly as the market where BC Hydro both bought electricity from Tolko and West Fraser and sold electricity to Tolko and West Fraser.<sup>1300</sup> In order to determine whether BC Hydro's purchase of biomass electricity conferred a benefit, the USDOC therefore compared BC Hydro's purchase price of biomass electricity from Tolko and West Fraser to tariff rates charged by BC Hydro to the same companies for electricity generated from all sources.<sup>1301</sup> The United States argues that the USDOC rejected the contention that the relevant market should be limited to the supply side of the market where BC Hydro bought electricity from Tolko and West Fraser, as these were the transactions for which the USDOC had to decide whether a benefit had been conferred.<sup>1302</sup> In our view, this approach by the USDOC was fundamentally flawed.

7.649. In considering the benchmark the USDOC selected, we note that the relevant financial contribution is the purchase by BC Hydro of electricity generated by Tolko and West Fraser from biomass.<sup>1303</sup> In purchasing electricity, BC Hydro was bound by the requirements of the BC Energy Plan, which required it to purchase electricity generated from biomass.<sup>1304</sup> In the context of *that* regulatory regime, electricity generated by Tolko and West Fraser was not substitutable – from BC Hydro's perspective – with electricity generated from other sources.<sup>1305</sup> As a result, the fact that BC Hydro did not track the source of electricity that it sells to *its* customers<sup>1306</sup>, or the fact that there was no information on the record to demonstrate that the method used to generate electricity changes the physical characteristics or the fungibility of electricity<sup>1307</sup>, is not determinative. The regulatory regime imposed by the BC Energy Plan shaped the prevailing market conditions<sup>1308</sup> governing the sale and purchase of electricity at the wholesale level. The fact that a regulatory

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<sup>1297</sup> Canada's first written submission, para. 1021 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.169).

<sup>1298</sup> Canada's first written submission, paras. 1022 and 1048-1054; second written submission, para. 348.

<sup>1299</sup> Canada's first written submission, para. 1049.

<sup>1300</sup> United States' first written submission, paras. 680-681.

<sup>1301</sup> United States' first written submission, para. 684; response to Panel question No. 278, paras. 420-421.

<sup>1302</sup> United States' first written submission, para. 681.

<sup>1303</sup> Furthermore, we find that the purchases of electricity produced from biomass energy sources were made pursuant to four specific EPAs between BC Hydro, and Tolko and West Fraser. (Preliminary determination, (Exhibit CAN-8), pp. 84-85). The EPAs were concluded pursuant to three different procurement mechanisms, the Bioenergy Call Phase II, Standing Offer programme, and bilateral negotiations. (See, above, paras. 7.640-7.641). There is nothing on the record to suggest that the regulatory regime existent in British Columbia, in a broad sense, was the subsidy programme under investigation.

<sup>1304</sup> We recall policy action No. 31 of the BC Energy Plan, which states that BC Hydro "will issue a call for proposals for electricity from sawmill residues, logging debris and beetle-killed timber". (BC Energy Plan, (Exhibit CAN-402), policy action No. 31). We also note that the BC Energy Plan provides that clean or renewable electricity generation continues to account for at least 90% of total generation in British Columbia. (BC Energy Plan, (Exhibit CAN-402), pp. 3 and 39, policy action No. 21; see, above, paras. 7.639-7.642). We consider that BC Hydro's acquisition of biomass energy in the four EPAs at issue was made pursuant to these policy directives.

<sup>1305</sup> Nor was it substitutable from the perspective of West Fraser and Tolko. The EPAs at issue were for the sale of electricity generated from biomass, not the sale of electricity indeterminate of the source. The United States argues that Tolko and West Fraser considered electricity they sold to BC Hydro to be "completely substitutable" with electricity provided by BC Hydro's own facilities. (United States' first written submission, para. 683. See also, second written submission, para. 432). In support of this assertion, the United States references statements which, in our opinion, demonstrate that electricity, *when sold in the retail market*, is fungible. (United States' first written submission, fn 1261).

<sup>1306</sup> United States' first written submission, para. 683.

<sup>1307</sup> The parties agree that electricity is physically identical regardless of how it is generated. (Canada's response to Panel question No. 281, para. 430; United States' response to Panel question No. 281, para. 425).

<sup>1308</sup> We note that the illustrative list of prevailing market conditions set forth in Article 14(d) includes "marketability". In our view, the regulatory requirement for a certain amount of electricity generated from biomass concerns the "marketability" of electricity.

regime shapes the wholesale electricity market in British Columbia is not, in and of itself, a cause of subsidization.<sup>1309</sup>

7.650. Accordingly, the benchmark selected by the USDOC should have reflected these prevailing market conditions for electricity at the wholesale level. By selecting a benchmark that reflected prevailing market conditions for the sale of electricity at the *retail* level, where the prevailing market conditions were not shaped by the same regulatory regime, the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement.<sup>1310</sup>

#### **7.11.1.5.2 Whether the USDOC improperly rejected the benchmarks submitted by the interested parties**

7.651. Having found that the USDOC failed to select a benchmark that related to the prevailing market conditions of BC Hydro's purchase of electricity from West Fraser and Tolko, we turn now to consider Canada's arguments that the USDOC improperly rejected the alternative benchmarks submitted by the interested parties during the investigation.

7.652. Canada argues that Article 14(d) permits the assessment of adequacy of remuneration for the purchase of a good in the absence of a benchmark price.<sup>1311</sup> According to Canada, three of the four EPAs in question had market-determined prices such that they did not need a benchmark.<sup>1312</sup> Canada also argues that Bioenergy Call Phase I could have served as an appropriate benchmark for all EPAs under investigation.<sup>1313</sup> Canada asserts that the USDOC improperly rejected BC Hydro's Bioenergy Call Phase I as a market-based price discovery mechanism.<sup>1314</sup> Canada submits that the evidence before the USDOC confirmed that the Bioenergy Call Phase I prices were market based. In particular, the expert report of Dr Rosenzweig showed that the Bioenergy Call Phase I followed "the 'open', 'transparent' and 'best offer' characteristics of a competitive process".<sup>1315</sup> In support of its assertion that the EPAs were "competitively priced", Canada also refers to the British Columbia Utilities Commission's acceptance of the EPAs resulting from the Bioenergy Call Phase I.<sup>1316</sup>

7.653. The United States argues that Canada's position whereby an investigating authority assesses the adequacy of remuneration by comparing the remuneration against itself is untenable.<sup>1317</sup> The United States argues, as did the USDOC, that it would be incongruent to select as a benchmark price the same programme price for electricity that is under investigation for providing a benefit.<sup>1318</sup>

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<sup>1309</sup> The regulatory regime *per se* is only disciplined under the SCM Agreement to the extent that it falls within the scope of that Agreement, in the sense that it provides for financial contributions that confer benefit. Furthermore, we note that the USDOC itself recognised that the existence of regulation in a market does not necessarily preclude prices in that market from being used as a benchmark:

Although we acknowledge that the electricity tariffs that are charged by both [sic] BC Hydro are regulated and approved by the [Government of British Columbia] through the [British Columbia Utilities Commission], we disagree that this precludes their use in determining the benefit to the recipients.

(Final determination, (Exhibit CAN-10), p. 166)

The USDOC did not determine that the regulatory regime resulting from the BC Energy Plan would distort the market, in the sense of preventing the establishment of market-determined prices of wholesale electricity.

<sup>1310</sup> Under the SCM Agreement, government regulation should not be equated with subsidization, unless it takes the form of a financial contribution that confers a benefit. Our finding is broadly consistent with reasoning advanced by the Appellate Body in *Canada – Renewable Energy / Feed-in Tariff Program*, in particular para. 5.176, and the Appellate Body's finding that "the government's definition of the energy supply-mix for electricity generation does not *in and of itself* constitute a subsidy". (Appellate Body Report, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.190). (emphasis added)

<sup>1311</sup> Canada's first written submission, para. 1029.

<sup>1312</sup> Canada's first written submission, para. 1060. Canada does not argue that the EPA between BC Hydro and Tolko's Kelowna facility, as a result of the Standing Offer programme, has market-determined prices such that it did not need a benchmark.

<sup>1313</sup> Canada's first written submission, para. 1059; second written submission, para. 377.

<sup>1314</sup> Canada's first written submission, para. 1057.

<sup>1315</sup> Canada's first written submission, para. 1059 (referring to Rosenzweig Report, (Exhibit CAN-417), p. 23).

<sup>1316</sup> Canada's first written submission, para. 1059.

<sup>1317</sup> United States' first written submission, para. 684. See also, second written submission, para. 438.

<sup>1318</sup> United States' first written submission, para. 678 (referring to Final determination, (Exhibit CAN-10), p. 167); comments on Canada's response to Panel question No. 275, para. 275.

According to the United States, the USDOC's reasoning that a comparison source is needed to determine whether remuneration is adequate, accords with the Appellate Body's understanding "that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison".<sup>1319</sup>

7.654. The United States also observes that, in rejecting these alternative benchmarks, the USDOC stated that the EPA process cannot be considered market based, because "this policy framework limits the sources from which BC Hydro can source electricity".<sup>1320</sup> The USDOC found that BC Hydro is required to purchase electricity "from only sources within the province, and increasingly from renewable sources of power".<sup>1321</sup>

7.655. We find that Canada has not put forward adequate legal arguments and evidence<sup>1322</sup> to make a *prima facie* case that the USDOC improperly rejected the alternative benchmarks.<sup>1323</sup> Canada has not provided a sufficient explanation of how the USDOC's rejection of the alternative benchmarks was improper in light of the policy framework that limits the purchase of biomass energy to sources within the province of British Columbia. In particular, we consider that Canada has not provided a sufficient explanation of how the geographical limitation on market participants results in alternative benchmark prices that do *not* deviate from being a market-determined price.<sup>1324</sup> Some form of government regulation may, in particular circumstances, distort pricing. Thus, although geographic limitations on market participants (imposed by regulation) may not necessarily distort pricing in *all* cases, there could be factual situations in which such limitations do operate to cause price distortion. Accordingly, the onus is on Canada, as the complainant, to establish *prima facie* that the USDOC's determination in this regard is flawed. The Panel asked the parties to explain whether and how the statement of the USDOC, that BC Hydro is required to purchase electricity from only sources within the province, is relevant for the Panel's analysis of Canada's claim under Articles 1.1(b) and 14(d) of the SCM Agreement.<sup>1325</sup> Canada contends the policy framework that the Government of British Columbia imposed on BC Hydro's purchase of electricity is "precisely the type of government decision concerning supply mix that the Appellate Body has expressly found cannot be used as a basis to reject an appropriate benchmark from within a properly identified market".<sup>1326</sup> Canada submits no other legal argument in support of its position. In particular, Canada does not address the geographic limitation alluded to by the USDOC.

7.656. In relation to the benchmark based on winning bids in Bioenergy Call Phase I, Canada argues that the expert report of Dr Rosenzweig confirms that Bioenergy Call Phase I prices were market based.<sup>1327</sup> We note that Dr Rosenzweig's Report acknowledges that the Government of British Columbia specified several criteria that BC Hydro must use for its long-term resource planning, including that BC Hydro must be capable of meeting its electricity supply obligations solely from electricity-generation facilities within British Columbia.<sup>1328</sup> In addition, Dr Rosenzweig's Report provides that, "[u]nder [British Columbia] guidelines, the geography of the market is [British Columbia] and the product(s) are long-term non-interruptible resources that are carbon neutral and provided by independent power producers".<sup>1329</sup> Notwithstanding these references, we

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<sup>1319</sup> United States' first written submission, para. 684 (referring to Appellate Body Report, *Canada – Aircraft*, para. 157). See also, second written submission, para. 441.

<sup>1320</sup> Final determination, (Exhibit CAN-10), p. 164; United States' first written submission, para. 676.

<sup>1321</sup> Final determination, (Exhibit CAN-10), p. 164.

<sup>1322</sup> Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134.

<sup>1323</sup> A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party. (Appellate Body Report, *EC – Hormones*, para. 104).

<sup>1324</sup> While proper benchmarks would normally emanate from the market for the good in question, it is only to the extent that these benchmark prices are market determined that they would have the requisite connection with prevailing market conditions in the country of provision, and thereby satisfy Article 14(d). (See, for example, Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151).

<sup>1325</sup> Panel question No. 276.

<sup>1326</sup> Canada's response to Panel question No. 276, para. 422 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.173 and 5.175-5.178). See also, response to Panel question No. 139, para. 398. Canada also argues that no law or regulation requires BC Hydro to purchase electricity from only sources within the province. (Canada's response to Panel question No. 276, para. 421). In response, the United States reiterates the USDOC's finding that it was the policy framework, rather than a law or regulation, that limited BC Hydro's purchase of electricity to in-province suppliers. (United States' comments on Canada's response to Panel question No. 276, paras. 278-279).

<sup>1327</sup> Canada's first written submission, para. 1059.

<sup>1328</sup> Rosenzweig Report, (Exhibit CAN-417), p. 6.

<sup>1329</sup> Rosenzweig Report, (Exhibit CAN-417), p. 15.

do not consider that Dr Rosenzweig's Report addresses how the limitation of the "geography of the market" to British Columbia affects prices in that market, if at all. In any event, Canada may not simply allege facts, as contained in Dr Rosenzweig's Report, and expect the Panel "to divine from it a claim of WTO inconsistency".<sup>1330</sup>

7.657. In relation to the three EPAs that Canada alleges the USDOC should have examined to assess if they were market based and consistent with prevailing market conditions, Canada argues that Tolko's Armstrong EPA was based on Bioenergy Call Phase I pricing and the British Columbia Utilities Commission accepted it as a cost-effective agreement.<sup>1331</sup> With respect to West Fraser's EPAs, Canada submits that Bioenergy Call Phase II produced market-determined prices.<sup>1332</sup> We do not consider this evidence submitted by Canada to be adequate to substantiate its claim that the USDOC's rejection of the alternative benchmarks was improper. We consider that, on its face, the operation of a policy framework that limits BC Hydro's purchases of biomass electricity to sources within the province, requires additional explanation to what Canada has provided as to how prices emanating from that market are, notwithstanding the policy, market-determined such that the USDOC's rejection of those prices was improper.

7.658. In reaching this conclusion, we do not consider that Canada has the burden of proof to demonstrate that the alternative benchmarks, which it alleges the USDOC improperly rejected, are WTO-consistent. Rather, we find that Canada, as the complainant, has the burden to make a *prima facie* case that the USDOC's rejection of the alternative benchmarks was improper. This necessarily involves the submission of adequate legal arguments and evidence in support of its claim.<sup>1333</sup> In light of the evidence and submissions before us, we find that Canada has not made a *prima facie* case that the USDOC improperly rejected the benchmarks submitted by the interested parties. We therefore reject this claim.

#### **7.11.1.5.3 The USDOC's determination of benefit in respect of Tolko's turn-down payments**

7.659. The EPA between BC Hydro and Tolko required Tolko's Armstrong facility to keep an agreed amount of capacity available to BC Hydro and prohibited it from selling electricity to a third party, even when BC Hydro declined to purchase electricity it would otherwise be required to purchase under the Agreement.<sup>1334</sup> If BC Hydro were to turn down energy, the EPA required it to make turn-down payments.<sup>1335</sup> During the POI, BC Hydro made two such turn-down payments to Tolko.<sup>1336</sup> The USDOC included the full amount of turn-down payments to Tolko Armstrong in its benefit calculation.<sup>1337</sup> In the final determination, the USDOC explained that "these payments are used to compensate Tolko for its investment in fixed generation assets that relate to its sales of electricity to BC Hydro".<sup>1338</sup>

7.660. Canada argues that the USDOC failed to identify an appropriate benchmark for Tolko's turn-down payments by treating them as a "grant" and adding the full amount of the turn-down payments to the benefit calculations.<sup>1339</sup> According to Canada, turn-down payments are contractual provisions between BC Hydro and Tolko.<sup>1340</sup> Canada explains that the turn-down payments compensated Tolko for reserving and making available its full generation capacity

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<sup>1330</sup> Appellate Body Report, *US – Gambling*, para. 140.

<sup>1331</sup> Canada's first written submission, para. 1060.

<sup>1332</sup> Canada's first written submission, para. 1061.

<sup>1333</sup> As not every claim of WTO-inconsistency will consist of the same elements, "the nature and scope of evidence required to establish a *prima facie* case 'will necessarily vary from measure to measure, provision to provision, and case to case'". (Appellate Body Report, *US – Gambling*, fn 151 (quoting Appellate Body Report, *Japan – Apples*, para. 159, in turn quoting Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335)).

<sup>1334</sup> Armstrong EPA, (Exhibit CAN-414 (BCI)), sections 7.3 and 7.10; Tolko questionnaire response, (Exhibit CAN-67 (BCI)), pp. TOLKO-CVD-143-TOLKO-CVD-144. See also, Canada's first written submission, paras. 1046 and 1063; and second written submission, para. 380.

<sup>1335</sup> [[\*\*\*]] (Armstrong EPA, (Exhibit CAN-414 (BCI)), p. 18).

<sup>1336</sup> Canada's first written submission, para. 1063.

<sup>1337</sup> Tolko calculation memorandum, (Exhibit CAN-420 (BCI)), tab "Electricity for MTAR".

<sup>1338</sup> Final determination, (Exhibit CAN-10), p. 159.

<sup>1339</sup> Canada's first written submission, paras. 1063-1065.

<sup>1340</sup> Canada's second written submission, para. 380.

exclusively to BC Hydro, as electricity not used by BC Hydro could not be stored and subsequently sold to another party.<sup>1341</sup>

7.661. The United States submits that Tolko itself, in response to the USDOC's questionnaire, described turn-down payments as a compensation for its "investment in fixed generation assets that relate to its sales of electricity to BC Hydro".<sup>1342</sup> The United States argues that the USDOC correctly determined that turn-down payments to Tolko were grants, because BC Hydro did not receive anything in return for providing a direct transfer of funds to Tolko.<sup>1343</sup>

7.662. It is undisputed that in the case of a grant "the conveyance of funds will not involve a reciprocal obligation on the part of the recipient".<sup>1344</sup> The issue before us, therefore, is whether the USDOC erred in finding that the turn-down payments BC Hydro made to Tolko did *not* involve a reciprocal obligation and as a result, if the USDOC failed to assess whether a benefit was conferred consistent with Article 1.1(b). We consider that the record evidence clearly indicates that the turn-down payments were part of the contractual obligation between BC Hydro and Tolko for the purchase of electricity, with reciprocal obligations clearly imposed on Tolko.<sup>1345</sup> We disagree with the arguments of the United States that BC Hydro did not receive anything in return for its payments, since these payments were made according to the provision of the EPA that guarantees the supply of electricity exclusively to BC Hydro and compensates Tolko's costs to generate electricity if BC Hydro turns down the electricity.<sup>1346</sup>

7.663. Nor are we persuaded by the United States' argument that Tolko's description of the turn-down payments as compensation for Tolko's investment in fixed generation assets is, in some way, determinative of the payments being a grant.<sup>1347</sup> Elsewhere in Tolko's questionnaire response (the document on which the United States and the USDOC rely), Tolko explains that:

[T]he Armstrong contract has a provision for BC Hydro to turn down the electricity generation at the Armstrong facility. BC Hydro then pays a fee, essentially a charge for having made our generation capacity available to BC Hydro,[<sup>45</sup>] for the firm energy that is not delivered.<sup>1348</sup>

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<sup>45</sup> It is common for both wholesale energy purchase contracts and electricity tariffs for large industrial customers to include a capacity component and an energy component. The capacity charge would reflect the peak demand the buyer requires, to compensate the Seller for having to have the capacity available to serve the Buyer, and the energy charge will reflect actual energy flows.

We consider this evidence does not support the United States' assertion that the payments were grants. To the contrary, Tolko specifically refers to the provision in the contract for the purchase of electricity, which allows BC Hydro to turn down electricity. An unbiased and objective investigating authority would have taken these contractual obligations into account when assessing whether a benefit was conferred pursuant to Article 1.1(b).

7.664. In light of the above, we find that the USDOC failed to assess whether a benefit was conferred consistent with Article 1.1(b). We also find that the USDOC acted inconsistently with the

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<sup>1341</sup> Canada's first written submission, para. 1064; second written submission, para. 380.

<sup>1342</sup> United States' response to Panel question No. 141, para. 425 (quoting Final determination, (Exhibit CAN-10), p. 159, and referring to Tolko questionnaire response, (Exhibit CAN-67 (BCI))). See also, second written submission, para. 685.

<sup>1343</sup> United States' first written submission, paras. 684-685; response to Panel question No. 279, paras. 422-423.

<sup>1344</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 617. See also, Canada's second written submission, paras. 378-380; United States' first written submission, para. 685; and United States' response to Panel question No. 141, para. 425.

<sup>1345</sup> Armstrong EPA, (Exhibit CAN-414 (BCI)), sections 7.3 and 7.10; Tolko questionnaire response, (Exhibit CAN-67 (BCI)), pp. TOLKO-CVD-143-TOLKO-CVD-144.

<sup>1346</sup> Armstrong EPA, (Exhibit CAN-414 (BCI)), sections 7.3 and 7.10.

<sup>1347</sup> United States' first written submission, para. 685; responses to Panel question No. 141, para. 425, and No. 279, paras. 422-423.

<sup>1348</sup> Tolko questionnaire response, (Exhibit CAN-67 (BCI)), p. TOLKO-CVD-153.

first sentence of Article 14(d) in that, after improperly treating the turn-down payments as grants, it failed to assess whether the purchase of goods was made for more than adequate remuneration.

#### **7.11.1.6 Conclusion**

7.665. In light of the above, we find that the USDOC selected a benchmark that did not relate to the prevailing market conditions within the market where BC Hydro purchased electricity, and accordingly, acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement. We find that Canada has failed to make a *prima facie* case that the USDOC improperly rejected alternative benchmarks in order to assess whether a benefit was conferred.

7.666. As for the turn-down payments BC Hydro made to Tolko, we find that the USDOC failed to assess whether a benefit was conferred consistent with Article 1.1(b). We also find that the USDOC acted inconsistently with the first sentence of Article 14(d) in that it failed to assess whether the purchase of goods was made for more than adequate remuneration.

#### **7.11.2 Québec provincial electricity programme**

##### **7.11.2.1 Introduction**

7.667. We now turn to Canada's claim that the USDOC incorrectly determined that the purchase of electricity by Hydro-Québec from Resolute was made for more than adequate remuneration and, therefore, was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. Canada contends the USDOC wrongly conflated the market for renewable biomass electricity with the market for all sources of electricity, by taking a benchmark from the market in which Hydro-Québec generates electricity from all sources and sells it to all consumers.

7.668. The United States argues that the USDOC found that Hydro-Québec was selling electricity to and purchasing it from Resolute, therefore the benefit to the recipient is the difference between the price at which Hydro-Québec sold electricity and the price at which the government purchased it back.<sup>1349</sup>

7.669. We begin by considering the regulatory regime in Québec in which Hydro-Québec operated and the relevant purchases of electricity were made.

##### **7.11.2.2 The Québec Energy Strategy**

7.670. In 2006, the Government of Québec issued the "Québec Energy Strategy 2006-2015" (Québec Energy Strategy) with the objectives of making energy supply more secure, promoting sustainable development, and increasing energy efficiency.<sup>1350</sup> Electricity in Québec is predominantly sourced from hydroelectricity.<sup>1351</sup> One of the "priority actions" of the Québec Energy Strategy relevant to the current dispute is to facilitate the decentralized production of electricity by encouraging "small-scale electricity production to trigger the development of new energy technologies, including those using biomass".<sup>1352</sup> The strategy provides that "[s]mall quantities of forest residues and biogas produced by small landfill sites or farms are ideal sources of energy for this type of decentralized production".<sup>1353</sup>

7.671. Hydro-Québec is a public utility, owned by the Government of Québec.<sup>1354</sup> Hydro-Québec has separate divisions responsible for the generation of electricity (Hydro-Québec Production), and supply of electricity to customers within Québec (Hydro-Québec Distribution).<sup>1355</sup> When

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<sup>1349</sup> United States' first written submission, para. 693.

<sup>1350</sup> Québec Energy Strategy 2006-2015, (Exhibit CAN-429), p. 4.

<sup>1351</sup> Québec Energy Strategy 2006-2015, (Exhibit CAN-429), p. 10.

<sup>1352</sup> Québec Energy Strategy 2006-2015, (Exhibit CAN-429), p. 72.

<sup>1353</sup> Québec Energy Strategy 2006-2015, (Exhibit CAN-429), p. 72.

<sup>1354</sup> Hydro-Québec Act, (Exhibit CAN-423); Canada's first written submission, para. 1067.

<sup>1355</sup> Québec questionnaire response, (Exhibit CAN-424 (BCI)), p. QC-BIO-1.

Hydro-Québec Distribution requires electricity beyond the guaranteed volume supplied by Hydro-Québec Production, it must be acquired through supply contracts.<sup>1356</sup>

7.672. The Power Purchase programme was one mechanism used to acquire additional electricity volume.<sup>1357</sup> Hydro-Québec issued the Power Purchase programme guided by the policy actions set out in the Québec Energy Strategy and associated regulations.<sup>1358</sup> The Power Purchase programme was designed to purchase 300 MW of electricity from cogeneration plants using forest biomass.<sup>1359</sup> The formula for the price that would be paid by Hydro-Québec Distribution to purchase power under the Power Purchase programme was set out in the standard contract provided with the programme description.<sup>1360</sup> As long as the eligibility criteria<sup>1361</sup> were met, bids submitted in the Power Purchase programme were accepted on a first come, first served basis, until the total quantity of electricity to be purchased pursuant to the programme was reached.<sup>1362</sup>

7.673. The *Régie* is the economic regulatory tribunal for the energy sector of Québec.<sup>1363</sup> It is a quasi-judicial body established by the *Act Respecting the Régie de l'énergie* and is responsible for, *inter alia*, setting distribution rates and conditions of service for Hydro-Québec Distribution, approving the supply plan and features of supply contracts<sup>1364</sup> entered into by Hydro-Québec Distribution, including approving the process for purchasing programmes for electricity from renewable sources (including biomass).<sup>1365</sup>

#### **7.11.2.3 The USDOC's determination regarding the benefit conferred on Resolute**

7.674. The USDOC found that among the power purchase agreements (PPAs) concluded by Hydro-Québec pursuant to the Power Purchase programme, were two PPAs with Resolute with respect to its forest biomass power plants at Gatineau newsprint and Dolbeau specialty paper mills.<sup>1366</sup>

7.675. The USDOC found that Resolute's pulp and paper mills purchased electricity from Hydro-Québec at the "Industrial L rate", the tariff in effect during the POI, and sold electricity to Hydro-Québec at an administratively-set price.<sup>1367</sup> The USDOC selected the Industrial L rate as a benchmark to measure the adequacy of remuneration for Hydro-Québec's purchases of electricity from Resolute. The benefit to Resolute is the difference between those two prices.<sup>1368</sup> The USDOC found that Hydro-Québec's purchase of electricity from Resolute conferred a benefit, which was measured by the difference between the benchmark, the Industrial L rate that Resolute paid for electricity, and the administratively-set prices at which Resolute sold electricity.<sup>1369</sup>

7.676. During the investigation, the Government of Québec argued that the Industrial L rate cannot be used as a benchmark because it does not differentiate by the type of power sold and cannot be

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<sup>1356</sup> Québec questionnaire response, (Exhibit CAN-424 (BCI)), p. QC-BIO-55; Canada's first written submission, para. 1069.

<sup>1357</sup> Québec questionnaire response, (Exhibit CAN-424 (BCI)), p. QC-BIO-55.

<sup>1358</sup> Order in Council D-1086-2011, (Exhibit CAN-431); Canada's first written submission, para. 1071.

<sup>1359</sup> Québec questionnaire response, (Exhibit CAN-424 (BCI)), p. QC-BIO-55. Eligible fuels for the programme were residual forest biomass comprised of bark, sawdust, shavings, trim ends, wood chips, scrap wood, compressed wood products, primary, secondary and de-inking sludge, pulp, and paper cooking liquors, as well as wood products generated in the course of silvicultural treatments or forestry operations.

<sup>1360</sup> Québec questionnaire response, (Exhibit CAN-424 (BCI)), p. QC-BIO-14. Applicants knew when they submitted a bid for the programme how Hydro-Québec Distribution would calculate the price to be paid for electricity purchased pursuant to the programme.

<sup>1361</sup> The eligibility criteria included that electricity must originate from generating facilities located in Québec. (Québec questionnaire response, (Exhibit CAN-424 (BCI)), p. QC-BIO-64).

<sup>1362</sup> Québec questionnaire response, (Exhibit CAN-424 (BCI)), p. QC-BIO-63.

<sup>1363</sup> Québec questionnaire response, (Exhibit CAN-424 (BCI)), p. QC-BIO-44.

<sup>1364</sup> The *Régie* does not approve individual supply contracts, but rather approves the model contracts that serve as the basis for individual contracts. (Québec questionnaire response, (Exhibit CAN-424 (BCI)), pp. QC-BIO-7-QC-BIO-8).

<sup>1365</sup> Québec questionnaire response, (Exhibit CAN-424 (BCI)), pp. QC-BIO-47-QC-BIO-48; Act respecting the *Régie de l'énergie*, (Exhibit CAN-428).

<sup>1366</sup> Preliminary determination, (Exhibit CAN-8), p. 85.

<sup>1367</sup> Final determination, (Exhibit CAN-10), p. 171.

<sup>1368</sup> Final determination, (Exhibit CAN-10), p. 171.

<sup>1369</sup> Final determination, (Exhibit CAN-10), pp. 171-172.

used for a renewable-energy-only programme.<sup>1370</sup> It noted that the Industrial L rate is effectively the price for hydropower, given that hydropower accounts for more than 98% of Hydro-Québec power supply. The Government of Québec and Resolute argued that the USDOC should use prices provided in the report, "The Competitive Cost of Biomass Generated Electricity" prepared by the Merrimack Energy Group (Merrimack Study) to determine a benchmark for Hydro-Québec's purchase of electricity.<sup>1371</sup> The Government of Québec also argued that the Merrimack Study can be used as a "tier-two" benchmark, since it provides a world-market price using a biomass price from Ontario and the United States, as well as a "tier-three" benchmark, because it was used to establish terms and conditions for the Power Purchase programme.<sup>1372</sup>

7.677. The USDOC stated that Hydro-Québec does not differentiate between the sources of electricity provided to its customers, which is confirmed by Hydro-Québec's tariff schedules.<sup>1373</sup> The USDOC rejected the arguments that "tier-two" or "tier-three" benchmarks should be used, given that the USDOC examined the benefit conferred to Resolute based on the benefit-to-the-recipient standard, instead of the three-tiered framework.<sup>1374</sup>

#### **7.11.2.4 Whether the USDOC improperly determined that Hydro-Québec's purchases of electricity were made for more than adequate remuneration**

##### **7.11.2.4.1 The benchmark selected by the USDOC**

7.678. Canada contends the USDOC wrongly conflated the market for renewable biomass electricity with the market for all sources of electricity, by taking a benchmark from the market in which Hydro-Québec generates electricity from all sources and sells it to all consumers. Canada submits that the USDOC failed to take into account the relevant supply-side factors, including the fact that biomass electricity and other generation technologies are not substitutable on the supply side of the market.<sup>1375</sup> Canada argues that the USDOC erred in using the Industrial L rate as a benchmark to assess the adequacy of remuneration, since it was selected within an inappropriate market.<sup>1376</sup>

7.679. The United States argues that the USDOC found that Hydro-Québec was selling electricity to, and purchasing it from Resolute, therefore the benefit to the recipient is the difference between the price at which Hydro-Québec sold electricity and the price at which the government purchased it back.<sup>1377</sup> The United States submits that the USDOC considered both demand-side and supply-side factors. On the demand side, the United States argues the evidence showed that Hydro-Québec considered electricity it purchased from Resolute substitutable with electricity it supplied, regardless of the source from which it was generated.<sup>1378</sup> On the supply side, the United States argues that evidence showed Resolute considered electricity that it sold to Hydro-Québec substitutable with electricity supplied by Hydro-Québec.<sup>1379</sup> For the United States, electricity tariffs that Hydro-Québec charged to Resolute best reflected the benefit-to-the-recipient standard endorsed by the *chapeau* of Article 14 of the SCM Agreement, since Hydro-Québec was both providing electricity to and purchasing it from Resolute.<sup>1380</sup>

7.680. We consider that the situation before us is analogous to BC Hydro's purchases of electricity from West Fraser and Tolko; the legal arguments of the parties are similar in relation to the two subsidy programmes, so we find it appropriate to adopt the same analytical approach.<sup>1381</sup> We must examine whether a benefit has been conferred as a result of the purchases by Hydro-Québec of electricity generated by Resolute from biomass. There is nothing on the record to indicate that the regulatory regime existent in Québec was the subsidy programme under investigation. In purchasing electricity, Hydro-Québec, was bound by the requirements of the Québec Energy Plan, which

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<sup>1370</sup> Final determination, (Exhibit CAN-10), p. 170.

<sup>1371</sup> Final determination, (Exhibit CAN-10), p. 170; Cost of biomass-generated electricity, (Exhibit CAN-432).

<sup>1372</sup> Final determination, (Exhibit CAN-10), pp. 170-171.

<sup>1373</sup> Final determination, (Exhibit CAN-10), p. 172.

<sup>1374</sup> Final determination, (Exhibit CAN-10), pp. 172-173.

<sup>1375</sup> Canada's first written submission, paras. 1081-1086.

<sup>1376</sup> Canada's first written submission, paras. 1087-1092.

<sup>1377</sup> United States' first written submission, para. 693.

<sup>1378</sup> United States' first written submission, para. 694.

<sup>1379</sup> United States' first written submission, para. 695.

<sup>1380</sup> United States' first written submission, para. 695.

<sup>1381</sup> See, above, paras. 7.647-7.650.

required it to purchase electricity generated from biomass.<sup>1382</sup> In the context of *that* regulatory regime, electricity generated by Resolute was not substitutable with electricity generated from other sources.<sup>1383</sup> The regulatory regime imposed by the Québec Energy Plan shaped the prevailing market conditions<sup>1384</sup> governing the sale and purchase of electricity at the wholesale level. The fact that a regulatory regime shapes the wholesale electricity market in Québec is not, in and of itself, a cause of subsidization.<sup>1385</sup> Accordingly, the benchmark selected by the USDOC should have reflected these prevailing market conditions for electricity at the wholesale level. By selecting a benchmark that reflected prevailing market conditions for the sale of electricity at the retail level, where the prevailing market conditions were not shaped by the same regulatory regime, the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement.

#### **7.11.2.4.2 Whether the USDOC improperly rejected the benchmark submitted by the interested parties**

7.681. Canada submits that the USDOC improperly rejected the data in the Merrimack Study as a proper benchmark. The Merrimack Study was based on biomass and renewable electricity costs in Ontario, the United States, and Québec.<sup>1386</sup> Canada argues that if the Panel agrees with the United States' argument that there is a single wholesale market for all renewable electricity in Québec, the USDOC was required to select a benchmark from within the wholesale market for renewable electricity, rather than relying on the retail rate.<sup>1387</sup> According to Canada, the USDOC's failure to rely on the Merrimack Study violates Articles 1.1(b) and 14(d) as it was the only benchmark that provided a fair assessment of the adequacy of remuneration determined in relation to the prevailing market conditions for biomass electricity.<sup>1388</sup>

7.682. The United States argues that the Merrimack Study fails to recognize that Hydro-Québec is acting on both sides of the relevant market for the benefit comparison (i.e. buying and selling electricity).<sup>1389</sup> According to the United States, the Merrimack Study relied on cost data limited to electricity generated by biomass energy technology and did not measure the rate for electricity generated from other sources when the evidence demonstrated that Hydro-Québec did not differentiate between generation sources of electricity.<sup>1390</sup>

7.683. We recall our finding, above, that the benchmark selected by the USDOC should have reflected the prevailing market conditions at the wholesale level, as shaped by the Québec Energy Plan.<sup>1391</sup> The USDOC rejected the Merrimack Study because it found that, "the [Government of Québec] failed to provide any evidence that the prevailing market conditions for the provision of

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<sup>1382</sup> We recall that one of the priority actions of the Québec Energy Strategy is to facilitate the decentralized production of electricity by encouraging "small scale electricity production to trigger the development of new energy technologies, including those using biomass". (Québec Energy Strategy 2006-2015, (Exhibit CAN-429), p. 72; see, above, paras. 7.670-7.673).

<sup>1383</sup> We are not persuaded by the arguments of the United States that the evidence showed Resolute considered electricity that it sold to Hydro-Québec substitutable with electricity supplied by Hydro-Québec. (United States' first written submission, para. 695; see also, second written submission, para. 433). We consider that the evidence demonstrates that electricity was substitutable in the retail market, i.e. in relation to Resolute's *consumption* of electricity.

<sup>1384</sup> We note that the illustrative list of prevailing market conditions set forth in Article 14(d) includes "marketability". In our view, the regulatory requirement for a certain amount of electricity generated from biomass concerns the "marketability" of electricity.

<sup>1385</sup> The regulatory regime *per se* is only disciplined under the SCM Agreement to the extent that it falls within the scope of that Agreement, in the sense that the regime provides for the provision of financial contributions that confer benefit. Furthermore, we note that the USDOC itself recognised that the existence of regulation in a market does not preclude prices in that market from being used as a benchmark:

Although we acknowledge that the electricity tariffs that are charged by both BC Hydro are regulated and approved by the GBC through the [British Columbia Utilities Commission], we disagree that this precludes their use in determining the benefit to the recipients.

(Final determination, (Exhibit CAN-10), p. 166)

The USDOC did not determine that the regulatory regime resulting from the Québec Energy Plan would distort the market, in the sense of preventing the establishment of market-determined prices of wholesale electricity.

<sup>1386</sup> Canada's first written submission, paras. 1093-1095.

<sup>1387</sup> Canada's second written submission, para. 368.

<sup>1388</sup> Canada's first written submission, para. 1095.

<sup>1389</sup> United States' first written submission, para. 696.

<sup>1390</sup> United States' first written submission, para. 696.

<sup>1391</sup> See, above, paras. 7.678-7.680.

electricity by Hydro-Québec is differentiated based upon the manner in which the electricity is generated".<sup>1392</sup> In support of this assertion, the USDOC stated that when electricity rates are set, there is no distinction between sources of electricity generated.<sup>1393</sup> While this may be true, the USDOC's determination does not consider the prevailing market conditions of the purchase of energy at the wholesale level, where a differentiation is made based upon the manner in which electricity *is* generated.

7.684. Therefore, we find that the USDOC improperly rejected the Merrimack Study and as such, assessed the adequacy of remuneration inconsistently with Articles 1.1(b) and 14(d).

#### **7.11.2.5 Conclusion**

7.685. In light of the above, the Panel finds that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in selecting a benchmark that did not relate to the prevailing market conditions within the market where Hydro-Québec purchased biomass electricity. In addition, we find that the USDOC improperly rejected the Merrimack Study and as such, assessed the adequacy of remuneration inconsistently with Articles 1.1(b) and 14(d).

### **7.11.3 New Brunswick provincial electricity programme**

#### **7.11.3.1 Introduction**

7.686. The final provincial electricity programme at issue is the LIREPP in New Brunswick. Canada claims that the USDOC erroneously found that the LIREPP constitutes a financial contribution to Irving through NB Power in the form of revenue foregone, rather than the provision of a good.<sup>1394</sup> Canada argues that the measure at issue should be characterized as a purchase of goods under Article 1.1(a)(iii).<sup>1395</sup> According to Canada, the USDOC's incorrect characterization of the financial contribution meant that it failed to assess the alleged benefit in accordance with Articles 1.1(b) and 14(d) of the SCM Agreement.<sup>1396</sup>

7.687. The United States argues that the credit issued pursuant to the LIREPP decreases the amount of NB Power's revenue (a state-owned corporation) and was properly considered to constitute a financial contribution in the form of revenue foregone.<sup>1397</sup> Because the USDOC properly considered the LIREPP was a financial contribution in the form of revenue foregone, the United States argues the USDOC appropriately decided not to analyse the benefit as if the financial contribution was a purchase of goods under Article 1.1(a)(iii).<sup>1398</sup>

7.688. We first set out the legal standard and relevant factual background to the LIREPP before considering the arguments of the parties.

#### **7.11.3.2 Legal standard**

7.689. We begin by recalling the text of Article 1.1 of the SCM Agreement that provides, in relevant part, as follows:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

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<sup>1392</sup> Final determination, (Exhibit CAN-10), p. 172.

<sup>1393</sup> Final determination, (Exhibit CAN-10), p. 172.

<sup>1394</sup> Canada's first written submission, para. 1109.

<sup>1395</sup> Canada's first written submission, para. 1110.

<sup>1396</sup> Canada's first written submission, para. 1096.

<sup>1397</sup> United States' first written submission, para. 707.

<sup>1398</sup> United States' first written submission, para. 709. See also, second written submission, para. 444.

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods[.]

7.690. Article 1.1(a)(1) is concerned with the different forms that a "financial contribution" may take. Under Article 1.1(a)(1)(ii), a financial contribution may take a form of foregoing government revenue that is otherwise due or not collected. The Appellate Body has stated that a situation where a government foregoes or does not collect its revenue that is "otherwise due" implies that less revenue has been raised by the government than would have been raised in a different situation.<sup>1399</sup> In other words, a government "gives up or relinquishes its entitlement to collect revenue that is owed or payable in other circumstances".<sup>1400</sup> In determining if revenue "otherwise due" has been foregone, a comparison must be made between the revenue actually raised and the revenue that would have been raised "otherwise". The basis of such a comparison is normally the tax or fiscal rules in the jurisdiction at issue.<sup>1401</sup>

7.691. The purchase of goods under Article 1.1(a)(1)(iii) occurs "when a 'government' or 'public body' obtains possession (including in the form of an entitlement) over a good by making a payment of some kind (monetary or otherwise)".<sup>1402</sup> As we have discussed, above, a benefit will be conferred if the purchase is made for more than adequate remuneration.

7.692. Article 1.1(a)(1) is not explicit as to the relationship between the subparagraphs; the structure of the provision does not exclude that there may be circumstances where a transaction may be covered by more than one subparagraph.<sup>1403</sup>

### **7.11.3.3 The Large Industrial Renewable Energy Purchase programme**

7.693. In 2012, the Government of New Brunswick established the LIREPP with two goals: (a) to use more electricity generated from renewable sources, in accordance with the New Brunswick Action Plan; and (b) to bring large industrial enterprises' net electricity costs in line with the average cost of electricity in other provinces.<sup>1404</sup> The Government of New Brunswick states that the purpose of the LIREPP "is to bring electricity costs for qualifying export-oriented companies in New Brunswick in line with the average cost of electricity in provinces where those companies' competitors are located".<sup>1405</sup>

7.694. NB Power, a state-owned company, is the sole supplier of electricity to consumers in New Brunswick.<sup>1406</sup> Together with the New Brunswick Department of Energy and Resource Development (DERD), NB Power administers the LIREPP.<sup>1407</sup> To qualify for the LIREPP, a company must produce "eligible electricity", meaning electricity generated within New Brunswick at an approved facility using biomass, or its chemical by-products.<sup>1408</sup> In order to be an "eligible facility"

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<sup>1399</sup> Appellate Body Report, *US – FSC*, para. 90. We consider this comports with the definition proffered by the United States based on the Oxford English Dictionary, "[r]ead together, the words 'revenue foregone' thus mean the difference between the income that a government could have collected and the income that it did collect". (United States' first written submission, para. 700).

<sup>1400</sup> Appellate Body Reports, *Brazil – Taxation*, para. 5.220.

<sup>1401</sup> Appellate Body Report, *US – FSC*, para. 90; Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 7.120.

<sup>1402</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.123 (referring to Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 7.231).

<sup>1403</sup> Panel Report, *Japan – DRAMS (Korea)*, para. 7.439; Appellate Body Reports, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 613 and fn 1287; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.120.

<sup>1404</sup> Final determination, (Exhibit CAN-10), p. 212. See also, Canada's first written submission, para. 1099; and LIREPP, (Exhibit CAN-440 (BCI)), p. 3.

<sup>1405</sup> New Brunswick LIREPP, (Exhibit CAN-452), p. 2.

<sup>1406</sup> Electricity Act, (Exhibit CAN-438), Sections 72, 73, and 82.

<sup>1407</sup> Appendix to New Brunswick questionnaire response, (Exhibit CAN-450 (BCI)), p. 2.

<sup>1408</sup> LIREPP Regulation, (Exhibit CAN-439), Section 2; Appendix to New Brunswick questionnaire response, (Exhibit CAN-450 (BCI)), p. 9.

for the LIREPP, a company must, *inter alia*, consume not less than 50 GWh of electricity per year, and purchase all, or a portion of, its firm electricity requirements from NB Power.<sup>1409</sup>

7.695. Under the LIREPP, NB Power must purchase eligible electricity<sup>1410</sup> from a large industrial enterprise such that the cost of electricity for all eligible facilities owned by the enterprise is reduced by the Target Reduction Percent.<sup>1411</sup> If NB Power procures an amount of electricity in excess of the amount required to meet renewable energy targets, NB Power will credit the excess amount towards any shortfalls incurred from the electricity goals of previous compliance years.<sup>1412</sup>

7.696. NB Power concluded a LIREPP Agreement<sup>1413</sup> with Irving through a group of four Irving affiliates (the Irving Group):

- a. Irving Paper (a manufacturer of printing and writing paper);
- b. Irving Pulp & Paper (a manufacturer of pulp and producer of biomass fuelled renewable electricity);
- c. St George Power LP (a hydroelectric generating station); and
- d. J.D. Irving, a diversified company, including Lake Utopia (a manufacturer of cardboard packaging components) and a separate forest products division that produces softwood lumber subject to the USDOC's investigation.<sup>1414</sup>

All four companies are co-parties to the LIREPP Agreement.<sup>1415</sup>

7.697. NB Power purchases renewable energy from Irving Pulp & Paper and St George Power. Rather than paying directly for that electricity, NB Power issues a credit for the amount it owes. That credit is applied to the monthly electricity bill issued to Irving Paper. Irving Paper then assigns a share of the amount of credit to J.D. Irving's Lake Utopia Division in proportion to Lake Utopia's electricity consumption (Net LIREPP credit).<sup>1416</sup>

#### **7.11.3.4 The USDOC's determination with respect to the benefit conferred on Irving**

7.698. The USDOC found that the LIREPP was properly analysed as revenue foregone, rather than a possible purchase of electricity for more than adequacy remuneration.<sup>1417</sup> According to the USDOC, the LIREPP credit transferred from Irving Paper to J.D. Irving conferred a benefit on the Irving

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<sup>1409</sup> LIREPP Regulation, (Exhibit CAN-439), Section 2; Appendix to New Brunswick questionnaire response, (Exhibit CAN-450 (BCI)), p. 10. In order to be an "eligible facility" and be eligible for the LIREPP, it must also be the case that 50% or more of the primary products produced by the facility are exported to another province or territory of Canada or elsewhere. (LIREPP Regulation, (Exhibit CAN-439), Section 2).

<sup>1410</sup> NB Power purchases eligible electricity under the LIREPP at the legislated rate of CAD 95 per MWh. (LIREPP Regulation, (Exhibit CAN-439), Section 5). NB Power ceases to purchase eligible electricity at the CAD 95 per MWh LIREPP price when the target reduction amount is reached. (Canada's response to Panel question No. 143, para. 408).

<sup>1411</sup> LIREPP Regulation, (Exhibit CAN-439), Section 4. The Target Reduction Percent is defined in LIREPP Regulation, (Exhibit CAN-439), Section 7 and is based on the amount of electricity that the eligible facilities were contracted to obtain from NB Power immediately before the participation in the LIREPP. (LIREPP Regulation, (Exhibit CAN-439), Section 4).

<sup>1412</sup> LIREPP Regulation, (Exhibit CAN-439), Section 12. Put simply, when the enterprise's electricity costs reach the average electricity cost of a Canadian producer in the same industry sector, NB Power ceases purchasing electricity at the CAD 95 per MWh LIREPP price. (Canada's first written submission, para. 1102 and fn 1869; response to Panel question No. 143, para. 408).

<sup>1413</sup> LIREPP Agreement, (Exhibit CAN-448 (BCI)).

<sup>1414</sup> Appendix to LIREPP questionnaire response, (Exhibit CAN-451 (BCI)), pp. LIREPP-2-LIREPP-3.

<sup>1415</sup> Irving Paper, Irving Pulp & Paper, and J.D. Irving's Lake Utopia Division together meet the energy consumption requirements of the LIREPP, while Irving Pulp & Paper and St George Power together meet the renewable energy generation requirements. (Canada's first written submission, para. 1106).

<sup>1416</sup> Appendix to LIREPP questionnaire response, (Exhibit CAN-451 (BCI)), p. LIREPP-3.

<sup>1417</sup> Final determination, (Exhibit CAN-10), p. 211.

Group.<sup>1418</sup> The USDOC determined that the amount of the credit was the countervailable benefit.<sup>1419</sup> The USDOC explained the programme as follows:

The NB Power officials stated that "the purpose of LIREPP is that 'you want to buy enough to get them to the target discount,'" adding that "we want to buy a certain of [electricity], then we resell at firm rates, then the difference is the NET LIREPP Adjustment." In other words, the NET LIREPP adjustment is the difference between the amount of renewable electricity that NB Power will purchase from the LIREPP participant (here, the participating Irving companies), and the amount of electricity that NB Power will sell to the LIREPP participant (again, the participating Irving companies).<sup>1420</sup>

7.699. The USDOC described the programme as "multifaced"<sup>1421</sup> and acknowledged that it "does encompass in part, the purchase of a good or service".<sup>1422</sup> However, the USDOC concluded that "the credits reduce the participating Irving Companies' monthly electricity bills, and it is the amount of the monthly credits that we have determined is the countervailable benefit".<sup>1423</sup> According to the USDOC, even though the Irving Group sold electricity to NB Power at CAD 95 per MWh, the rate was immaterial to the calculation of the Net LIREPP adjustment.<sup>1424</sup> The USDOC explained this was because the volume of electricity sold is derived using the Target Discount (the total electricity bills for the participating Irving companies multiplied by the Target Reduction Percent) and the fixed rate of CAD 95 per MWh, and the programme guarantees that the Target Discount is reached each month by adjusting the volume of electricity NB Power purchases from the Irving Group.

#### **7.11.3.5 Whether the USDOC improperly found that New Brunswick provided a financial contribution to Irving in the form of revenue foregone that conferred a benefit**

7.700. Canada contends that although the LIREPP was similar to the calls for power in British Columbia and Québec, where the USDOC characterized the financial contribution at issue as the purchase of goods for more than adequate remuneration, the USDOC erroneously characterized the LIREPP as revenue foregone.<sup>1425</sup> Canada argues the USDOC failed to take into account the exchange of rights and obligations under the LIREPP.<sup>1426</sup> According to Canada, the Net LIREPP credit represents money that NB Power owes to the Irving Group for renewable electricity purchased under LIREPP, rather than money that NB Power is entitled to receive.<sup>1427</sup> As a result of an allegedly incorrect finding of financial contribution, the USDOC failed to properly assess the alleged benefit to the Irving Group in accordance with Article 14(d). Canada argues that since the USDOC relied on its revenue foregone finding, it measured benefit by the full amount of the Net LIREPP credit, rather than examining the adequacy of remuneration for purchased electricity.<sup>1428</sup>

7.701. The United States argues that the amount of credit was determined in advance and was separate and apart from any purchases of renewable energy from the LIREPP participants.<sup>1429</sup> The United States submits that NB Power first determines the amount of credit it wants to give to the programme participants and then "works backwards to build up that credit through a series of renewable energy power purchases and sales and additional credits".<sup>1430</sup> The United States argues that since the credit is not tied to the amount of electricity purchased, the USDOC correctly concluded that the credit reduced the Irving Group's electricity bills so this amount confers a benefit.<sup>1431</sup> The United States argues that the USDOC correctly decided not to analyse benefit as if the contribution

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<sup>1418</sup> Final determination, (Exhibit CAN-10), p. 211.

<sup>1419</sup> Final determination, (Exhibit CAN-10), p. 213.

<sup>1420</sup> Final determination, (Exhibit CAN-10), p. 212. (fn omitted)

<sup>1421</sup> Final determination, (Exhibit CAN-10), p. 212.

<sup>1422</sup> Final determination, (Exhibit CAN-10), p. 213.

<sup>1423</sup> Final determination, (Exhibit CAN-10), p. 213.

<sup>1424</sup> Final determination, (Exhibit CAN-10), p. 213.

<sup>1425</sup> Canada's first written submission, para. 1096; second written submission, para. 384.

<sup>1426</sup> Canada's first written submission, paras. 1109-1110; second written submission, para. 388.

<sup>1427</sup> Canada's first written submission, para. 1111; opening statement at the first meeting of the Panel (27 February 2019), para. 147. See also, second written submission, para. 385 where it argues that, "[c]ontrary to Commerce and the U.S. assertion, at no point do the Irving entities receive money for free, nor does NB Power forego any money it is entitled to receive".

<sup>1428</sup> Canada's first written submission, paras. 1114-1116.

<sup>1429</sup> United States' first written submission, paras. 707-708; second written submission, para. 446.

<sup>1430</sup> United States' first written submission, para. 708; second written submission, para. 446.

<sup>1431</sup> United States' first written submission, para. 708; second written submission, para. 446.

constituted a purchase of goods.<sup>1432</sup> The benefit for revenue foregone, according to the United States, is the amount of revenue that is foregone or not collected.<sup>1433</sup> In other words, the revenue foregone by New Brunswick as a result of this credit is the money that the Irving Group did not spend on the electricity bill received from NB Power.<sup>1434</sup> According to the United States, even if the Panel were to find that the LIREPP involved the purchase of a good, such a finding would not exclude the possibility that the LIREPP also constitutes a financial contribution in the form of revenue foregone as defined under Article 1.1(a)(ii).<sup>1435</sup>

7.702. We recall that Article 1.1(a)(1) does not preclude circumstances where a transaction may be characterized under more than one subparagraph of that provision.<sup>1436</sup> However, the issue before us is not whether the LIREPP might *also* be characterized as a purchase of goods under Article 1.1(a)(1)(iii). The issue before us is whether the USDOC erred in characterizing the LIREPP as revenue foregone, rather than the purchase of goods. The United States argues that the amount of the Net LIREPP credit was separate and apart from any purchases of renewable energy from the LIREPP participants<sup>1437</sup>, and that the USDOC was therefore correct in treating the amounts as revenue foregone.

7.703. NB Power generates revenue by selling electricity to customers in New Brunswick, including the Irving Group. Therefore, any amount that is due to NB Power is, ultimately, in exchange for the provision of electricity to consumers in New Brunswick. Under the LIREPP, NB Power pays for the renewable electricity it purchases pursuant to the programme from the eligible companies in the Irving Group by issuing a credit on Irving Paper's electricity bills. We consider that the LIREPP credit is a payment mechanism under the LIREPP Agreement between NB Power and the Irving Group, and represents an amount that NB Power owes to the Irving Group in return for the purchase of renewable electricity.<sup>1438</sup> Although the credit amount ultimately reduces the Irving Group's electricity bills, it does not constitute an amount that would be otherwise due to NB Power. This is not an amount that would otherwise have accrued to NB Power, since NB Power would, in any event, have had to pay that amount to Irving Paper in return for the renewable electricity that it purchased from eligible companies in the Irving Group. The USDOC acknowledged that, "the program does encompass, in part, the purchase of a good or service".<sup>1439</sup> However, it is the revenue generated from these "purchases" of electricity that is used as a credit on Irving Paper's bill against the Irving Group's overall electricity charges.<sup>1440</sup> As such, we consider that the USDOC's finding that the LIREPP credits are revenue foregone and therefore the amount of the countervailable benefit is not one that an unbiased and objective investigating authority could have reached.

7.704. We also do not agree with the argument of the United States that the amount of electricity NB Power purchased from the Irving Group was "immaterial" to the credit that appeared on the companies' electricity bills.<sup>1441</sup> The United States argues that NB Power predetermines the credit to be given to participants in the LIREPP and then "works backwards" to build up to that credit.<sup>1442</sup> According to the United States, the amount of electricity that NB Power purchases from the Irving Group is immaterial to the Net LIREPP adjustment credit that appears on Irving Paper's electricity

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<sup>1432</sup> United States' first written submission, para. 707; second written submission, paras. 443-446.

<sup>1433</sup> United States' first written submission, para. 709 (referring to Panel Report, *US – Washing Machines*, para. 7.303).

<sup>1434</sup> United States' first written submission, para. 709; second written submission, para. 444 (referring to Panel Report, *US – Washing Machines*, para. 7.303).

<sup>1435</sup> United States' second written submission, para. 445.

<sup>1436</sup> See, above, paras. 7.689-7.692.

<sup>1437</sup> United States' first written submission, paras. 707-708.

<sup>1438</sup> We consider that a purchase of a good under Article 1.1(a)(1)(iii) can be effected in exchange for consideration that is of value to both parties to the transaction. (Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 618-619).

<sup>1439</sup> Final determination, (Exhibit CAN-10), p. 213. Elsewhere in the determination, the USDOC appears to acknowledge that the credit is the payment mechanism for the purchase of electricity. The USDOC states, "[i]nstead of paying the full amount owed for 'purchased' renewable energy to IPP and SGP directly, NB Power applies the 'NET LIREPP' credits to the monthly electricity bill issued to IPL, a cross-owned paper producer". (*Ibid.* p. 214). Based on the USDOC's own reasoning, the credit was issued *in lieu* of payment.

<sup>1440</sup> Appendix to New Brunswick questionnaire response, (Exhibit CAN-450 (BCI)), p. 1.

<sup>1441</sup> United States' comments on Canada's response to Panel question No. 280, para. 287.

<sup>1442</sup> United States' first written submission, para. 707; comments on Canada's response to Panel question No. 280, paras. 286-288.

bills.<sup>1443</sup> We understand that the credit is determined in connection with the Target Reduction Percent, which is the percentage by which qualifying companies in New Brunswick would have to reduce their electricity costs to be in line with the average cost of electricity in provinces where those companies' competitors are located. While the Target Reduction Percent may be set in accordance with the LIREPP policy objectives, it does not follow that the amount of electricity purchased is *immaterial* to the credit for the purposes of characterizing the financial contribution pursuant to Article 1.1(a)(1). To the contrary, it is a precondition to the Irving Group receiving the credit that NB Power purchases the requisite amount of electricity. Both the design *and* operation of the LIREPP are relevant considerations in determining its proper characterization for the purpose of Article 1.1(a)(1).<sup>1444</sup> We consider that by focusing on the design of the programme, i.e. that the credit was, according to the United States, predetermined in order to meet certain policy objectives, the USDOC failed to give relevant consideration to the operation of the programme. Specifically, the USDOC failed to consider that the requisite amount of electricity must, as a matter of fact, be purchased by NB Power before a credit is issued to the Irving Group. We find that this is not a conclusion that an unbiased and objective investigating authority could have reached.

#### **7.11.3.6 Conclusion**

7.705. In light of the above, we find that the USDOC erred by characterizing the LIREPP as a financial contribution to Irving through NB Power in the form of revenue foregone, rather than a purchase of goods consistent with Article 1.1(a)(1)(iii). Because the USDOC erred in its characterization of the financial contribution at issue, we also find that it failed to properly assess the alleged benefit to the Irving Group in accordance with Article 1.1(b) and the first sentence of Article 14(d) of the SCM Agreement.

#### **7.11.4 Whether the USDOC failed to ascertain the precise amount of subsidies allegedly conferred by provincial programmes**

7.706. Canada claims that the United States acted inconsistently with Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the USDOC improperly attributed to the production of softwood lumber products certain alleged subsidies that were bestowed on the production of non-investigated products, and therefore failed to properly ascertain the precise amount of subsidies attributable to the product under investigation.<sup>1445</sup> Canada asks the Panel to find that the USDOC improperly countervailed an alleged benefit that was tied to a product other than the product under investigation.<sup>1446</sup>

7.707. We have upheld Canada's claims under Articles 1.1(b) and 14(d) of the SCM Agreement challenging the USDOC's determination that provincial electricity programmes in British Columbia, Québec, and New Brunswick conferred a benefit on West Fraser, Tolko, Resolute, and Irving. Having made these findings, we do not consider it necessary to make additional findings that the USDOC improperly countervailed a benefit that was tied to a product other than softwood lumber.

7.708. Therefore, we exercise judicial economy on Canada's claims under Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.<sup>1447</sup>

#### **7.12 Canada's claims concerning the specificity of the accelerated capital cost allowance (ACCA) for Class 29 assets**

7.709. In the final determination of the underlying investigation, the USDOC concluded that the ACCA for Class 29 assets (Class 29 programme) was *de jure* specific, because, as a matter of law, eligibility for the programme was expressly limited to certain enterprises or industries.<sup>1448</sup> In this

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<sup>1443</sup> United States' first written submission, para. 708; comments on Canada's response to Panel question No. 280, para. 287.

<sup>1444</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.120.

<sup>1445</sup> Canada's panel request, pp. 2-3; first written submission, paras. 1119-1149; and second written submission, paras. 389-394.

<sup>1446</sup> Canada's second written submission, para. 394.

<sup>1447</sup> The DSU does not require a panel to examine all legal claims made by the complaining party. Rather, a panel is only required to make findings on those claims necessary to resolve the particular matter. (Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18).

<sup>1448</sup> Final determination, (Exhibit CAN-10), p. 200.

regard, the USDOC noted that Class 29 assets refer to machinery and equipment used in manufacturing and processing of goods. Pursuant to Canada's Income Tax Act and Income Tax Regulations, Class 29 assets acquired after 18 March 2007 and before 2016 can be fully depreciated at an accelerated rate over three years, and the amount of depreciation can be claimed as a deduction to reduce the taxpayer's taxable income.<sup>1449</sup>

7.710. The Income Tax Regulations exclude certain activities from the definition of "manufacturing or processing", e.g. farming, fishing, logging, some mining activities, and construction. The machinery and equipment used for the excluded activities cannot claim a tax deduction under the Class 29 programme. In the absence of the Class 29 programme, "the manufacturing and processing assets acquired would otherwise have been included in Class 43, which is subject to normal, i.e., nonaccelerated, depreciation".<sup>1450</sup>

7.711. Canada claims that the USDOC's finding of *de jure* specificity with regard to the Class 29 programme is inconsistent with Articles 2.1(a) and 2.1(b) of the SCM Agreement.

### **7.12.1 Provisions at issue**

7.712. Articles 2.1(a) and 2.1(b) of the SCM Agreement read as follows:

In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
- (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions<sup>[2]</sup> governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

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<sup>2</sup> Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

### **7.12.2 Evaluation**

7.713. Article 2.1 of the SCM Agreement sets out principles for determining whether a subsidy is specific to "an enterprise or industry or group of enterprises or industries", referred to in the SCM Agreement as "certain enterprises". The disciplines for *de jure* specificity are provided in Articles 2.1(a) and 2.1(b). The inquiry under Article 2.1(a) focuses on whether the granting authority or its legislation "explicitly limits access" to a subsidy to "certain enterprises". Article 2.1(b) establishes circumstances in which a subsidy shall be deemed non-specific. It provides that the specificity shall not exist if the legislation at issue sets out "objective criteria or conditions governing the eligibility for, and the amount of, a subsidy".

7.714. In the final determination, the USDOC considered that the Income Tax Regulations explicitly exclude certain activities from its definition of manufacturing and processing. The enterprises and industries engaged exclusively in the excluded activities are not eligible for Class 29 programme. Therefore, access to the subsidy is expressly limited to non-excluded enterprises and industries.<sup>1451</sup> The USDOC also noted that the eligibility criteria for Class 29 do not satisfy the statutory requirement for "objective criteria", because they favour certain enterprises or industries over others. In other words, Income Tax Regulations favour "enterprises or industries that are engaged in qualifying

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<sup>1449</sup> Preliminary determination, (Exhibit CAN-8), p. 72; Final determination, (Exhibit CAN-10), p. 197.

<sup>1450</sup> Preliminary determination, (Exhibit CAN-8), p. 72; GOC-CRA-ACCA-4, (Exhibit USA-16), p. 21.

<sup>1451</sup> Final determination, (Exhibit CAN-10), p. 198.

manufacturing and processing activities, over enterprises or industries that are not".<sup>1452</sup> In response to an interested party's argument that the excluded activities are eligible for comparable tax benefits available under other provisions of Canadian tax law, the USDOC stated that the existence of these other tax provisions are not subject to this investigation and are not material to the examination of the Class 29 programme.<sup>1453</sup> Based on these considerations, the USDOC determined that the Class 29 programme is *de jure* specific, because, as a matter of law, eligibility for the programme is expressly limited to certain enterprises or industries.<sup>1454</sup>

7.715. Canada challenges the USDOC's *de jure* specificity finding on the following grounds:

- a. The USDOC acted inconsistently with Article 2.1(a), by failing to demonstrate that the Canadian legislation at issue "explicitly limits access" to the Class 29 programme to "certain enterprises".
- b. Considering the Class 29 programme is non-specific under Article 2.1(a), it was unnecessary to determine the existence of "objective criteria and conditions" under Article 2.1(b). Nonetheless, the Class 29 programme is non-specific within the meaning of Article 2.1(b).
- c. The USDOC acted inconsistently with Articles 2.1(a) and 2.1(b), by failing to consider the specificity of the Class 29 programme within the broader context of Canadian tax legislation.

We address each of the alleged inconsistencies below.

**7.12.2.1 Whether the USDOC acted inconsistently with Article 2.1(a) by failing to demonstrate that the Canadian legislation at issue "explicitly limits access" to the Class 29 programme to "certain enterprises"**

7.716. Canada contends that access to the Class 29 programme is not limited based on industry or enterprise.<sup>1455</sup> Canada makes three arguments to support its view.

- a. First, Canada argues that the USDOC failed to demonstrate that access to the Class 29 programme is limited to "certain" enterprises or industries, given that no industries or enterprises are enumerated or particularized in the relevant provisions of Canada's Income Tax Act and Income Tax Regulations.<sup>1456</sup> In Article 2.1(a), the word "to" prior to "certain enterprises" shows that the explicit limitation must identify certain enterprises or industries.<sup>1457</sup>
- b. Second, Canada asserts that a limitation on access to a small number of excluded activities does not "explicitly" limit the Class 29 programme to certain enterprises or industries.<sup>1458</sup>
- c. Third, Canada submits that the only limitation is based on the activities that equipment is used for, but this does not satisfy the requirements of Article 2.1(a), because *de jure* specificity exists only where the granting authority or its legislation explicitly limits access to the subsidy to certain enterprises or industries.<sup>1459</sup> Canada argues that the activity-based exclusion does not lead to an exclusion of particular industries and that the Class 29 programme is broadly used across a wide range of industries. Specifically, companies engaged in excluded activities often have assets that are used for eligible

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<sup>1452</sup> Final determination, (Exhibit CAN-10), pp. 197-199.

<sup>1453</sup> Final determination, (Exhibit CAN-10), p. 198.

<sup>1454</sup> Final determination, (Exhibit CAN-10), pp. 196-197.

<sup>1455</sup> Canada's first written submission, para. 1165; opening statement at the first meeting of the Panel (27 February 2019), para. 158.

<sup>1456</sup> Canada's first written submission, para. 1163.

<sup>1457</sup> Canada's opening statement at the first meeting of the Panel (27 February 2019), para. 160; response to Panel question No. 147, para. 418.

<sup>1458</sup> Canada's first written submission, para. 1164.

<sup>1459</sup> Canada's opening statement at the first meeting of the Panel (27 February 2019), para. 158.

manufacturing activities, and thus are subject to the Class 29 programme for such assets.<sup>1460</sup>

7.717. The United States replies that the USDOC determined that the Class 29 programme was *de jure* specific because this programme was explicitly limited to machinery and equipment used in manufacturing and processing operations, excluding multiple industries or enterprises from its application.<sup>1461</sup> The United States argues that Article 2.1(a) does not require "explicit" identification of "certain enterprises" that have access to a subsidy, rather, the relevant enterprises must be "known and particularized", but not necessarily "explicitly identified".<sup>1462</sup> The United States points out that the term "explicitly" modifies the verb "limit", meaning that the inquiry under Article 2.1(a) is whether the granting authority or its legislation "explicitly limits the access" to a subsidy to certain enterprises, not whether it "identifies" certain enterprises.<sup>1463</sup> The United States submits that the evidence on the record demonstrated that "access to the subsidy is expressly limited to non-excluded enterprises and industries".<sup>1464</sup>

7.718. The United States further submits that the term "certain enterprises" refers, *inter alia*, to a "group of enterprises or industries" and the term "group" means "a number of people or things that are located close together or are considered or classed together".<sup>1465</sup> In this regard, the United States argues that if a measure limits the eligibility for a subsidy based on the type of activities conducted by the recipients, those recipients are "considered or classed together", and the recipients will be "known and particularized".<sup>1466</sup> Finally, the United States contends that Canada's argument that the record evidence shows that a wide range of industries actually used Class 29 blurs the distinction between *de jure* and *de facto* specificity. The United States asserts that the USDOC was not required to examine the number of enterprises that are used for a subsidy as part of its *de jure* specificity analysis.<sup>1467</sup>

7.719. We note that Article 2.1(a) provides that a subsidy shall be specific, where "the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises". The phrase "the granting authority, or the legislation pursuant to which the granting authority operates" situates the analysis for assessing any limitations on access "in the particular legal instrument or government conduct effecting such limitations".<sup>1468</sup> Thus, the focus of the analysis under Article 2.1(a) is on whether, as a matter of law, access to the subsidy is limited to certain enterprises, not on whether they in fact receive it.<sup>1469</sup>

7.720. In the present case, we need to assess whether the USDOC properly considered that Canada's Income Tax Act and the Income Tax Regulations explicitly limit the availability of the subsidy to certain enterprises or industries. In doing so, we note that the term "explicitly" suggests that the limitation on the access to the subsidy to certain enterprises must be "express, unambiguous, or clear" from the content of the relevant instrument.<sup>1470</sup> The phrase "certain enterprises" refers to "a single enterprise or industry or a class of enterprises or industries that are known and particularized", but not necessarily "explicitly identified".<sup>1471</sup>

7.721. The Income Tax Act and the Income Tax Regulations provide that Class 29 assets, i.e. machinery and equipment used in manufacturing and processing of goods, can be depreciated at an accelerated rate over three years. However, the Income Tax Regulations provide that machinery and equipment used for certain activities are not eligible to be depreciated using the

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<sup>1460</sup> Canada's first written submission, paras. 1165-1168; response to Panel question No. 149, para. 426.

<sup>1461</sup> United States' first written submission, paras. 738, 747, and 753.

<sup>1462</sup> United States' first written submission, paras. 738 and 751; second written submission, para. 458.

<sup>1463</sup> United States' first written submission, para. 750; second written submission, para. 458.

<sup>1464</sup> United States' first written submission, para. 747.

<sup>1465</sup> United States' second written submission, para. 458 (referring to Definition of "group" from Oxford English Dictionary Online, (Exhibit USA-78)).

<sup>1466</sup> United States' second written submission, para. 458.

<sup>1467</sup> United States' first written submission, para. 755; second written submission, para. 463.

<sup>1468</sup> Appellate Body Report, *US - Anti-Dumping and Countervailing Duties (China)*, para. 368.

<sup>1469</sup> Appellate Body Report, *US - Anti-Dumping and Countervailing Duties (China)*, para. 368.

<sup>1470</sup> Appellate Body Report, *US - Anti-Dumping and Countervailing Duties (China)*, para. 372.

<sup>1471</sup> Appellate Body Report, *US - Anti-Dumping and Countervailing Duties (China)*, para. 373.

Class 29 programme. In particular, the Income Tax Regulations stipulate that Class 29 "manufacturing or processing" does not include:

- (a) [F]arming or fishing; (b) logging; (c) construction; (d) operating an oil or gas well or extracting petroleum or natural gas from a natural accumulation thereof; (e) extracting minerals from a mineral resource; (f) processing of (i) ore, other than iron ore or tar sands ore, from a mineral resource to any stage that is not beyond the prime metal stage or its equivalent, (ii) iron ore from a mineral resource to any stage that is not beyond the pellet stage or its equivalent, or (iii) tar sands ore from a mineral resource to any stage that is not beyond the crude oil stage or its equivalent; (g) producing industrial minerals; (h) producing or processing electrical energy or steam, for sale; (i) processing a natural gas as part of the business of selling or distributing gas in the course of operating a public utility; (j) processing heavy crude oil recovered from a natural reservoir in Canada to a stage that is not beyond the crude oil stage or its equivalent; or (k) Canadian field processing.<sup>1472</sup>

7.722. Thus, the Income Tax Regulations, on their face, limit access to the Class 29 programme by excluding certain activities from the definition of "manufacturing and processing". In particular, machinery and equipment that are primarily used in farming, fishing, logging, construction, and some mining activities cannot be depreciated at the accelerated rate. For Canada, the activity-based exclusion does not lead to an exclusion of particular enterprises or industries. We consider, however, that a limitation on access to a subsidy may be established "in many different ways"<sup>1473</sup>, including, for example, "by virtue of the type of activities conducted by the recipients".<sup>1474</sup> The Income Tax Regulations limit access to the Class 29 programme based on the type of activities conducted by the eligible enterprises. Furthermore, as argued by the United States, the activities excluded from the Class 29 programme can be associated with the respective industries. The enterprises or industries exclusively involved in the listed activities are not eligible for the Class 29 programme. The enterprises or industries partially involved in the excluded activities have a limited access to the Class 29 programme, to the extent that a tax deduction is claimed for the eligible activities. Thus, we consider that an investigating authority may properly view the activity-based limitation of access to the Class 29 programme as a limitation on access to certain enterprises or industries.

7.723. In addition, the term "certain enterprises" in Article 2.1 refers *inter alia* to "a group of enterprises or industries". The Appellate Body clarified that the term "group" means "[a] number of people or things regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose, or classed together because of a degree of similarity".<sup>1475</sup> The phrase "a group of enterprises or industries" can be understood as "a class of enterprises or industries that are known and particularized".<sup>1476</sup> Thus, we agree with the United States that the Income Tax Regulations limit access to the Class 29 programme to "a group of enterprises or industries", i.e. companies that are not excluded from the definition of "manufacturing and processing" by virtue of the type of their activities.

7.724. Further, we consider that an unbiased and objective authority could consider, as the USDOC did, based on the text of the Income Tax Regulations, that access to the Class 29 programme is limited. Article 2.1 does not specify "any numerical threshold pointing to a minimum or maximum number of things" required in order to qualify as a "group of certain enterprises or industries" or "certain enterprises".<sup>1477</sup> The phrase "certain enterprises" rather means that the relevant enterprises must be "known and particularized", but not necessarily "explicitly identified".<sup>1478</sup> We thus reject Canada's argument that the limitation on access is not "explicit" because the exclusion is limited to a small number of activities.<sup>1479</sup>

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<sup>1472</sup> Final determination, (Exhibit CAN-10), p. 197; United States' first written submission, para. 747.

<sup>1473</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 413.

<sup>1474</sup> Appellate Body Report, *US – Washing Machines*, para. 5.223.

<sup>1475</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373.

<sup>1476</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373.

<sup>1477</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.365.

<sup>1478</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373.

<sup>1479</sup> We note that a similar approach was taken by the panel in *US – Washing Machines*, where Korea argued, in the context of regional specificity under Article 2.2, that the subsidy was available to 98% of the land mass, and that the exclusion of a small area from otherwise generally available tax credits did not

7.725. Canada also argues that companies involved in the excluded activities can anyway claim tax deductions under the Class 29 programme for machinery and equipment used for excluded activities. Canada submits that companies that are associated with each of the excluded activities have claimed deductions under Class 29, i.e. companies in the farming, fishing, logging, construction, and mining industries each claimed Class 29 deductions during the POI with respect to their assets not used in these activities.<sup>1480</sup> We recall that the subsidy is deemed specific under Article 2.1(a), when a source of any limitation on access to the subsidy is "the particular legal instrument or government conduct effecting such limitation".<sup>1481</sup> Article 2.1(a) thus focuses "not on whether a subsidy has been granted to certain enterprises, but on whether access to that subsidy has been explicitly limited"<sup>1482</sup> in the legislation pursuant to which the granting authority operates, or by the granting authority itself. Thus, the fact that in practice the enterprises involved in the excluded activities used the Class 29 programme for the eligible machinery and equipment is not a relevant consideration for the analysis of *de jure* specificity under Article 2.1(a).

7.726. Based on the above, we consider that the USDOC reasonably found that access to the Class 29 programme was explicitly limited to "certain enterprises" within the meaning of Article 2.1(a) of the SCM Agreement.

#### **7.12.2.2 Whether the Class 29 programme is non-specific within the meaning of Article 2.1(b)**

7.727. Canada submits that because the Class 29 programme is not specific under Article 2.1(a), the USDOC did not need to examine specificity based on the existence of "objective criteria or conditions" under Article 2.1(b). Nonetheless, for Canada, the criteria governing eligibility for the Class 29 programme are "objective", and do not favour certain enterprises over others.<sup>1483</sup> The United States responds that the eligibility criteria for the Class 29 programme are not based on "objective criteria or conditions", because the Income Tax Regulations explicitly exclude assets that are used for certain activities by certain enterprises or industries and favours enterprises or industries that are not engaged in those activities.<sup>1484</sup>

7.728. Article 2.1(b) establishes that specificity "shall not exist" if the granting authority, or the legislation pursuant to which the granting authority operates, establishes "objective criteria or conditions governing the eligibility for, and the amount of", the subsidy, provided that eligibility is "automatic and that such criteria or conditions are strictly adhered to". Such conditions and criteria "must be clearly spelled out in law, regulation, or other official document so as to be capable of verification".<sup>1485</sup> Footnote 2 to Article 2.1(b) defines "objective criteria or conditions" as criteria or conditions that are "neutral", "do not favour certain enterprises over others", and "are economic in nature and horizontal in application, such as number of employees or size of enterprise".

7.729. During the underlying investigation, a Canadian interested party argued that the Class 29 programme is not *de jure* specific, because it has "objective criteria or conditions governing the eligibility for, and the amount of" the tax reduction that are based on "neutral criteria not favoring one enterprise over another". The USDOC considered that the eligibility criteria for Class 29 are not "objective", because they "favour one enterprise or industry over another". Specifically, the USDOC stated that the Income Tax Regulations favour "enterprises or industries that are engaged in qualifying manufacturing and processing activities, over enterprises or industries that are not".<sup>1486</sup>

7.730. Considering that the Income Tax Regulations explicitly excluded enterprises involved in certain activities from the Class 29 programme, we are of the view that the USDOC properly determined that the Income Tax Regulations favour certain enterprises over others, and thus the eligibility criteria are not objective. Therefore, we reject Canada's allegation that the criteria

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establish regional specificity under Article 2.2. That panel considered that the phrase "geographical region" is not qualified in any way, which suggests that "the designation of any geographical region – no matter how small or how large – would suffice to trigger the application of Article 2.2". (Panel Report, *US – Washing Machines*, para. 7.282). See also, Appellate Body Report, *US – Washing Machines*, paras. 5.236-5.239.

<sup>1480</sup> Canada's first written submission, para. 1168.

<sup>1481</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 748.

<sup>1482</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 368.

<sup>1483</sup> Canada's first written submission, para. 1169.

<sup>1484</sup> United States' first written submission, paras. 738, 748, and 757.

<sup>1485</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.119.

<sup>1486</sup> Final determination, (Exhibit CAN-10), p. 199.

governing eligibility for the Class 29 programme do not favour certain enterprises over others and are "objective" within the meaning of Article 2.1(b).

#### **7.12.2.3 Whether the USDOC acted inconsistently with Articles 2.1(a) and 2.1(b), by failing to consider the specificity of the Class 29 programme within the broader context of Canadian tax legislation**

7.731. During the investigation, a Canadian interested party argued that the activities excluded from Class 29 are eligible for other tax deductions and credits under the Income Tax Act. For example, "individuals engaged in farming or fishing are exempt for tax on the first \$1 million in capital gains from the disposition of their farming or fishing property, while the oil and gas and mining industries can deduct exploration and development expenses (the latter at 30% per year on a declining balance basis)".<sup>1487</sup> The USDOC rejected this argument, by noting that the existence of these other tax provisions is not subject to its analysis in the underlying investigation.

7.732. Canada repeats that same argument before us and asserts that the USDOC failed to consider the Class 29 programme in the context of other provisions of the Income Tax Act, given that excluded activities are eligible for other tax deductions and credits under the Income Tax Act.<sup>1488</sup> Canada argues that the USDOC's approach contradicts the United States' position in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, where the United States argued that the allocation of patent rights under NASA/USDOD Agreements should be analysed in the context of the overall patent regime in the United States.<sup>1489</sup> The United States submits that while the broader legal framework of a subsidy may be relevant for a *de jure* specificity analysis, the other tax deductions and credits are different from the Class 29 programme. The United States argues that Canada did not identify any other tax provision to demonstrate that the excluded industries and enterprises were able to receive the same subsidy under other provisions of the Income Tax Act and the Income Tax Regulations.<sup>1490</sup>

7.733. We agree with the parties that the consideration of the broader legislative framework under a specificity analysis may be relevant in certain circumstances. For instance, as indicated by Canada, in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, both the panel and the Appellate Body considered that the allocation of patent rights under NASA/USDOD R&D contracts has to be examined in the broader context for the allocation of patent rights to contractors under all R&D contracts with other government departments and agencies. This is because "the allocation of patent rights or waivers under the NASA/USDOD contracts and Agreements operates within the legislative and regulatory framework that applies to R&D activities performed by all enterprises for US Government departments and agencies". The Appellate Body upheld the panel's finding that the allocation of patent rights under the NASA/USDOD contracts is not specific. The Appellate Body explained that both under the general regulations and under a NASA waiver, ownership rights over the invention will belong solely to the contractor, although the mechanism for the initial allocation of patent rights is formally different.<sup>1491</sup> Put differently, the result of NASA's patent regulation is the same as under the general regulation, even though the formal procedure is different.

7.734. At the same time, the Appellate Body cautioned that the examination of specificity under Article 2.1 should not include subsidies that are different from those challenged by the complaining Member. In particular, per the Appellate Body, a subsidy, access to which is limited to "certain enterprises", does not become non-specific merely because there are other subsidies that are provided to other enterprises pursuant to the same legislation.<sup>1492</sup> In the present case, Canada argues that the USDOC should have examined other tax deductions and credits under the Income Tax Act applicable to the activities excluded from the Class 29 programme. As indicated above, during the investigation, a Canadian interested party referred to certain tax exemptions for individuals engaged in farming and fishing, as well as deductions for the oil and gas and mining industries. Even if these tax exemptions benefit the excluded activities, Canada does not explain how these tax benefits relate to the type of subsidy at issue, i.e. the Class 29 programme, or how these tax benefits lead to the same result as the Class 29 programme. The subsidy at issue,

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<sup>1487</sup> Public version of joint case brief, (Exhibit CAN-311), p. II-11. (fn omitted)

<sup>1488</sup> Canada's first written submission, para. 1161.

<sup>1489</sup> Canada's first written submission, paras. 1170-1174 (referring to Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 787-789).

<sup>1490</sup> United States' first written submission, para. 760.

<sup>1491</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 780.

<sup>1492</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 751.

investigated by the USDOC, is the ACCA for Class 29 assets. The evidence before the USDOC showed that the enterprises and industries that are not eligible for the Class 29 programme, are subject to a standard rate of depreciation under Class 43.<sup>1493</sup> Based on the above, we consider that Canada has not demonstrated that the examination of other tax benefits was warranted in this case, or how the assessment of the Class 29 programme in the context of other tax benefits would lead to the finding of non-specificity.

#### **7.12.2.4 Conclusion**

7.735. In light of the above, we find that the USDOC provided a reasoned and adequate explanation for its conclusion that the Class 29 programme was *de jure* specific within the meaning of Articles 2.1(a) and 2.1(b).

### **7.13 Canada's claims concerning the Maritimes Stumpage Benchmark**

#### **7.13.1 Introduction**

7.736. Canada's claim with respect to the "Maritimes Stumpage Benchmark" concerns the USDOC's benefit determination, specifically, its determination on whether the Canadian provinces of Alberta, Ontario, or Québec provide standing timber to Canadian producers and exporters at less than adequate remuneration (thereby conferring a benefit under Article 1.1(b) of the SCM Agreement and within the meaning of Article 14(d) of this Agreement). Canada submits that the USDOC maintains the Maritimes Stumpage Benchmark as an unwritten measure and considers this benchmark to be a *measure of present and continued application*, or, in the alternative an *ongoing conduct*.<sup>1494</sup> In particular, Canada contends that in determining whether these provinces provide standing timber at less than adequate remuneration, the USDOC compares stumpage prices to private prices in the Maritime Provinces<sup>1495</sup> of Canada (i.e. the benchmark) and treats the stumpage prices from these provinces as "in-market" prices (i.e. a tier-one price under the United States' domestic law).<sup>1496</sup>

7.737. Canada argues that in softwood lumber proceedings between 2004-2006, the USDOC relied on a benchmark based on private prices in Nova Scotia and New Brunswick whereas in the more recent softwood lumber investigation (in 2017) and the uncoated groundwood paper investigation (in 2018) the USDOC used a benchmark based on private prices in Nova Scotia alone.<sup>1497</sup> Canada explains that the USDOC's use of any of the benchmarks containing private prices from one or both of these provinces would constitute an application of the Maritimes Stumpage Benchmark measure as described by Canada.<sup>1498</sup>

7.738. The evidence Canada relied on to establish that this benchmark is a measure of present and continued application, or ongoing conduct, comprises extracts from the USDOC's determinations in its countervailing duty investigations on softwood lumber as well as uncoated groundwood paper and includes determinations from 2004 to 2018 (though no determinations were made between 2006-2017).

7.739. Canada asserts that this measure is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement because the USDOC assesses the adequacy of remuneration in a manner inconsistent with "the prevailing conditions for standing timber in the relevant regional market within the country of provision".<sup>1499</sup>

7.740. The United States argues that the Maritimes Stumpage Benchmark is not a measure susceptible to dispute settlement in the WTO, and even if Canada could demonstrate that the

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<sup>1493</sup> Preliminary determination, (Exhibit CAN-8), p. 72; GOC-CRA-ACCA-4, (Exhibit USA-16), p. 21.

<sup>1494</sup> Canada's first written submission, paras. 1175-1208.

<sup>1495</sup> The "Maritime Provinces" refers to the Canadian provinces of Nova Scotia and New Brunswick. Newfoundland and Labrador, and Prince Edward Island are also in this region, but do not produce substantial quantities of lumber and as a result are not included in the benchmark. (Canada's first written submission, para. 1175 and fn 1973).

<sup>1496</sup> Canada's first written submission, para. 1175.

<sup>1497</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 33.

<sup>1498</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 33.

<sup>1499</sup> Canada's first written submission, para. 1178.

Maritime Stumpage Benchmark could be challenged as a measure of present and continued application or ongoing conduct, Canada has not demonstrated that it would necessarily violate Articles 1.1(b) or 14(d) of the SCM Agreement.<sup>1500</sup>

### 7.13.2 Legal standard

#### 7.13.2.1 Measures

7.741. Measures can be challenged in WTO dispute settlement proceedings on an "as applied" or an "as such" basis. A claim that a measure is inconsistent "as such" challenges a measure as a rule or norm that has general and prospective application, whereas a claim that a measure is inconsistent "as applied" challenges a specific application of the measure.<sup>1501</sup> The Appellate Body has explained that the implications of "as such" challenges are more far-reaching than "as applied" claims because a complaining party is seeking to prevent Members from *ex ante* engaging in certain conduct.<sup>1502</sup> The presumption that WTO Members act in "good faith" in the implementation of their WTO commitments is particularly apt in the context of measures challenged "as such".<sup>1503</sup>

7.742. However, the Appellate Body has clarified that "as applied" and "as such" do not exhaustively define the types of measures that can be challenged in WTO proceedings.<sup>1504</sup> The Appellate Body has explained that, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"<sup>1505</sup>, and that "[t]he scope of measures that can be challenged in WTO dispute settlement is therefore broad".<sup>1506</sup>

#### 7.13.2.2 Unwritten measures

7.743. The Appellate Body has cautioned that "[p]articular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document".<sup>1507</sup> Notwithstanding that this observation was made in reference to a rule or norm of general and prospective application, we consider that similar rigour ought to be applied in relation to measures characterized as present and continued application, or ongoing conduct. This is not to say that we must review Canada's claim through the prism of a rule or norm of general and prospective application. In *Argentina – Import Measures*, the Appellate Body explained:

When tasked with assessing a challenge against an unwritten measure, a panel is also not always required to apply rigid legal standards or criteria that are based on the "as such" or the "as applied" nature of the challenge. Rather, the specific measure challenged and how it is described or characterized by a complainant will determine the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged. A complainant seeking to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a Member and its precise content. Depending on the specific measure challenged and how it is described or characterized by a complainant, however, other elements may need to be proven.<sup>1508</sup>

7.744. Accordingly, in assessing Canada's claim, we consider it necessary to examine whether Canada has established that the measure is attributable to the United States, the precise content of the measure, and other elements as set out by Canada in its submission.

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<sup>1500</sup> United States' first written submission, para. 762.

<sup>1501</sup> See, for example, Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.154.

<sup>1502</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

<sup>1503</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 173.

<sup>1504</sup> See, for example, Appellate Body Reports, *US – Continued Zeroing*, para. 179; *EU – Biodiesel (Argentina)*, fn 429.

<sup>1505</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. See also, Appellate Body Reports, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67; and *US – Anti-Dumping Methodologies (China)*, para. 5.122.

<sup>1506</sup> Appellate Body Report, *EC and certain Member States – Large Civil Aircraft*, para. 794. See also, Appellate Body Reports, *Guatemala – Cement I*, fn 47; *Argentina – Import Measures*, paras. 5.106 and 5.109; and *US – Anti-Dumping Methodologies (China)*, para. 5.122.

<sup>1507</sup> Appellate Body Report, *US – Zeroing (EC)*, paras. 196 and 198. (emphasis original)

<sup>1508</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.110.

### **7.13.2.3 Measures as present and continued application, or ongoing conduct**

7.745. The Appellate Body has explained that "the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged *will be informed by how such measure is described or characterized by the complainant*".<sup>1509</sup> Canada has, as noted above, described the measure at issue as having present and continued application, or in the alternative, ongoing conduct.

### **7.13.3 Whether Canada has established the existence of the Maritimes Stumpage Benchmark**

#### **7.13.3.1 Introduction**

7.746. At the outset, we note that the United States does not dispute that a measure characterized as having present and continued application is susceptible to dispute settlement in the WTO. Instead, the United States argues that Canada has not demonstrated that the Maritimes Stumpage Benchmark exists as a measure of present and continued application.<sup>1510</sup> In contrast, the United States argues that measures of ongoing conduct are not susceptible to challenge in the WTO dispute settlement system.<sup>1511</sup>

7.747. In examining whether Canada has established that the Maritimes Stumpage Benchmark has present and continued application, we must consider whether Canada has established the following constituent elements for a measure of present and continued application:

- a. the measure is attributable to the United States;
- b. the measure has precise content; and
- c. the measure has present and continued application, which is to say, it currently applies and will continue to be applied in the future.<sup>1512</sup>

7.748. In examining whether Canada has established that the Maritimes Stumpage Benchmark is an ongoing conduct, we must consider whether Canada has established the following constituent elements of ongoing conduct:

- a. the attribution of the measure to the United States;
- b. the precise content of the measure;
- c. the repeated application of the conduct; and
- d. the likelihood that such conduct will continue.

7.749. We begin by examining whether Canada has established the existence of the Maritimes Stumpage Benchmark as a measure of present and continued application.

#### **7.13.3.2 The existence of the Maritimes Stumpage Benchmark as a measure of present and continued application**

7.750. Canada challenges the Maritimes Stumpage Benchmark as "a measure" of present and continued application.<sup>1513</sup> Therefore, in addition to attribution and precise content of such a measure, Canada will have to establish that this measure is currently applied and will continue to be applied in the future.

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<sup>1509</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.108. (emphasis added)

<sup>1510</sup> United States' first written submission, para. 765.

<sup>1511</sup> United States' first written submission, para. 778.

<sup>1512</sup> Canada's first written submission, paras. 1184-1185 (quoting Appellate Body Reports, *Argentina – Import Measures*, para. 5.146).

<sup>1513</sup> Canada's first written submission, p. 475.

7.751. With respect to attribution, we note that the parties do not dispute that the USDOC made the determinations to which Canada refers in its first written submission.<sup>1514</sup> However, the United States argues that the measure cannot be attributed to the United States because the measure does not exist.<sup>1515</sup> We consider that the USDOC is a body of the United States' government, and its actions are therefore attributable to the United States. Thus, to the extent that those actions give rise to the measure challenged by Canada, that measure would be attributable to the United States.

7.752. With respect to precise content, our review of the content of the measure will be based on the complainant's description of the measure.<sup>1516</sup> The measure at issue here is what Canada describes as the Maritimes Stumpage Benchmark. Canada presents the precise content of the measure as follows:

The precise content is that, since 2004, when presented with the factual circumstances of assessing the adequacy of remuneration of Crown-origin standing timber prices in Alberta, Ontario, or Québec, [USDOC] has applied a benchmark based on private prices in the Maritime Provinces and treated it as an in-market benchmark. The [USDOC] repeatedly employs the same three steps to get to this result. In particular, the [USDOC]:

1. refers to its regulations and its benchmark hierarchy;
2. applies its regulations to find that private prices from the Maritimes are "tier-one", "in-country" benchmark; and,
3. finds that, irrespective of the evidence presented, its benchmark in the Maritime Provinces is comparable to Alberta, Ontario, or Québec.<sup>1517</sup>

7.753. The term "Maritimes Stumpage Benchmark", as used by Canada, includes a benchmark based on both Nova Scotia and New Brunswick.<sup>1518</sup> To establish the precise content of the measure, Canada submitted evidence comprising extracts from the USDOC's determinations in which Canada asserts this measure was applied. This evidence shows, as noted in paragraphs 7.737-7.738 above, that in earlier softwood lumber proceedings, i.e. proceedings between 2004-2006, the USDOC relied on a benchmark based on private prices in Nova Scotia and New Brunswick whereas in the more recent softwood lumber investigation (in 2017) and the uncoated groundwood paper investigation (in 2018), the USDOC used a benchmark based on private prices in Nova Scotia alone.<sup>1519</sup> Canada explains, as also noted above, that *any* of the benchmarks containing private prices from one or both of these provinces would constitute an application of the Maritimes Stumpage Benchmark measure.<sup>1520</sup> Therefore, Canada uses the term Maritimes Stumpage Benchmark to refer to two different type of benchmarks, one based on Nova Scotia and New Brunswick (which was applied between 2004-2006) and the other based on Nova Scotia alone (which was applied between 2017-2018).

7.754. Canada submits that the Maritimes Stumpage Benchmark exists as "a [m]easure" of present and continued application.<sup>1521</sup> The phrase "a measure" shows that Canada is challenging a single measure.<sup>1522</sup> We consider that to establish the precise content of the Maritimes Stumpage

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<sup>1514</sup> Canada's first written submission, para. 1189; United States' first written submission, para. 766.

<sup>1515</sup> United States' first written submission, para. 766; second written submission, para. 466.

<sup>1516</sup> In *Argentina – Import Measures* for instance, the complainants challenged the existence of a single (unwritten) measure consisting of a combination of one or more of five trade-related requirements or TRRs. Therefore, the Appellate Body stated in that case that as part of its examination of the precise content of this single measure, the panel was also required to evaluate whether the individual TRRs applied and operated as part of a single measure. (Appellate Body Reports, *Argentina – Import Measures*, para. 5.124).

<sup>1517</sup> Canada's response to Panel question No. 150, para. 428. See also, first written submission, paras. 1190-1194.

<sup>1518</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 33.

<sup>1519</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 33.

<sup>1520</sup> Canada's opening statement at the first meeting of the Panel (28 February 2019), para. 33.

<sup>1521</sup> Canada's first written submission, p. 475. (emphasis added)

<sup>1522</sup> This is consistent with Canada's description of the measure. In addition to contending that the Maritimes Stumpage Benchmark is *a measure* of present and continued application, Canada also notes that "it"

Benchmark as a single measure, Canada needs to show that the two benchmarks operate as part of a single measure. To demonstrate that the two benchmarks operate as part of a single measure, the complainant may have to show that the benchmarks are applied and operate together, or collectively advance some underlying policy. In our view, simply asserting that two types of benchmarks comprise "a [single] measure", without showing for instance how they apply or operate together, or collectively advance some underlying policy, would not be sufficient to establish that they form part of a single measure. We consider that the Appellate Body's findings in *Argentina – Import Measures* offer some useful guidance in this regard.

7.755. In *Argentina – Import Measures* the complainants challenged the existence of a single (unwritten) measure consisting of a combination of one or more of five trade-related requirements or TRRs. In that dispute, the Appellate Body stated that, as part of its examination of the precise content of this single measure, the panel was also required to evaluate whether the individual TRRs applied and operated as part of a single measure.<sup>1523</sup> The Appellate Body concluded that the panel had done so. In reaching this conclusion, the Appellate Body noted that the panel analysed how the individual TRRs operated together to further an underlying policy of managed trade, and that the content of the single measure consisted of the combined operation of the individual TRRs as one of the tools that Argentina used to implement this policy, noting that the combined operation of the individual TRRs was a defining element of the content of the TRRs measure (as a single measure).<sup>1524</sup>

7.756. We consider that the Appellate Body's finding in this regard supports the view that when a complainant challenges different instruments (or as here, different benchmarks used to determine the existence of subsidy), the complainant would have to demonstrate that such different instruments operate as part of a single measure.<sup>1525</sup> This demonstration could be made by showing that the instruments apply and operate together, or collectively advance some underlying policy. Neither the complainant, nor a panel could simply assume that different instruments form part of a single measure. Otherwise, the requirement to examine whether a complainant has established the precise content of a measure may well be superfluous.

7.757. To be sure, this does not mean that a single measure could not be applied in varying facts and circumstances. There may well be variations in the underlying facts and circumstances in which a measure is applied. However, those variations in the underlying facts and circumstances must not detract from the fact that the substance of the actions or omissions at issue remain the same across those different facts and circumstances, such that its precise content is discernible.<sup>1526</sup>

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has been applied in every instance and that "it" is being currently applied and will continue to be applied in the future. (Canada's first written submission, para. 1187).

<sup>1523</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.124.

<sup>1524</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.126, 5.130, and 5.133.

<sup>1525</sup> See also, Panel Report, *Russia – Railway Equipment*, para. 7.946. The panel stated that a complainant may have to demonstrate how the different components of a measure operate together as part of a single measure and how such a single measure exists as distinct from its components.

<sup>1526</sup> Take the panel and Appellate Body Report in *US – Supercalendered Paper* as an example. In *US – Supercalendered Paper*, the unwritten measure challenged by the complainant was what it described as "Other Forms of Assistance – AFA measure", which comprised (a) the USDOC asking the respondents in the underlying countervailing duty investigations whether they received "other forms of assistance"; and (b) where the USDOC discovered information that it deemed should have been provided in response to the above question, applying adverse facts available with respect to that respondent to determine that the discovered information amounted to countervailable subsidies. (Panel Report, *US – Supercalendered Paper*, para. 7.308). To establish the precise content of the Other Forms of Assistance – AFA measure, the complainant relied on extracts from various investigations conducted by the USDOC. The respondent contended that the complainant had not established the precise content of this measure because, among others, the evidence submitted by the complainant showed that there were variations in the USDOC's questions regarding "other forms of assistance" as well as its determinations when the USDOC discovered information. (Panel Report, *US – Supercalendered Paper*, para. 7.315). However, the panel took the view that the variations pointed out by the respondent in the wording of the USDOC's questions as well as its determinations did not detract from the fact that the substance of the questions and the USDOC's conduct remained the same. (Panel Report, *US – Supercalendered Paper*, para. 7.316). The Appellate Body (i.e. the majority of the three Appellate Body Members) upheld the finding of the panel. In this regard, the majority, like the panel, held that although the various determinations of the USDOC relied upon by the complainant to establish precise content concerned different facts, such differences or variations did not detract from the fact that the substance of the USDOC's conduct remained the same. (Appellate Body Report, *US – Supercalendered Paper*, para. 5.23). The findings of the panel and the Appellate Body show that it may be possible to establish the precise content of a single measure across varying

7.758. In this particular case, Canada has neither advanced any argument nor presented any evidence showing that the different benchmarks utilized by the USDOC<sup>1527</sup> operate as a single measure. Canada has not shown for example that these two benchmarks operate and apply together, or collectively advance an underlying policy of the USDOC to use the Maritimes Stumpage Benchmark when it assesses the adequacy of remuneration of Crown-origin standing timber prices in Alberta, Ontario, or Québec. In addition, while in describing the content of the measure, Canada contends that irrespective of the evidence presented, the USDOC finds that a benchmark in the Maritime Provinces is comparable to Alberta, Ontario, or Québec, the evidence Canada relied upon undermines its description of the measure.

7.759. Instead, the USDOC's determinations that Canada relies upon as evidence to establish the existence of the Maritimes Stumpage Benchmark show that the USDOC selected its benchmark following the three-tier hierarchy set out in Section 351.511(a)(2) of the USDOC's CVD Regulations. Tier-one of this three-tier hierarchy refers to a benchmark based on "market-determined prices from actual transactions of the good within the country under investigation". In these determinations, the USDOC based its benchmark on stumpage prices for private-origin standing timber from New Brunswick and Nova Scotia or Nova Scotia alone because, according to the USDOC, they were market-determined prices resulting from actual transactions in the "country in question", i.e. Canada.<sup>1528</sup> Nothing in the determinations shows that the USDOC would treat only transactions in the Maritime Provinces as those from the "country in question", or that it would not select a benchmark outside the Maritime Provinces irrespective of the evidence presented to it. On the contrary, the USDOC's determinations, and specifically its preliminary determination on softwood lumber products in 2017, show that the USDOC used a benchmark based on Nova Scotia after considering the evidence on the record of that investigation.

7.760. For example, in examining in this determination whether it could use prices for private stumpage in Nova Scotia as a benchmark, the USDOC examined whether prices in Nova Scotia were distorted, based on the information presented by the Government of Nova Scotia in that investigation. It noted that (a) the Government of Nova Scotia had provided data indicating that private-origin standing timber accounted for the majority of the softwood harvest volume and that Crown-origin standing timber accounted for less than a quarter of the softwood harvest volume; and (b) based on information supplied by the Government of Nova Scotia, which aligned with its conclusions of non-distortion in Nova Scotia in earlier determinations, the USDOC was preliminarily determining that the sale of Crown-origin standing timber did not distort prices for private-origin standing timber in Nova Scotia (and thus using these prices as a tier-one benchmark in that investigation). We consider this shows that the USDOC's decision to use prices in Nova Scotia was driven by the underlying facts and circumstances, including the evidence presented by the interested parties in the investigation, rather than some sort of policy to use prices from one of the Maritime Provinces. In addition, the analysis contained in the USDOC's determination in this regard does not suggest, as Canada contends, that irrespective of the evidence the USDOC concludes that a benchmark in the Maritime Provinces is comparable to Alberta, Ontario, or Québec. Instead, it suggests that the USDOC reached its conclusions after examining the evidence presented by the Government of Nova Scotia in this investigation. Therefore, we find that the evidence that Canada relied upon does not support its description of the content of this measure, and also does not support its view that irrespective of the evidence the USDOC concludes in its determinations that a benchmark in the Maritime Provinces is comparable to Alberta, Ontario, or Québec.

7.761. In addition, we find that Canada has failed to show that this alleged "measure" has present and continued application. We note that in *Argentina – Import Measures*, the Appellate Body stated that the measure in that dispute had present and continued application "in the sense that it currently applies and it will continue to be applied in the future until the underlying policy ceases to apply".<sup>1529</sup> In characterizing the Maritimes Stumpage Benchmark as a measure of present and continued application, Canada relies on this statement of the Appellate Body and contends as follows:

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facts and circumstances as long as those variations do not detract from the substance of the actions or omissions at issue.

<sup>1527</sup> The USDOC, as noted above, used a benchmark based on Nova Scotia and New Brunswick in softwood lumber investigations between 2004-2006, and a benchmark based on Nova Scotia alone, in the softwood lumber investigation in 2017 and the uncoated groundwood paper investigation in 2018.

<sup>1528</sup> Canada's first written submission, para. 1192 and table 30.

<sup>1529</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.146.

- a. The measure currently applies because the USDOC used a Nova Scotia benchmark in the underlying investigation i.e. the softwood lumber investigation in 2017.<sup>1530</sup>
- b. The measure will continue to be applied in the future because:
  - i. First, the measure has had repeated and uninterrupted application over an extended period of time, which, Canada argues, demonstrates that the USDOC will continue to act in the same way and apply the measure when faced with the relevant factual circumstances.<sup>1531</sup> Canada contends that the USDOC has not deviated from applying this measure since 2004 and has made its determinations in a consistent manner.<sup>1532</sup>
  - ii. Second, the USDOC's uninterrupted application of the measure has continued despite differences in the facts in the underlying proceedings.<sup>1533</sup> Canada supports this view noting that the USDOC applied the Maritimes Stumpage Benchmark in an investigation on uncoated groundwood paper from Canada, i.e. on a product other than softwood lumber.<sup>1534</sup>
  - iii. Third, the USDOC's consistent reference to precedents from previous determinations where the Maritimes Stumpage Benchmark was applied shows that this measure is likely to continue in future. In this regard, Canada refers to the panel's finding in *US – Supercalendered Paper* that consistent references to precedents when a measure is applied constitute evidence that it was likely that the measure would continue.<sup>1535</sup>

7.762. The evidence presented by Canada to support its arguments again comprise extracts from the USDOC's determinations, which, according to Canada, demonstrate that the Maritimes Stumpage Benchmark currently applies and will continue to apply in the future.<sup>1536</sup> In order to ascertain whether the measure currently applies or will continue to apply in the future, we address the following questions: What measure currently applies? What measure will continue to apply in the future? For Canada, it is the Maritimes Stumpage Benchmark that currently applies and will continue to apply in the future.

7.763. However, we consider that the evidence presented by Canada does not show that a Maritimes Stumpage Benchmark (assuming the precise content of such a benchmark is established) is being currently applied or will continue to be applied in the future. Let us consider the extracts from the USDOC's determinations from 2004-2006 and again from 2017-2018 relied on by Canada.

7.764. With respect to the period 2004-2006, Canada relies on extracts from the first and second administrative reviews on softwood lumber products from Canada (both preliminary and final determinations) as well as the third review (preliminary determination).<sup>1537</sup> In these determinations, the USDOC consistently stated that following the hierarchy set out in Section 351.511(a)(2) of the USDOC's CVD Regulations it must first determine whether there are "actual market-determined prices for timber sales in Canada" that can be used to measure whether the provincial stumpage programmes provide timber for less than adequate remuneration. It determined that the "Maritimes' private prices" were "market-determined prices in Canada" and therefore usable under the first tier of the USDOC's three-tier hierarchy to assess the adequacy of remuneration.<sup>1538</sup> Consider for instance the USDOC's preliminary determination concerning the third administrative review on softwood lumber products issued on 12 July 2006, where the USDOC stated that consistent with its approach in the first and second administrative reviews it was using "Maritimes' private prices" to measure the adequacy of remuneration of the stumpage programmes administered by Alberta, Saskatchewan, Manitoba, Ontario, and Québec.<sup>1539</sup> It stated that it was doing so because it had preliminarily determined that the Maritimes' private prices were

<sup>1530</sup> Canada's first written submission, para. 1195.

<sup>1531</sup> Canada's first written submission, para. 1196.

<sup>1532</sup> Canada's first written submission, para. 1196.

<sup>1533</sup> Canada's first written submission, paras. 1196-1197.

<sup>1534</sup> Canada's first written submission, para. 1197.

<sup>1535</sup> Canada's first written submission, para. 1199 (referring to Panel Report, *US – Supercalendered Paper*, para. 7.328).

<sup>1536</sup> See e.g. Canada's first written submission, para. 1199.

<sup>1537</sup> Canada's first written submission, paras. 1192 and 1199 and tables 30 and 31.

<sup>1538</sup> See, e.g. Canada's first written submission, para. 1192 and table 30. (emphasis added)

<sup>1539</sup> Canada's first written submission, paras. 1192 and 1199 and tables 30 and 31.

"market-determined prices *in Canada*" and were "therefore, usable under the first tier of [the USDOC's] adequate remuneration hierarchy".<sup>1540</sup> These "Maritime private prices" were "market-determined stumpage prices from Nova Scotia and New Brunswick".

7.765. With respect to the period 2017-2018, Canada relies on the preliminary and final determination of the countervailing duty investigation on softwood lumber products from Canada (in 2017) as well as the preliminary and final determination of the countervailing duty investigation on uncoated groundwood paper from Canada (in 2018). In these determinations, the USDOC again referred to its three-tier hierarchy for assessing adequacy of remuneration and noted for example that the preferred benchmark was the market prices from actual transactions within the "country" under investigation. But unlike the determinations between 2004-2006, where it concluded *Maritimes' private prices* were market-determined prices in Canada and therefore usable under its tier-one benchmark, the USDOC concludes in these investigations that prices for private-origin standing timber in *Nova Scotia* were prices in the country subject to investigation, i.e. Canada and therefore usable under its tier-one benchmark.<sup>1541</sup>

7.766. The comparison of the determinations in 2004-2006 with the determinations in 2017-2018 shows the following:

- a. In the determinations between 2004-2006 as well as 2017-2018, the USDOC examined whether there were market-determined prices "in Canada" (consistent with tier-one of its three-tier hierarchy that refers to a benchmark based on "market-determined prices from actual transactions of the good within the country under investigation").
  - i. in the determinations discussed above in 2004-2006 it found that "market-determined prices in Canada" were prices for private-origin standing timber from the "Maritimes"; and
  - ii. in the determinations discussed above in 2017-2018 it found that "market-determined prices in Canada" were prices for private-origin standing timber from Nova Scotia.

7.767. We consider that Canada has not shown through this evidence that the USDOC decided to use a Maritimes Stumpage Benchmark in 2017-2018. For instance, Canada does not show that in the determinations in 2017-2018 the USDOC decided to use the prices in Nova Scotia in pursuance of a policy to use a price from the Maritime Provinces. Instead, this evidence shows that the USDOC's decision to use a price from Nova Scotia was driven by (a) the requirement under its domestic regulations to use as a tier-one benchmark "market-determined prices from actual transactions of the good within the country under investigation", which, according to the USDOC, prices in Nova Scotia were; and (b) the underlying facts and circumstances of the case. For instance, as noted in paragraph 7.760 above, in the USDOC's preliminary determination on softwood lumber in 2017, the USDOC examined the evidence presented by the Government of Nova Scotia, and only after concluding that this evidence showed that there was no distortion in stumpage prices in Nova Scotia did it use the prices in this province as a benchmark. If the USDOC was not open to considering a benchmark outside Nova Scotia, or outside a Maritime Province, because for example it felt compelled by a policy or practice to use a benchmark from the Maritime Province, such an analysis may well have been unnecessary.

7.768. Based on the above, we consider that Canada has not shown that the USDOC's decision to use the prices in Nova Scotia in the softwood lumber investigation in 2017 or the uncoated groundwood paper investigation in 2018, was part of a policy to use prices from the Maritime Provinces. Instead, we consider that the evidence shows that the USDOC's decision to use a price from Nova Scotia was driven by (a) the requirement under its domestic regulations to use as a tier-one benchmark "market-determined prices from actual transactions of the good within the country under investigation"; and (b) the underlying facts and circumstances of the case in question.

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<sup>1540</sup> Canada's first written submission, paras. 1192 and 1199 and tables 30 and 31; Third administrative review on softwood lumber products, (Exhibit CAN-206), p. 33946. (emphasis added)

<sup>1541</sup> Canada's first written submission, paras. 1192 and 1199 and tables 30 and 31.

7.769. We conclude that the USDOC's use of a price from Nova Scotia in the softwood lumber investigation in 2017 or the uncoated groundwood paper investigation in 2018 does not show that a Maritimes Stumpage Benchmark is a measure that is being currently applied.

7.770. Regarding Canada's submission that the Maritimes Stumpage Benchmark is likely to be continued in the future, Canada relies on three sets of arguments:

- a. the Maritimes Stumpage Benchmark is a measure that has had repeated and uninterrupted application over an extended period of time;
- b. the uninterrupted application of the measure has continued despite differences in the facts in the underlying proceedings; or
- c. the USDOC's consistent reference to precedents from previous determinations where the Maritimes Stumpage Benchmark was applied shows that this measure is likely to continue in future.

7.771. For the same reasons that we provided above when concluding that Canada has not established that the Maritimes Stumpage Benchmark is a measure that is being currently applied, we also conclude that Canada has not established that (a) the Maritimes Stumpage Benchmark is a measure that has had repeated and uninterrupted application over an extended period of time; and (b) the uninterrupted application of the measure has continued despite differences in the facts in the underlying proceedings. In addition, we disagree with Canada's argument that the USDOC's consistent reference to precedents from previous determinations where the Maritimes Stumpage Benchmark was applied shows that this measure is likely to continue in future. For instance, in support of its view that the USDOC consistently refers to precedents from previous determinations, Canada notes that the USDOC referred to its earlier determination in Lumber IV in the preliminary and final determination of the countervailing duty investigation on softwood lumber products from Canada in 2017.<sup>1542</sup> However, the evidence presented by Canada shows that the USDOC relied on earlier determinations in Lumber IV to reinforce the conclusions reached in these determinations.

7.772. In the preliminary determination for example, as noted in paragraph 7.760 above, the USDOC examined whether prices for private-origin standing timber in Nova Scotia were distorted by reviewing the information presented by the Government of Nova Scotia in this investigation. Having reviewed this information, the USDOC concluded that based on this information and the fact that this information aligned with the USDOC's conclusions in its earlier determination in Lumber IV, it was preliminarily determining that the sale of Crown-origin standing timber in Nova Scotia did not have a distortive impact of on the province's stumpage prices. This shows that the USDOC was making its determinations based on the underlying facts and circumstances of the investigation, rather than following its precedents as part of some policy to use prices from the Maritime Provinces. In any event, this finding does not show that the USDOC was relying on past determinations as a precedent that required it to use a Maritimes Stumpage Benchmark.

7.773. Therefore, based on the above, we conclude that Canada has not established that the Maritimes Stumpage Benchmark has present and continued application. In support of our finding, we note that in *Argentina – Import Measures*, a dispute where the measure was also characterized as having present and continued application, the Appellate Body found that the panel correctly concluded that the measure had "present and continued application, in the sense that it currently applies and it will continue to be applied in the future *until the underlying policy ceases to apply*".<sup>1543</sup> Canada has not pointed to any evidence that demonstrates the application, or existence, of an underlying policy of the USDOC in relation to the alleged measure. In addition, we consider that Canada has not established the existence of a policy to apply the Maritimes Stumpage Benchmark through the extracts from the USDOC's determinations that it relies upon as evidence.

7.774. Based on the above, we find that Canada has not established that the Maritimes Stumpage Benchmark is a measure of present and continued application.

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<sup>1542</sup> Canada's first written submission, para. 1199 and table 31.

<sup>1543</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.146. (emphasis added)

### **7.13.3.3 The existence of the Maritimes Stumpage Benchmark as a measure of ongoing conduct**

7.775. As we have rejected Canada's claim that the Maritimes Stumpage Benchmark is a measure of present and continued application, we turn now to Canada's alternative claim, that the Maritimes Stumpage Benchmark can be characterized as ongoing conduct. The constituent elements, as noted above, are:

- a. the attribution of the measure to the United States;
- b. the precise content of the measure;
- c. the repeated application of the conduct; and
- d. the likelihood that such conduct will continue.<sup>1544</sup>

7.776. We have already discussed the issues concerning attribution and precise content of the measure above. Regarding the repeated application of the conduct and the likelihood that such conduct would continue, Canada states as follows<sup>1545</sup>:

- a. With respect to the repeated application of the conduct, the repeated application of the Maritimes Stumpage Benchmark took place nine times in the following proceedings:
  - i. first, in three administrative reviews under the countervailing duty order in the Lumber IV investigation (i.e. the administrative reviews that took place in 2004-2006);
  - ii. second, the softwood lumber investigation in 2017; and
  - iii. third, the uncoated groundwood paper investigation in 2018.
- b. With respect to the likelihood that such conduct would continue, Canada states, relying again on evidence in the form of extract from the USDOC's determination, as follows:
  - i. first, the measure has had repeated and uninterrupted application where the relevant factual circumstances arise, in different proceedings and over an extended period of time;
  - ii. second, the USDOC consistently interpreted its relevant statutory and regulatory provisions as directing it to apply the measure; and
  - iii. third, the USDOC refers to precedents from previous determinations where it had applied the Maritimes Stumpage Benchmark.

7.777. We consider that Canada has not established either the repeated application of the conduct, or the likelihood that such conduct would continue. We note that Canada's argument concerning the repeated application of the USDOC's conduct presupposes that the USDOC engaged in the same conduct across the determinations relied upon by Canada as evidence, which were made between 2004-2018. We recall that the conduct Canada alluded to is that when assessing the adequacy of remuneration of Crown-origin standing timber prices in Alberta, Ontario, or Québec, the USDOC applied a benchmark based on private prices in the Maritime Provinces and treated it as an in-market benchmark. However, as noted in paragraph 7.768 above, the USDOC's reliance on a benchmark based on prices in Nova Scotia in 2017 and 2018 does not demonstrate that the USDOC was relying on a benchmark based on prices in the Maritime Provinces, which undermines Canada's submission of repeated application of a Maritimes Stumpage Benchmark.

7.778. Regarding the likelihood of continuation of the conduct, we consider that Canada essentially relies on the same type of arguments as it does when contending that Maritimes Stumpage Benchmark is a measure of continued application. In paragraph 7.771 above, we concluded that

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<sup>1544</sup> Canada's first written submission, para. 1201.

<sup>1545</sup> Canada's first written submission, paras. 1203-1205.

Canada has not established that (a) the Maritimes Stumpage Benchmark is a measure that has had repeated and uninterrupted application over an extended period of time; (b) the uninterrupted application of the measure has continued despite differences in the facts underlying a proceeding; or (c) the USDOC's consistent reference to precedents from previous determinations where the Maritimes Stumpage Benchmark was applied shows that this measure is likely to continue in future. Therefore, for the same reasons, we conclude that Canada has also not established the likelihood of continuation of the conduct, i.e. likelihood of continued application of the Maritimes Stumpage Benchmark.

7.779. Based on the above, we find that Canada has not established the existence of the Maritimes Stumpage Benchmark as ongoing conduct.<sup>1546</sup>

#### **7.13.4 Conclusion**

7.780. In light of the foregoing, we find that Canada has failed to demonstrate that the Maritimes Stumpage Benchmark exists, either as a measure of present and continued application or ongoing conduct. We find that the evidence relied upon by Canada does not support its description of the content of this measure, and also does not support its view that irrespective of the evidence the USDOC concludes in its determinations that a benchmark in the Maritime Provinces is comparable to Alberta, Ontario, or Québec. In addition, we consider that the evidence presented by Canada does not show that a Maritimes Stumpage Benchmark is being currently applied or will continue to be applied in the future.

7.781. In relation to Canada's claim in the alternative, that the Maritimes Stumpage Benchmark is a measure of ongoing conduct, we consider that Canada has not established either the repeated application of the conduct, or the likelihood that such conduct would continue.

7.782. Because we find that Canada has not demonstrated the existence of the measure, we do not consider it necessary to separately examine whether the alleged measure is WTO-consistent.

### **8 CONCLUSIONS AND RECOMMENDATION**

8.1. For the reasons set out in this Report, we conclude as follows:

- a. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting the proposed private stumpage and log prices in Ontario as a valid stumpage benchmark to determine the adequacy of remuneration for Crown timber provided to the respondent companies by the province.

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<sup>1546</sup> In reaching this conclusion we note that a measure has been found to be ongoing conduct in three WTO cases, *US – Continued Zeroing*, *US – Orange Juice (Brazil)*, and *US – Supercalendered Paper*. We consider that the present case is distinguishable from the facts in all of these three disputes. In both *US – Continued Zeroing* and in *US – Orange Juice (Brazil)* the issue was continued use of the same "zeroing methodology". Here, however, Canada has not shown the existence of the same methodology. In particular, as discussed above, the specific benchmark used by the USDOC differs across the determinations relied upon by Canada. In addition, in *US – Orange Juice (Brazil)* the panel concluded that Brazil had established the existence of the USDOC's continued use of zeroing procedures as a "measure" in the form of "ongoing conduct" under the orange juice anti-dumping duty order. In support of this view, the panel relied on the following evidence (a) a computer programme used by the USDOC that was instructed to use zeroing; (b) evidence from the USDOC's determination where it stated that US domestic law defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise", and that outside the context of anti-dumping investigations involving the W-W methodology, the USDOC interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than the export price of constructed export price. (Panel Report, *US – Orange Juice (Brazil)*, paras. 7.191-7.192). Here, however, Canada does not show that the USDOC interprets the statutory obligation to use an in-country benchmark to mean that whenever it assesses the adequacy of remuneration of standing timber provided by the Canadian provinces of Alberta, Ontario, or Québec it will use a benchmark based on private transactions from the maritime provinces. As regards the panel and Appellate Body report in *US – Supercalendered Paper*, as noted in fn 1526 above, unlike the present case, the panel found that the substance of the questions and the USDOC's conduct remained the same across the relevant determinations. Here, however, we consider that the USDOC's conduct is not the same, and as noted above, is driven by (a) the requirement to use a benchmark based on transactions in the country of provision; and (b) the underlying facts and circumstances of the case.

- b. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting the proposed BCTS auction prices in British Columbia as a valid stumpage benchmark to determine the adequacy of remuneration for Crown timber provided to the respondent companies by the province.
- c. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting the proposed auction stumpage prices in Québec as a valid stumpage benchmark to determine the adequacy of remuneration for Crown timber provided to the respondent companies by the province.
- d. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting the proposed TDA log prices in Alberta as a valid stumpage benchmark to determine the adequacy of remuneration for Crown timber provided to the respondent companies by the province.
- e. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by erroneously finding that the Nova Scotia benchmark price reasonably reflected the prevailing market conditions in Alberta, Ontario, and Québec, and by failing to make the necessary adjustments to the Nova Scotia benchmark price, such that the benchmark price related or referred to the prevailing market conditions in the market where the good was provided.
- f. The USDOC acted inconsistently with the *chapeau* of Article 14 of the SCM Agreement by using the unreliable Nova Scotia survey for calculating the benchmark price to determine the adequacy of remuneration for Crown timber provided to respondent companies by Alberta, Ontario, and Québec.
- g. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to consider the full remuneration paid by respondent companies in Alberta, Ontario, Québec, and New Brunswick in determining the adequacy of remuneration for Crown timber provided to the respondent companies by these provinces.
- h. With respect to Canada's claims under Article 14(d) of the SCM Agreement concerning the USDOC's use of the Washington State log price benchmark for determining the adequacy of remuneration for Crown timber provided by British Columbia:
  - i. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement because it failed to adjust its benchmark on account of the (1) conversion factors used in British Columbia, (2) utility-grade and beetle-killed logs in the harvest of the Canadian respondents.
  - ii. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement because it did not have proper basis to conclude that stand-as-a-whole pricing was not a prevailing market condition in British Columbia, and thus had no basis to not take this condition into account when adjusting its benchmark to reflect the prevailing market conditions in British Columbia.
  - iii. Canada has not established that the Washington State log price benchmark was *per se* inconsistent with Article 14(d), i.e. irrespective of adjustments to the benchmark, because of the differences in market conditions between Washington State and British Columbia.
  - iv. Canada has not established that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement because it did not adjust its benchmark on account of the higher transportation costs incurred by the Canadian respondents, compared to producers in eastside Washington to bring their lumber to their primary US markets.
- i. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly setting-to-zero the results of certain comparisons between the prices of examined transactions and the benchmark price in determining the adequacy of remuneration for Crown timber provided to respondent companies by New Brunswick and British Columbia.

- j. The USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that the export-permitting process for British Columbia logs was a financial contribution in the form of government direction or entrustment to provide goods.
- k. The USDOC acted inconsistently with Article 1.1(a)(1)(i) of the SCM Agreement by characterizing the reimbursements provided by New Brunswick to JDIL, and by Québec to Resolute, as financial contributions in the form of grants. Consequently, the USDOC's benefit findings in respect of these reimbursements were inconsistent with Article 1.1(b) of the SCM Agreement.
- l. The USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by using a benchmark that did not relate to the prevailing market conditions within the market where BC Hydro purchased biomass electricity from West Fraser and Tolko, and therefore incorrectly determined if a benefit was conferred. We decline to rule on Canada's claim that the USDOC improperly rejected the alternative benchmarks submitted by the interested parties as Canada has failed to make a *prima facie* case in that regard.
- m. The USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement with respect to the turn-down payments that BC Hydro made to Tolko by failing to assess whether a benefit was conferred consistently with Article 1.1(b). The USDOC acted inconsistently with the first sentence of Article 14(d) in that it failed to assess whether the purchase of goods was made for more than adequate remuneration.
- n. The USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by using a benchmark that did not relate to the prevailing market conditions within the market where Hydro-Québec purchased biomass electricity from Resolute and therefore incorrectly determined if a benefit was conferred.
- o. The USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by improperly rejecting the Merrimack Study as a benchmark to assess if Hydro-Québec's purchases of electricity from Resolute conferred a benefit.
- p. The USDOC erred by characterising the LIREPP as a financial contribution to Irving through NB Power in the form of revenue foregone, rather than a purchase of goods consistent with Article 1.1(a)(1)(iii), and as a result, failed to properly assess the alleged benefit to the Irving Group in accordance with Article 1.1(b) and the first sentence of Article 14(d) of the SCM Agreement.
- q. Canada has not established that the USDOC acted inconsistently with Articles 2.1(a) and (b) of the SCM Agreement in concluding that the ACCA for Class 29 assets was *de jure* specific.
- r. Canada has not demonstrated the existence of a "Maritime Stumpage Benchmark" as a measure of present and continued application, or as ongoing conduct, and therefore we do not need to address Canada's claims under Articles 1.1(b) and 14(d) of the SCM Agreement challenging the Maritimes Stumpage Benchmark.

8.2. We exercise judicial economy with respect to the following claims:

- a. Canada's claim that the USDOC acted inconsistently with Articles 1.1(b), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by improperly setting-to-zero the results of certain comparisons between the prices of examined transactions and the benchmark price, in determining the adequacy of remuneration for Crown timber provided to respondent companies by New Brunswick and British Columbia.
- b. Canada's claim that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by relying on the unreliable Nova Scotia survey for calculating the benchmark price to determine the adequacy of remuneration for Crown timber provided to respondent companies by Alberta, Ontario, and Québec.

- c. Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement regarding the USDOC's initiation of an investigation against the export-permitting process for British Columbia logs, in light of the finding set out in paragraph 8.1(j) above.
- d. Canada's claims under Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 concerning the USDOC's attribution of certain alleged subsidies to the production of softwood lumber products, and therefore the USDOC's failure to ascertain the precise amount of subsidies attributable to the product under investigation.

8.3. For the procedural reasons set out in this Report, we decline to rule on Canada's claim under Article 14(d) of the SCM Agreement in respect of the USDOC's use of Irving's purchases of Nova Scotia private timber as a stumpage benchmark for determining the adequacy of remuneration for Crown timber provided by New Brunswick. Considering that Canada did not properly make out that claim, we have no basis to conclude that the USDOC was under an obligation to consider using, as a starting point, in its benefit analysis a stumpage benchmark from within New Brunswick. We, therefore, have no basis, and decline to rule on Canada's claim under Article 14(d) that the USDOC improperly rejected the proposed stumpage benchmark in New Brunswick to determine the adequacy of remuneration for Crown timber provided to the respondent companies by that province.

8.4. For the procedural reasons set out in this Report, we also decline to rule on Canada's claims under Articles 19.3 and 19.4 of the SCM Agreement concerning certain reimbursements related to the respondent companies' obligations to perform silviculture provided by New Brunswick to JDIL, and by Québec to Resolute.

8.5. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with SCM Agreement, they have nullified or impaired benefits accruing to Canada under that agreement.

8.6. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measure into conformity with its obligations under SCM Agreement.

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